

**Law and Morality in Assisted Reproductive Technology Case study on the
*Leeds Teaching Hospitals NHS Trust v Mr & Mrs A & Others*¹**

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Introduction

Position of enunciation

There is a beautiful feminist adage that goes, 'the personal is political'. What this aphorising adage conveys is that in post-industrial Great Britain, even the most personal or trivial occurrence in a citizen's life is tied up to wider societal arrangements, conventions, and the resulting contestations. Within real life cases, a wealth of information can be extracted about the workings of our society. My position of enunciation in writing this article is to a large extent based upon this feminist aphorism and the consequences that can be drawn from it.

We are living in an age in which Assisted Reproductive Technologies (ARTs) are helping humankind stretch the boundaries of reproduction further than has ever been imaginable. Concretely speaking, ARTs are causing many of our commonplaces, such as the ideal articulation between the nuclear family ideal—heterosexual—and human reproduction, in the welfare of children, to be shaken in their foundations. Concomitantly, due to the capabilities of ARTs, the two obfuscated structural ideals of these commonplaces, institutional and popular, are being unveiled. On the one hand, there is the normalising power of the law instituting the nuclear family as the norm, controlling childbearing practices, and legitimating the ideal necessity of the 'natural' link between the two. On the other hand, there exist our dominant popular moral conventions, the sum of our popular morality shared by all classes, regarding the preference and presumed naturalness of the nuclear family and the importance of a child knowing and growing up with his/her biological mother and father since there is a 'mysterious', undiscovered, hereditary psychological link there.

Unwittingly ARTs have granted us ammunition to kill the 'Gods'², Popular Morality and existing Legislation. The tension I am describing is one between ARTs which

are indeterminate, bearing an unlimited potential as far as human reproduction is concerned, and the ruling traditions inscribed in the law and popular morality. The latter seek to set limits for human reproduction by promoting the ideal confluence of biological reproduction and the nuclear family; preferably that a child is reared with his/her natural mother and father or at least knows them.

It is safe to state that since one cannot turn back the hand of the time, ART is here to stay. The question then is not will we kill the 'Gods', existing legislation and popular morality, but when and how will this occur? Concomitantly, what new values and legislation, in short 'Gods', will we create that guarantee the moral well being of all citizens?

...[S]cience is essentially productive. Knowing it need not interpret the world, science transforms it, and by this transformation science conveys its own nihilistic demands—the negative power that science has made into the most useful tools, but with which it dangerously plays. Knowledge is fundamentally dangerous ... for a universe cannot be constructed without having the possibility of its being destroyed by making science possible, Nihilism becomes the possibility of science—which means that the human world can be destroyed by it (Blanchot 1977, 122-23).

This was quoted from West (1981) he argues that deconstructing old securities due to scientific and philosophical advancements are not enough. What also has to be done is build *new worldviews* that counter among others the patriarchal norms that still permeate many Western societies. However, we know that it turns out these new 'Gods' will be conjunctural, in other words, containing traces of the old with new additions to fit the new realities (Strathern 2001).

To gain insight on how the tension between the indeterminacy of ARTs and the ruling 'traditions' inscribed in the law and the popular moral conventions play themselves out, this article is based on a relevant case study, the much publicised court case *Leeds Teaching Hospitals NHS Trust v Mr & Mrs A & Others*. It is a case involving a gamete mix-up during a fertilisation treatment resulting in the birth of dark skinned twins for a pink skinned couple, Mr and Mrs A. Genetic testing concluded that Mrs A was the genetic mother but the sperm came from Mr B, a dark skinned man, who had also visited the clinic with his wife. This case severed the 'natural' link between the nuclear household and biological reproduction. And hence lay bare how these two had to be articulated once again by the law and indirectly the dominant popular morality.

In the resulting court case the presiding judge decided based on statutes and common law, that the legal father be synonymous with the biological father. While it is not rare that children do not have a legal father, the judge felt that this was of utmost consequence. Mr B was awarded legal rights since he was the biological father and as a safeguard that the children would not suffer any psychological trauma being of 'mixed race'. However, it was also deemed of tantamount importance that the children grow up in a nuclear household hence the children remained with couple A. Couple A was advised to file for adoption. This was possible under the *Adoption and Children Act 2002*, § 52, since unlike Mr B, Mrs A as the biological and legal mother also had parental rights.

The information through which this case is reconstructed is based on secondary sources, the media, academic articles, and the transcripts of the judge who presided over the case.

I am aware that there is a gap between real life and the simulacrum of publicised reality. Baudrillard (1983) makes clear that in our contemporary world there is a disjuncture between lived reality and the representations hereof. In certain instances there comes to exist a complete severance between the two. Unaware of this, many persons conflate the two, privileging representations above the lived reality.

Inferring hereupon, some could argue that, the case study presented in the subsequent chapter is not a real life occurrence but actually a representation of representations of what took place with families A and B and the court case that followed. Whilst this is undoubtedly true, like everyone else, this author cannot get around the fact that reality is always mediated; it is a question of being clear as to what forms of mediation are at play. Hall (1997) makes the statement that reality is always mediated, either by our mouths, pens, mental images, or increasingly by the media. Nevertheless, from cases mediated by the media one can discern wider societal tensions and coming transformations.

General outline

This article will begin with a thorough reconstruction describing the case, *Leeds Teaching Hospitals NHS Trust v Mr & Mrs A & Others*. In the other sections material will be furnished to explain the courts decision and the societal relevance of this case.

Following this, the Assisted Reproduction Technologies mentioned in the case study will be discussed. The focus will be on the development of these techniques and the methodology employed. The point will be to demonstrate that these techniques are indeterminate and therefore offer many ways to strengthen alternative family types indirectly contesting the 'natural' link between reproduction and the nuclear heterosexual family norm.

The manner in which the existing regulations on ARTs seek to curtail the indeterminacy of these techniques making them fall in line with the law's notion of the welfare of children, the importance of the ideal articulation between the nuclear household and biological reproduction, will be discussed. Herein it will also be shown how these laws inadvertently emphasise ethnicity and the transference of psychic properties from biological parents to their offspring.

It will be demonstrated how the law corresponds largely to the dominant popular moral conventions. An argument as to how and why within the popular morality the nuclear family became the norm, a norm that justified itself as both trans-historical and the best institution safeguarding civility and the socialisation of children will be presented. Furthermore it will be shown why alternative family types, such as

female headed households, are not able to contest the hegemony of the nuclear family norm.

Finally, I will give briefly appraise my findings highlighting the possible implications of ART's future influence on the law and our dominant popular morality.

Case study: children of mixed 'race' born from injecting the wrong sperm into the egg.

This case study is largely based on information gathered in the media (BBC 2002 a, b, 2003; *The Guardian* 2003; *The Times* 2002) and other secondary sources (Harris, J. 2002, Kaebnick and Murray 2003, Ford and Morgan 2003) along with the two judicial declarations of the judge who attended the case (*Leeds Teaching Hospitals NHS Trust v Mr & Mrs A & Others* 2002 and 2003).

Couples A and B underwent *in vitro* fertilisation (IVF)³, one form of ART, at the UK's largest HFEA⁴ licensed assisted conception unit. Both couples were unable to conceive a child in the traditional manner. Through ART the wish of the respective couples that the sperm and the ova of their partners be used in the fertilisation process could be accommodated.

However, due to human error the sperm cells of Mr B ended up fertilising the eggs of Mrs A. The specific IVF method used was intra-cytoplasmic sperm injection (ICSI)⁵. The mix-up only came to light nine months later when Mrs A gave birth to twins, two healthy boys. Unlike the pink skinned Mr and Mrs A, the boys were of mixed 'race', alerting the parents and medics that something had gone wrong. Additional medical tests showed that Mrs A was the genetic mother but Mr A had definitely not fathered the twins.

Puzzled by the mix-up, not a first in the history of IVF practices in the UK, the HFEA and the Leeds fertility clinic took steps to find out how the error occurred and what judicial measures should be opted for in order to remedy the situation. Besides the undoubtedly genuine motivation to remedy the situation, it is safe to postulate that there was the fear that liability claims would be made by couple A for damages caused by the erroneous practices of the clinic. So far this has not been the case (Evendale 2002).

Judge Dame Elizabeth Butler-Sloss advised both bodies that the first step should be to ascertain the identity of the genetic father, and further to review whether the alternative remedying procedures in the 1990 Act were in accordance with the *European Convention on Human Rights* 1950, the latter due to the ratification of the Convention by the UK.

The internal clinical investigation headed by the HFEA led to the discovery that labels were misread allowing the gametes to be mixed-up (HFEA press release 5 June 2003). As was stated previously, it turned out that the sperm that had fertilized the ova of Mrs A was of Mr B. Couple B however had not yet conceived a child, and the investigation was not able to ascertain whether this could also be

attributed to a clinical error. Having discovered the identity of the genetic father of Mrs A twins, the HFEA stepped once more to the court. The HFEA is responsible for registering people to whom children are born as a result of treatment in licensed fertility clinics (1990 Act §13(2) (d)) and sought advice on how to register the twins.

However, an 'unforeseen consequence' was that once mass media reporters got wind of the case it became a public spectacle. *The News of the World*, the *Scotsman*, the *Times*, *Daily Post*, the *Herald*, and other renowned and not so renowned newspapers, were full of commentary concerning the IVF mix up. This coincided with the fact that couple A and B had their own agendas and were not sitting still waiting for the clinic, the HFEA, and the court to decide on what they conceived as their personal issues.

To be heard in a largely anonymous society, concomitantly hoping to muster public sympathy, couples A and B presented their cases in the media. Couple B, who had no children of their own, mentioned that since the children were born from Mr B's sperm they wanted to find out what their rights were. In between the lines one could read that they only found it natural that some sort of rights should be awarded to them. Inversely, as a party in the case, Mr A wanted to claim his right to be the legal father of the twins born from his married wife. They were his children conceived by his wife. In the end four parties applied to the Family Division: couples A and B, the HFEA, and the Leeds clinic. The Family Division is the court where disputes concerning the family are decided.

To quiet the mass media induced public frenzy that the IVF mix-up had provoked, the Department of Health issued a statement that an external investigation would be conducted into the matter. The findings, which would be received by the Chief medical officer, would form the basis for new and more effective guidelines to diminish the chances of such a mix-up recurring. In the meantime, whilst the external research was being conducted, the HFEA introduced new recommendations to prevent a recurrence. These recommendations are to be implemented by all fertility clinics in the UK. Succinctly put these are: 1) a restriction on placing back no more than two embryos, 2) a neutral witness must be assigned to appraise that the right steps in the treatment are being undertaken, 3) s/he must sign all steps. As far as the Leeds clinic was concerned, urgent revisions of its protocols and procedures were demanded. A licensing committee will monitor the proceedings at this clinic very closely.

While the official governmental channels, the HFEA and the Department of Health, thought about and enacted new guidelines and recommendations, in the Family Division court, all parties were involved in a legal battle over rights and custody. The case *Leeds Teaching Hospitals NHS Trust v Mr & Mrs A & Others*, was heard by Dame Elizabeth Butler-Sloss before the High Court of Justice.

Three hearings took place before the decision was made. Both families sought treatment under the 1990 Act. All parties involved in the court case agreed that the twins who lived with couple A since their birth should stay with couple A. However, when it came to the matter of establishing legal parentage over the twins, couples

A and B had differing opinions. Legal parentage is of consequence since it is the legal parents who are entitled to make decisions to ensure the long-term welfare of the children.

Couple A's argument was that since at birth they had registered the children as their own this registration should be made congruent with legal parentage. Hence, besides Mrs A, Mr A should also be awarded legal parentage rights. Mr B argued against this claiming that since he was the genetic father of the twins and had not consented to sperm donation, these legal rights should be awarded to him.

What it all boiled down to was that it was the judges' task to decide fatherhood based on statutes and common law. This will be discussed thoroughly in the next section.

What suffices to state here is that, although the 1990 Act makes provisions for a non-biologically related man to be called legal father under strict conditions (§28), for the most part legal fatherhood is equated with biological affiliation. Mr A could not meet those conditions, and since Mr B was the genetic father all points were decided in his favour. Besides the lawful grounds that were used to justify this case the judge also mentioned the importance of 'race'.

Through no fault of theirs, they have been born children of mixed race by a mistake which cannot be rectified They have inherited two cultures but, in reality can only gain real benefit from one during their childhood (case para. 55).

In order to safeguard the 'dual cultural inheritance' of the twins, the judge felt that they should know who their true father is. "I respectfully and am certain that *truth* in this case is more important to the rights of the twins and their welfare than a fictional certainty" (case para. 57, added emphasis). However, there remained the thorny issue of family life. After all, the twins had lived with Mr and Mrs A since their birth, would remain living with them, and had also been registered by them.

The second part of the judgement looked at compliance of the 1990 Act with the *European Convention on Human Rights* 1950 (hereafter called *the Convention*) implemented in the UK under the *Human Rights Act 1998*. Article 8 of *the Convention* was the only pertinent article taken into consideration. Article 8(1) declares a right to *family life*⁶ while Article 8(2) mentions the cases when this right may be violated, for example when it is contrary to public morality.⁷ The judge decided that Mr and Mrs A had a right to respect for *family life* in relation to the twins, and their Article 8(1) right had been violated by the legal rights awarded to Mr B. In contrast, "Mr B does not have a right for respect his family life which might have been breached if Mr A had been able to establish his presumption of fatherhood" (case para. 48).

As an 'escape-hatch', or a third option out of a dialectical impasse, Judge Butler-Sloss decided that in domestic law there were sufficient provisions, like adoption, to protect their rights. In other words the 1990 Act was seen to be in compliance with *the Convention*, and no declaration of incompatibility needed to be made.

It is now up to the couples to decide what to do with this judgement. Will Mr B continue to exercise his legal fatherhood and will Mr A, through Mrs A's parental rights, seek legal parentage in the form of adoption? Will they again seek their rights under the law?

Andrea Dyer, solicitor for Mr and Mrs A, confirmed that they would apply to adopt the twins. She said: "The couple feel blessed that they have two beautiful children and Mr A will continue to treat them as his own. They feel a great deal of sympathy for Mr and Mrs B." The Bs' solicitor, Mohammed Ayub, praised Mr and Mrs A for their "sensitivity and understanding". If Mr B applies for contact with the children, the courts would have to decide whether it was in their best interests (Guardian, 2003).

This case study offers much food for thought. Herein it summons a series of questions requiring clarification. What exactly is intra-cytoplasmic sperm injection, the ART that was sought by the two couples? How is it generally understood in the field of ARTs, and how does the law seek to regulate these all? Why did all parties, the A's, the B's, the judge, the HFEA, and the Leeds clinic, find it necessary for the twins to have a legal father and a legal mother? Why wasn't one legal parent, in this case Mrs A, sufficient? Are we dealing here with a widespread nuclear family bias found within all the echelons of British society? Why was the 'race' factor deemed of importance in the decision? In the following sections these questions will be explored and answered.

The possible vistas that the indeterminacy of ARTs open up

The court case involving couples A and B presents the reader with the situation where a procedural mistake with ART caused a public commotion. The publicity may be related to the fact that ARTs are widespread in the UK. There are about 115 licensed clinics in the UK that provide one or more assisted infertility treatments (HFEA Annual report 2002). Currently, one out of every six couples being of reproductive age is infertile and the preferred option of these couples is to pay a visit to a doctor hoping to gain access to ARTs that will enable them in conceiving a child. The three ARTs relevant to the case study will be discussed in this section.⁸ These are: 1) Sperm donation and artificial insemination (DI), 2) *In Vitro* Fertilisation (IVF) and 3) Intra-Cytoplasmic Sperm Injection (ICSI). These ARTs have revolutionised the field of human reproduction. They can be understood as responses to British society's need to connect the ideal of the nuclear family to biological maternity and paternity. Men and women should produce offspring that are reared by both of them within the nuclear household. But like every scientific response to a societal necessity there are elements of excess. And these excesses make ARTs indeterminate as far as articulations between human reproduction and family types are concerned. Put differently, the fit between the perceived or felt societal need and the scientific response in the form of ARTs is not a perfect one. If one omits all the legislative procedures, popular values, and indirectly the financial constraints that seek to curtail their indeterminacy, one realises that they open up new vistas.

In the court case discussed in the previous section, Mr B was awarded legal rights because he is the biological father of the twins and did not consent to donating his

sperm in the fertilisation of Mrs A's eggs. The judge made it clear that although this was a case involving ART, it was not a case of sperm donation (para. 57). This begs the question as to the nature of sperm donation and its relationship to ART.

Artificial insemination with donor sperm is the oldest ART. Presently, annually about 3500 people receive treatment with donor sperm in UK HFEA licensed clinics⁹ (HFEA Annual Report 2002a). The method of artificial insemination is very simple, and besides clinical treatment it can also be practised at home. The question is how did the link between sperm donation and artificial insemination (in other words DI), start out and become such practice?

'Necessity is the mother of invention' is a well-known English saying that hints at the 'birth' of the connection of sperm donation and artificial insemination. For two centuries if not longer getting pregnant after marriage was interpreted among other things as a symbolic confirmation of the nuptial union between husband and wife (Berg 1995). In the womb of the wife the seed of the husband was brought to blossom, and after nine months hopefully a healthy child would see the light of day.

'Nature' or life, however, would not be worthy of the adjectives precarious or unpredictable if from time to time it did not 'disobey' the wishes of humankind. Throughout the ages there have been cases in which the semen of the man was of a low sperm count¹⁰, had a poor sperm motility, a complete absence of sperm or simply a sexual incompatibility between husband and wife.¹¹ These occurrences were not always understood in these terms, but with new techniques these interpretations were born. For instance, in the Victorian age when a married couple did not conceive a child, it was the woman who was blamed and automatically considered infertile. Even with the contemporary understandings based on scientific advancements this archaic myth lives on (Lasker 1998 and Snowden 1998).

To counteract the exceptions to the rule that couples should seek to bear children ideally within the nuclear union, broadly speaking, two strategies were employed. The first was the development of techniques that lessened or eliminated the infertility of male partners with poor sperm motility or low sperm count. Advanced techniques developed to remedy the infertility of male partners are IVF and ICSI. The second strategy, which took place parallel or better said due to early failings of the first, was linking artificial insemination as a form of ART with sperm donation. In this case the nuclear family was upheld, but the ideal link between the biological mother and father in this family type was severed and skilfully obfuscated. *Procedures were enacted safeguarding the anonymity of the donor and the exclusive rights of the nuclear couple to legal and parental rights. This was what the judge was alluding to in the case study.*

To some degree, artificial insemination developed as a technique to help heterosexual couples where the male partner was sub-fertile or regular sexual intercourse was inhibited for whatever reason. However, since with this technique sperm obtained through masturbation was injected using a device, donor sperm would also do. In fact the use of donor sperm in combination with artificial

insemination became widespread. The biological father need not have anything to do with the child that is conceived with his sperm. The link between the nuclear household and the biological father could be severed. Another variant is that the child born through donor sperm could be raised in a nuclear household while fully aware of his or her biological father and having contact with the man who donated his sperm.

Another consequence of sperm donation, which is contesting the nuclear heterosexual family as the privileged domain to rear children, is that nowadays lesbian couples or single (homo- or heterosexual) women have easier access to sperm especially in the private fertility clinics.¹² In addition homosexual couples if lucky can find a female friend willing to bear a child for them.

One of the ways in which male infertility was combated, and its articulation with the norm of couples having children upheld, was through the search for and development of more advanced ARTs. In the media reports on the case involving couples A and B, IVF meaning fertilisation outside the human body, was mentioned interchangeably with ICSI. While scientifically speaking they are not considered the same techniques, they are very much related. Commonly, ICSI is understood as a newer form of IVF that was awarded a distinct name due to the specificity of the procedure.

Male partners whose sperm cells displayed difficulties fertilising the ova were termed sub-fertile. The term sub-fertile is related to the growing understanding or perspective that infertility is linked to our technological advances. "As each new reproductive technology enters the market, the definition of infertility changes. Infertility can only be defined as the condition that no reproductive technology [as yet] can resolve" (Lee and Morgan 2001, 27). Someone who today may be deemed infertile need not be so if, and when, new techniques are developed helping his sperm to fertilise his partner's egg.

Although the precise reasons for couples A and B's treatment at the Leeds fertility clinic could not be ascertained from the gathered material, it is possible to postulate that it may have had to do with the sub-fertility of Mr A and/or B. In such cases the discovery of IVF redefined the boundaries of their sub-fertility enabling them the status of being fertile. Both men and their wives may have been heartened by the success rate of IVF. Currently, about one million children are born world-wide using IVF.

IVF is far more complex than DI. It involves fertilisation outside the female body. The ova are extracted from the female's body. The 'harvested' eggs are then brought together with semen in a petrie dish that ideally leads to their fertilisation. The number of embryos that are transferred into the womb is subject to regulation. The 5th Code of Practice states that no more than 3 embryos are allowed to be placed back (HFEA 2001, para. 9.18). The current trend set by the HFEA is that only two embryos should be placed back, this recommendation was not yet codified in the Code of Practice but was communicated to fertility clinics. *Recently, due to the above-mentioned error in the Leeds fertility clinic, this limited number of*

embryos (two) was made an official regulation through the Court judgement by Dame Elizabeth Butler-Sloss (Leeds Teaching Hospitals NHS Trust v Mr & Mrs A & Others 4 Nov 2002) and HFEA statement (2002c). The rest of the embryos will be frozen in case they are needed later.

The decision as to when IVF should be applied is a thorny issue in itself. It is safe to state that when applied in fertility treatment the process of IVF is only cost effective if the woman has severely blocked tubes. In all other cases other ART options are cheaper. However, the choice of which ART including IVF, should be applied does not depend solely or even principally on cost effectiveness. Increasingly there are many instances where IVF is applied despite it being negatively weighed on the cost versus benefits scale.

A trend worth mentioning, due to its increasing import, is the application of IVF combined with genetic tests to ensure that hereditary diseases are bypassed. Herein what is considered a genetic disability differs from one society to another and is rapidly subject to change as newer techniques become available leading to new definitions of heredity and the possible bypassing hereof.¹³

It is easily possible to postulate that besides Mr A and/or B being sub-fertile their wives may also have some form of blocked tubes.

The ICSI method is virtually the same as that for IVF. The sole difference is that, instead of mixing eggs and sperm cells on a petrie dish, one sperm cell is injected with a thin needle through the outer coating of the ovum, into the egg cytoplasm. The sperm used is usually fresh and derived from the male partner. However, with ICSI frozen (donor) sperm is as effective as fresh sperm.

Like DI and IVF, ICSI led to a revolution in the area of child conception. With ICSI even the most 'sub-fertile' men, those with an extremely low sperm count and/or fertile activity, can conceive a genetically related child. Not surprisingly many couples opt for ICSI. Its discovery has led to a relative decrease in couples using donor sperm throughout the years (HFEA 2002a). The decrease has been relative, however, since ICSI is far more expensive than IVF and DI.¹⁴ Access to IVF and ICSI is class stratified. In the UK only patients of middle class and above can afford ICSI treatment (Ledger 2003).

Couples A and B underwent ICSI. Hence, one can infer that they are probably middle class or upper-middle class. If they did not pay to undergo the technique, they had the right social and cultural capital (Bourdieu 1989) to get funding from Strategic Health Authorities (StHA). In addition one can posit that both Mr A and B were sub-fertile to opt for the expensive ICSI.

In the light of this, although the case of couples A and B involved gamete mix-up, the result, Mr B fathering the children of Mrs A, is due to the indeterminacy of these techniques. Artificial insemination, IVF, and ICSI open unexpected vistas. They can be used to strengthen the ideal articulation between biological reproduction and the nuclear family, but they can also unveil that the link between these two is a matter

of societal choice, convention or coercion not based on a historical contingent truth. If one imagines away all the regulations and societal norms surrounding these techniques, what emerges is the insight that they do not necessarily favour heterosexuality, the nuclear family, or tying biological and social maternity and paternity together. Any family type will do as well as the fact that a couple or a single's sexual preference is of very little consequence. It is primarily through the existing laws and popular morality that many of these vistas can be obfuscated or rendered fantastic. To curtail this indeterminacy is where the existing laws and regulations, and the dominant popular morality come in. The existing laws will be the focus of the following section.

Laws & Regulations on Assisted Reproductive Technologies in relation with parents and children

We still attach weight to the blood tie as the key to the relationship between parents and child. There is still a depth of feeling which underpins the idea of a child *belonging* to a particular set of 'parents' when they are linked genetically. ... Irrespectively [sic] of how many people have contributed in various ways to the child's creation, the law will still only contemplate a maximum of two people, of different gender, being recognised as the parents of a child, perhaps in an attempt to (re)create the nuclear family which the child should have had. (Borton & Douglas 1995, 110).

Introduction

In the preceding section the ARTs that are of consequence in the case *Leeds Teaching Hospitals NHS Trust v Mr & Mrs A & Others* were discussed. At the end of that section the conclusion was drawn that these technologies are indeterminate, that they do not privilege the existing normative articulation between the nuclear family and human reproduction. With ARTs, a connectivity between human reproduction and other family types, such as same sex or female-headed, is just as feasible.

The curtailment of the indeterminacy of ARTs is to be sought in the existing laws and the dominant popular morality. In this section the focus will be on the former. In other words seeking to appreciate how the guidelines and regulations based on the existing laws implicitly and explicitly determine that human reproduction should ideally be articulated to the nuclear family despite the indeterminacy of ARTs.

This section will start out by elaborating on the Warnock Report of 1985. This research document assessing the possible impacts of ARTs, and the need to make these amenable to the welfare of the child, was discussed in Parliament. In order to 'safeguard' the welfare of the child, it favoured the ideal connectivity between the nuclear family and human reproduction. This is despite the indeterminacy of ARTs. This report forms the basis on which the 1990 Act was conceived. The 1990 Act sets the guidelines for infertility treatment and research in the UK. In the second subsection a short summary of the most important paragraphs of the Act that are of consequence for the case study will be given. Thereafter it will be demonstrated how congruence was sought and to great measure achieved, between the 1990

Act and the existing legislation with regards to legal motherhood, fatherhood, and the welfare of children. Following this, it will be argued that the emphasis on the ideal situation of growing up with or knowing one's natural parents (the biological linkage) as a safeguard to the mental and emotional welfare can inadvertently lead to ethnic politics. As in: children who belong to ethnic group X will feel alienated if he or she grows up in a family comprised of persons belonging to ethnic group Y. In the 1990 Act provision is made so that children born through donor sperm will be able to have access to knowledge concerning the ethnic identity of the donor (§ 32; HFEA 2002b, para. 9). This is deemed necessary for these children to establish a stable 'kernel' identity. As in the other sections, italicised references to the case study will be made.

The Warnock report

The Warnock report is a research document in which policy recommendations were presented on how the indeterminacy of ARTs could be curtailed in order to secure the welfare of the child.

Within the report acknowledgement was made that the foundation of societal practices, in the field of kinship arrangements and the welfare of the child, stood and fell based on the dominant definitions of what is moral.

It would be idle to pretend that there is not a wide diversity in moral feelings whether these arise from religious, philosophical or humanist beliefs. What is common (and this too we have discovered from evidence) is that people want *some principles or other* to govern the development and use of the new techniques. There must be *some* barriers that are not to be crossed, *some* limits fixed, beyond which people must not be allowed to go. Nor such a wish for containment a mere whim or fancy. The very existence of morality depends on it. A society which had no inhibiting limits, especially in the areas with which we have been concerned, questions of birth and death, of the setting up of families, and valuing of human life, would be a society without moral scruples. *And this nobody wants* (Warnock Inquiry 1985, para. 5).

Nevertheless, according to the Warnock report, within the plethora of moral politics which exist in the UK, the dominant ethical position taken by the law should be that which embodies the general sentiment of the British population (ibid., para. 6-8), a sentiment that shows a strong preference for the ideal articulation between the nuclear household and human reproduction. Following this sentiment, the Warnock report states categorically, "we believe that as a general rule it is better for children to be born into a two-parent family, with both father and mother, although we recognise it is impossible to predict with any certainty how lasting such a relationship will be"(ibid., para. 2.11). It is telling that this statement follows an elaboration whereby the demands of single mothers and same sex couples for equal access to ARTs are addressed and framed as being most understandable and in many ways incontestable (ibid., para. 2.9-10).

Two critical remarks can be made concerning the Warnock report. The first is that after reading the report one is left wondering whether the gravity of feminist and gay and lesbian rights movements, was considered. The commonality between the moral politics of these movements, with regard to their contestations of the

dominance of the nuclear household, is their advocacy of equity. This advocacy of equity is translated concretely speaking into petitions, lobbies and demonstrations for plural or non-nuclear family biased laws that can accommodate multiple moral politics. In other words, laws and the concomitant benefits and protections that regard equally nuclear, single (male/female), same sex, and extended kinship units.

Although mention was made of these other moral politics and family types, especially in the light of the indeterminacy of ARTs, the possibility of plural or non-nuclear family biased laws was not seriously entertained. This is due to the fact that these single or same-sex family types were deemed incompatible with the welfare of the child. Studies, however, show that this prejudice is based on myth rather than fact (Campion 1995 and Golombok 2001).

This leads to the second point of criticism which is the implicit instrumentality with which ARTs were appraised and the uncritical taken for granted dominance of the nuclear family norm within British society. In the Warnock report ARTs were unequivocally conceived as technologies that can be applied to reproductive practices within an already existing societal field whereby implicitly the nuclear family took on a primordial as well as a privileged socially constructed connotation. Because of the unquestioned acceptance of the latter, which makes it seem naturally commensurable to human reproduction, in certain paragraphs of the report the ideal link between the nuclear family and the welfare of the child is made to seem a self evident fact that “exists outside or beyond the technological and political machinations of the world” (Strathern 1992, 11). “[S]hared discourse affirming these (traditional family) values, and grounding them in ‘nature’ were restored” in the public debates surrounding the report (Franklin 1999, 131 following Canell 1990). In other sections the nuclear family as the ideal kinship unit safeguarding the welfare of the child is acknowledged as being the best institution created in the long history of family arrangements in the UK.

This uncritical acceptance of the normative articulation between the nuclear family and reproductive practices is also found within the popular morality. In the next section this will be elaborated. What suffices to remark here, is that an historical appraisal on the matter reveals that this taken for granted normative articulation is itself a product of technological innovations and political decisions, namely, the industrial revolution and the bourgeoisie politics (Abelove 1992). The aim of the latter was to ‘civilise’ the unruly and amoral masses, concomitantly making them more docile and amenable to factory work. The nuclear family, where ideally women stayed at home with the kids, and fathers were made to feel an obligation to support their ‘dependants’, became a pivotal site in the creation of docile factory workers.

What is argued is that the Warnock report obfuscated the link between technological innovations and the possibility, constitution, and dominance of certain family types (Strathern 1992). It is possible to postulate that there is an affinity between ARTs and the increasing flexibility or plurality in the area of work, leisure, and lifestyle practices. Had the Warnock report explicitly questioned where the

dominant sentiment towards the nuclear family came from, how it arose, and the formative element of technological innovations therein, more light would have been shed on the increase of contestations by other kinship arrangements and the influence of ART herein. These family types could then be judged on their own merit. Unfortunately this was not the case.

The 1990 Act.

Sections of the 1990 Act that are pertinent to the case study will be discussed. As far as motherhood is concerned, §27 states:

- (1) The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.
- (2) Subsection (1) above does not apply to any child to the extent that the child is treated by virtue of adoption as not being the child of any person other than the adopter or adopters.
- (3) Subsection (1) above applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs.

In other words, by virtue of carrying the embryos motherhood and legal rights are established. *Understandably, Mrs A was awarded legal rights of the twins. Based on Statutes, this would be the case even if the ova were that of Mrs B. If this had occurred, no court case would have been possible. Mrs A would not have been able to relinquish her legal rights except via adoption.*

With regards to fatherhood the most relevant section of 1990 Act is 28(2)-(6). In this paragraph the male spouse is deemed the father:

- (2) If –
 - (a) at the time of the placing in her of the embryo or the sperm and eggs or of her insemination, the woman was a party to a marriage, and
 - (b) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage,then, subject to subsection (5) below, the other party to the marriage shall be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her insemination
- (3) If no man is treated, by virtue of subsection (2) above, as the father of the child but –
 - (a) the embryo or the sperm and eggs were placed in the woman, or she was artificially inseminated, in the course of treatment services provided for her and a man together by a person to whom a licence applies, and
 - (b) the creation of the embryo carried by her was not brought about with the sperm of that man,then, subject to subsection (5) below, that man shall be treated as the father of the child.
- (4) Where a person is treated as the father of the child by virtue of ` subsection (2) or (3) above, no other person is to be treated as the father of the child.
- (5) Subsections (2) and (3) above do not apply –
 - (a) in relation to England and Wales and Northern Ireland, to any child who, by virtue of the rules of common law, is treated as the legitimate child of the parties to a marriage,
 - (b) (applies to Scotland only), or
 - (c) to any child to the extent that the child is treated by virtue of adoption as not being the child of any person other than the adopter or adopters.
- (6) Where –
 - (a) the sperm of a man who had given such consent as is required by paragraph 5 of Schedule 3 to this Act was used for a purpose for which such consent was required, or

(b) the sperm of a man, or any embryo the creation of which was brought about with his sperm, was used after his death, he is not to be treated as the father of the child.

This paragraph clearly states that all children born within wedlock are to be considered those of the husband. This rule, however, ceases when the husband can show he did not give his consent to use the sperm of a donor. *The latter was of consequence since Mr A was deemed not the legal father because it is shown he did not consent to the use of Mr B's sperm. Hence, Mr B was awarded legal rights. The only way he would not have been eligible if, as sub paragraph 6 dictates, he had consented to donate his sperm. In the court case the judge made it clear that this did not apply to Mr B.*

On a general note, the first thing that meets the eye after reading the entire 1990 Act is the strong bias towards the nuclear family. While in principle everyone can apply for infertility treatment, provisions are made so as to remind applicants of the unquestionable 'need', that even children born through ART have, for a father. To give an example:

The guidance given by the code shall include guidance for those providing treatment services about the account to be taken of the welfare of children who may be born as a result of treatment services (*including a child's need for a father*), and of other children who may be affected by such births (§ 25.2, emphasis mine).

Several authors have averred that provisions such as these reinforce the idea of the social or psychological 'need' for a father (Borton and Douglas 1995, 63-4).

In addition, they also infer that "the policy behind the legislation is actively to discourage treatment for those infertile people who live outside the umbrella of the nuclear family" (Lee and Morgan 2001, 222). Single women for instance are thoroughly appraised before gaining access to treatment with ART. An HFEA patient leaflet dated the year 2000 clearly states:

The HFE Act does not exclude any woman from being considered for treatment. People seeking treatment are entitled to a fair and unprejudiced assessment of their situation and needs. This should be conducted with skill and sensitivity appropriate to the delicacy of the case and the wishes and feelings of those involved. In situations where the child will have no legal father the clinic will pay particular attention to the prospective mother's ability to meet the child's needs throughout childhood.

Due to the provisions within the 1990 Act, which favour the nuclear family, clinics can deem same sex arrangements or female-headed households to be incompatible with the welfare of children.

Under the National Health Service - Strategic Health Authority (NHS-StHA), infertility treatment is only partially covered. For instance about 25 % of IVF cycles are NHS funded. In order to gain access to this coverage, eligibility criteria have to be met. Although these criteria differ per StHA and per treatment, the nuclear family bias is a recurring theme. "Some Authorities state that you have to be married before you will receive funding for treatment" (National Infertility

Awareness Campaign Website) while others may accept unmarried heterosexual couples who meet the requirements as far as the length of what is considered a stable relationship is concerned; this boils down to being able to prove that for at least a year they have been together and have had frequent and unprotected sexual intercourse. One way of eliminating the preferential treatment implicitly awarded to the nuclear family arrangement is to have the StHA abstain from funding ARTs.

At present, due to the high costs involved coupled with the nuclear family bias, working class persons in alternative living arrangements, single women or same sex couples, are virtually excluded from gaining access to ARTs. As a rule same sex or singles get access to ARTs exclusively on a fee-paying basis (Ledger 2003).

Although, belonging to the financially better off classes helps single mothers and same sex couples gain access to ARTs, there still remains the fact that legally their living arrangements are not recognized. This is not only the case with the 1990 Act but also those that preceded it. In fact there is congruence between all the old and the new existing legislature with regards to the welfare of the child.

The congruence between the 1990 Act and other laws

Before the advent of ART, the Warnock report, and the 1990 Act, within the law the normative articulation between the nuclear family and the welfare of child had been enshrined. The various provisions were brought together in the *Children Act 1989*. In the Lord Chancellor's consultation papers it is stated that:

The Children Act 1989 rests on the belief that children are generally best looked after within the family, with both parents playing a full part and without resort to legal proceedings. For most purposes the Act makes no distinction between married and unmarried parents, and it seeks to encourage both [biological] parents to continue to share in their children's upbringing, even after separation or divorce. (Lord Chancellor's Department Consultation Paper 1998, § 42).

Under §3 (1) parental rights automatically befall the biological mother and the biological father within wedlock. Parental rights refer to all the rights, duties, powers, responsibilities, and authority which by law a parent of a child has in relation to the child and his property. "The Act does not attempt to list parental rights and duties which are recognised in law, as it was felt that these were bound to change at various stages in a child's life to meet the different circumstances" (Wragg 1998, 29).

A qualification has to be made since if the biological father is not married to the mother he is not automatically awarded parental rights. He can apply for legal and parental rights which will be granted to him since within this act legal and parental rights are synonymous with biological fatherhood/motherhood (Children Act 1989, § 2 and § 4; Borton and Douglas 1995, 49 and ch 3-5).

Due to the existence of this act Mr B can petition for joint parental rights with Mrs A. However Mr and Mrs A can seek to legally adopt the twins by resorting to the Adoption and Children act 2002, in which case Mr B would lose his legal rights.

All the emphasis that is put on biological affiliation, within both the *Children Act* 1989 and the 1990 Act, ignores the unforeseen consequences this can have with ART application in 'mixed race situations' as was inadvertently the case with couples A and B. Since there is strong similarity between both Acts, I will focus on the 1990 one.

'Race' and the 1990 Act.

As in all UK Statutes and laws, 'race' is not considered a valid category of social distinction in the 1990 Act. However ethnicity has led many to assert that ethnicity is the new term which envelopes the cultural component of race thinking (Gilroy 1999). Briefly, once there is an idea of monolithic ethnic groups with their incommensurable primordial cultures, which they pass on from generation to generation, 'race' thinking thrives. The other social positions that bind persons in the UK such as belonging to the same class, lifecycle, or occupational group are erroneously deemed of lesser significance.

Studies have shown that despite the so-called ethnic differences within the UK most citizens have internalised the common civic culture (Bauman 1996 and Williams 1989). To give an example: when it comes to reasoning concerning what is permissible within societal living, Muslims in the UK have more in common with Anglicans than they do with those who profess the same faith across the Channel. The substratum, civic culture, is determined by the place one resides; specific cultural attributes of ethnic groups are always secondary.

Yet due to the continuing importance awarded to the messages of elite formations within ethnic groups that stress difference, this common civic culture is obfuscated. Unfortunately, even within the regulations provision is made whereby ethnicity is defined as an unequivocal substratum.

In § 31 it is stated that non-identifiable information about the donor should be collected and herein genetic health and ethnicity are of prime importance. When a child born of donor sperm is eighteen years of age s/he can be granted access to this information. The reasoning behind the registering of ethnicity is that it helps the child to establish his or her identity. The agency responsible for this collection and registering is the HFEA (HFEA 2002b, para. 9). *It is thus understandable that within the case study this agency emphasised the need to know the identity of the genetic father of Mrs A twins.*

One can postulate that due to the fact that within the normative articulation between the nuclear family and human reproduction so much emphasis is placed on biological linkage inadvertently this plays ethnicity in hand. Popularly speaking, ethnicity is usually conceived as being a primordial tie of a culturally defined group and therefore has implicit biological connotations. A confluence thus takes place

between ethnicity and the biological reductions operative in privileging the nuclear family as the ideal site of human reproduction.

In establishing biogenetic individuality as the basis of personhood, it constitutes what can be described as the geneticisation of both kinship and identity. Children born of donation were debated in terms of their right to know their genetic origins, a right seen as integral to their successful development and acquisition of a complete identity. ...

... The ability to define personhood in strictly biogenetic terms is consistent with the primary kinship unit of the biological family, the primary kinship distinction between 'blood' relations and in-laws, the bilateral reckoning of relations, and the rules concerning incest in contemporary English kinship.

... That the biological facts hold such a prominent position in Euro-American kinship definitions therefore requires more explanation than that they are 'true'. ... (Franklin 1999, 134).

Based on the provisions in the 1990 Act, pertaining to the stipulation that a child has the right to know since this helps in his or her identity formation, the judge in the case study argued that the mixed 'race' twins of Mrs A should know that Mr B is their biological father (para. 55). He was thus given legal rights.

Conclusions

This section set out to show how even with the advent of ART the existing law seeks to uphold the primacy given to the ideal articulation between the nuclear family and the human reproduction. This is done for the welfare of the children born through this technique.

It started out by arguing that even the independent research committee and its policy recommendations, the Warnock report, unquestionably accepted this ideal articulation. Hereafter it was demonstrated how the product of this report, the 1990 Act influenced the judge's decision in the court case. In addition the 1990 Act makes it virtually impossible for persons with lesser financial means to gain access to ARTs. Only same-sex couples or single parents that can pay for themselves are able to get around this financial hurdle and the implicit nuclear family bias. *Lastly, the danger with the biological reduction in this Act is that it can unwittingly strengthen the idea of ethnic differences. Here too the judge's decision that being of mixed 'race' the twins should know the identity of their biological father. This would safeguard them from suffering psychological traumas regarding their identity or an essential part of their identity.*

In the following section ways in which this Act mirrors the prevailing popular morality, the dominant sentiment of the British will be demonstrated.

Family Types, popular moral conventions and regulation of sex

Our most basic assumption about the world, the nature of the difference between the sexes, is a selection from reality, not a reflection of it (La Fontaine 1981, 346)

What existing findings appear to suggest is that aspects of family structure such as genetic

relatedness, number of parents and the mother's sexual orientation, may matter less for children's psychological adjustment than warm and supportive relationships with parents, and a positive family environment. New families, it seems, flourish on old values (Golombok 1998).

Introduction

In the previous section the manner in which the existing laws and regulations seek to curtail the indeterminacy of ART was discussed. The argument made was that the guidelines enacted seek to make ARTs amendable to the ideal articulation posited in the law between the heterosexual nuclear household and human reproduction. An ideal based on the presumption of safeguarding the welfare of the child.

It was also argued that the regulations concerning infertility treatment inadvertently endorse ethnic politics; since the non-identifiable material collected privileges the taking inventory of the physical characteristics and ethnicity besides the growing importance of the donor's medical history (HFEA 2002b, para. 9, 15).

This section will seek to demonstrate that there is an affinity between the articulation privileged in the 1990 Act and that of the dominant popular morality. In all subsections brief references to the case study will be made. As elsewhere these will be italicised.

It is argued that the nuclear family is presented as the norm because adherents make both trans-historical and constructivist claims. It is argued that it has existed metaphorically since the Garden of Eden, and it is also reasoned that it is the best kinship-based institution we have created towards the raising of children and the propagation of a civilised society.

Subsequently, based primarily on Feminist and Marxist analyses of the nuclear family, the ascendance and consolidation of this family type is being reconstructed. The point will be to show how it became widely accepted by the various classes, through a process of internalisation, becoming dominant in the prevailing popular morality.

Despite its dominance there is a gap between the real and the ideological representation. This causes contestations by other family types, and as an example female-headed households will be briefly discussed. However, due to a lack of institutional support and social stigma these family types remain peripheral. Furthermore, at best they should be understood as counter assertions within the hegemony of the dominant popular morality. In the last section general conclusions will be drawn.

Nuclear heterosexual family

Despite the fact that there exist many family types, with regard to children the Warnock report states "... we believe that as a general rule it is better for children

to be born into a two-parent family, with both mother and father..." (Warnock 1985, para. 2.11). Consequently, this designates other articulations that tie into other family types as abnormalities (Jagger and Wright 1999a).

There exists, and we can infer that there has always existed, a discrepancy between the nuclear family norm—heterosexual involving two natural parents and their offspring—and the realities on the ground. The norm surrounding this family type presents itself as simultaneously trans-historical—it has always been this way since Adam and Eve, and as the best kinship-based institution we have created towards the socialisation of children and the propagation of an orderly society. The latter part of the norm illuminates that it is a social construct and hence deconstructs the trans-historical myth surrounding it (Jagger and Wright 1999b). Inversely, for some, its trans-historical edge overrides or makes less relevant the social constructivism also clearly detectable in the norm.

'Easy does it', one might say; things aren't that simple. Explaining how illogical the norm surrounding the nuclear family is does not curtail or dismiss its power and influence. This is the case because it is socially relevant, meaning it is tied to several societal practices, socialising institutions, which it reinforces and which consequently reinforces its status. *The Court case involving couples A and B demonstrates how the institution of law and more specifically the family division reinforces the status of the nuclear family and the ideal link between this institution and human reproduction.*

In addition, these institutional practices have a correlative within the dominant popular morality, the hegemonic ideology shared by members of all social classes. This is what renders it virtually unquestionable. In order to analytically tackle the ideological grounding of the nuclear family norm, within the dominant popular morality, three different types of questions have to be asked.

Why did the nuclear family become the norm? *How* does it manage to remain such a potent force among most members of the UK society? *What* is the nature of the realities behind the norm that are increasingly contesting its status?

Despite the crude economic reductionism that is tied to many Marxist scholars, this school of thought offers a vital clue as to why the nuclear family norm became dominant in the UK and the rest of Western Europe. In its simplified version, the story goes that with the rise of industrial capitalism (during the 18th and 19th century) the elite formations in society sought to fix the workers, trekkers from the countryside, to particular spots in the urban areas. Academics, influenced by the Women and Development approach (WAD), claimed that the fixed effect, which had at its basis the agenda of making the trekkers dependent upon the industries, had a gender dimension to it. This gender dimension boiled down to coercing industrial workers, which were mostly men, into living in nuclear family units. In such a way women, who were forced to stay home or earned far less, became a reserve army of potential proletarians and unwittingly helped groom their men and male children into faithful and responsible workers. In other words most women,

able-bodied or not, came to depend on the male as breadwinners and to view their prime identification as that of mothers and homemakers.

These arrangements did not fall out of the sky but were partially based on patriarchal historical antecedents going all the way back to ancient Rome. As Gittins writes, for centuries fathers were allowed to sell a child under age of seven. Up until the nineteenth century it was understood that the father owned his children's labour power, and children were expected to work from an early age. Their earnings belonged to their father. In a like manner, their bodies also belonged to him; the mother had no legal rights over her own children because she, too, was regarded as part of the father's household and property (Gittins 1993, 172). One qualification has to be made with regards to Gittins sweeping account of history, and that is that class distinctions made it at times impossible for some men to own their women. Slaves in Europe and elsewhere did not own their women because they were the 'property', human chattel, of others.

Besides exploitative motivations it is undeniable that there existed as well an element whereby the bourgeoisie classes and other elite formations believed in the institution of nuclear family, their preferred type, and saw themselves as stern yet benevolent bearers of civilisation (Gittins 1993, 157). Thus there was an ideological motivation at play as well, one that had to be brought to the masses.

What this *why* perspective does not explain is exactly *how* the elite formations managed to make the nuclear family the norm among the masses in Great Britain. How did they promote their ideology in such a way that the masses internalised this? Studies have shown that among the latter group, masses and even among many elite, bisexuality, homosexuality, same sex couples, and female-headed households were not rare exceptions (Abelove, 1992). In fact they never really 'died out'.

Still what is obvious is that these other kinship and sexual arrangements survived on the peripheries. The rise of the nuclear family and hence the positioning of other forms at the periphery was accomplished due to the disciplinary practices of emerging institutions.

Disciplinary power is concerned with the regulation, surveillance and government of, first, the human species or whole populations, and secondly, the individual and the body. Its sites are those new institutions which developed throughout the nineteenth century and which 'police' and discipline modern populations – in workshops, barracks, schools, prisons, hospitals, clinics, and so on. (Hall 1992, 289).

The term disciplinary is employed here to evoke the ambiguity inherent in the word. First, it refers to persons being disciplined by others. Second, it refers to an act of submission whereby the ones being disciplined let themselves be drilled even if contestation arises from time to time. The reason this takes place is due to perceived benefits. In the end this double process, being disciplined and accepting the disciplinary power of others, leads to an internalisation whereby ideally persons become their own disciplining agents. This occurs because the outcome of the

disciplinary power creates new subject identities. It creates mothers, fathers and children and new ideas concerning appropriate morality.

Concretely speaking then, many of the male workers accepted the disciplining practices of the elite formations because they felt that it was partially to their own benefit. Living with a woman in a heterosexual union meant that their beds would be made, their food prepared, and they gained the status of breadwinner. In a benevolent reading, their task was to fend for their wife and children. The outside world was their domain while their wives functioned as their 'deputies' at home. In a cruder appraisal one could argue that symbolically and unfortunately many times also literally, their spouses were their 'property'. Most women accepted the norm because in dire times they were 'assured' of a meal and a roof over their heads, their children stood a better chance of surviving, and their gender status 'grew' as they accepted the title of mother and housewife.¹⁵ While they were practically treated as the 'property' of their men, they owned their children¹⁶, even if the husband had the final say. *It is possible to postulate that while love for the twins may have been part of Mr A's motivation to seek legal parentage there may have been an element whereby he felt that he had rights since as a husband he was head of the household and hence symbolically owned the fruits of his wife's womb.*

Accompanying the growth of the nuclear family a whole set of new institutions were created such as kindergartens, primary schools, social work, family division, housing projects for nuclear families, modern day understandings of marriage, and extensive documentation practices.

For the case study it is worth mentioning that the modern day incarnations of agencies with extensive documentation practices are the HFEA and the Leeds fertility clinic. These are charged with registering the biological mother and father of children born through ICSI and curtailing members of other family type's easy access to these treatments.

Through these documenting agencies and the other above-mentioned institutions the ideal of the necessity of the articulation between the nuclear family and human reproduction was promoted. Of importance herein was the invention of modern day notions of psychical heritage, a child's so-called inheritance of personality traits, from his or her biological mother and father, a transference supposedly taking place during the conception. Together with the biological affiliation, this invention of a psychic inheritance led to the belief of a core self among the various classes. The emerging institutions such as welfare agencies and family division advised the various sectors of society to rear children within the nuclear household ideally encompassing the biological mother and father. Besides coercive sanctions their appeal was framed in a mixture of duty and love since the child bore physical and as well as psychic material from his or her biological parents. This, however, is pseudoscience since we know that while there is biological transference there is no falsifiable evidence to suggest the transmission of personality traits from the biological father to his offspring through his semen. Nevertheless this myth lives on and is currently even being framed in genetic terminology. Among others Benders argues against the idea of genes as bearers of personality traits.

In terms of parenthood, genetics does not address the roles of pregnancy, labour, birth, and nurturance. And these are just the scientific or biological components that are absent from genetic essentialism. One of the gravest problems with genetic essentialism or genetic determinism is its reductionism. Genetic analysis cannot tell us anything about the social world, culture, politics, spirit, or mind (Bender 2003, 19).

It is possible to postulate that in the case study, Mr B was implicitly motivated to seek legal parentage based upon an internalisation of the idea of psychic inheritance. If so, he should not be seen as an exception, since the idea of a psychic heritage was and still is widely promoted, obfuscating the fact that it is through the process of mirroring their parents that children come to psychically emulate their prime caretakers personality traits. In addition, when one or both of the biological parents are not around it was the other caretakers that projected these ideas upon the children. In the most extreme cases some parents of adopted children implicitly project that they cannot love or understand them like their biological mother and father can.

Adoptive parents worry that the child's feeling towards them will change. They also worry about distress that knowledge about adoption may bring to the child, and about possible damaging effects to the child's sense of security and self-esteem. Once parents disclose to their children that they are adopted, they can no longer pretend that their relationship with their children is exactly the same as that of biological parents (Golombok 2001, 26).

Herewith the difficulties of upbringing and the later search by these children for their 'roots' is erroneously explained and popularised.

The larger point is that the disciplinary practices, and consequent internalisation of its precepts by all sectors, led to an overall acceptance of the dominance of the nuclear family norm and its ideal articulation with human reproduction. What started out as the ideology of the bourgeoisie became the dominant popular morality. However, the dominant popular morality is subject to modifications since like every prevailing ideology it bears excess and therefore creates 'unforeseen' effects. Such an 'unforeseen' effect was that in time the British masses aspired to equality with the dominant formations in society (Hall 1991). For example: 'if I adhere to the nuclear family norm what makes you and your children more respectable than me? My children and I deserve equal protection and privilege'. Partially, as a consequence of these demands, laws were enacted to protect the rights of all children and ensure 'stable' parenting situations which boiled down to strengthening the nuclear family norm. *In the case study the presiding judge felt that the twins, conceived through a mistake with ICSI, had a right to know the identity of their biological father. At the same time, by advising couple A to file for adoption, she was seeking to safeguard their rights to family life and subsequently the welfare of the twins.*

The crisis of the nuclear family

Despite the endorsement of the nuclear family norm by the dominant popular morality, it has always been contested. The ideal never completely matched the reality. This is especially true in our day and age. In post-industrial consumer

driven Britain informality, flexibility, lifestyle choice, and the ideal of making one's life a work of art are the new credos. In this milieu, all normative institutions including the nuclear family are under 'attack'. Many women are financially independent, they are entitled to the same rights as their male counterparts, and therefore are far less dependent upon their husbands or boyfriends.

Currently, the age when most persons get married in the UK is rising. In fact, since the 1960s, the UK has witnessed an increasing divorce rate. Today the average marriage lasts approximately 11 years (Office for National Statistics). Of all the children registered in the UK only 65 % live with both their biological parents. Of the remaining 35 %, one out of every ten lives with a step-parent (Office for National Statistics). Children growing up in the UK are increasingly exposed to the realities outlined above.

Children are living in an increasing variety of different family structures, and these are not static. Due to changes in cohabitation, marriage and divorce patterns, children may experience a range of different family structures while growing up. Parents separating can result in one-parent families, and new relationships can create stepfamilies (Office for National Statistics 2002).

The question that arises is why in the case of the Leeds Teaching Hospitals NHS Trust v Mr & Mrs A & Others such an emphasis was placed on establishing legal parentage of the twins and upholding the primacy of the nuclear family as the ideal kinship arrangement for the upbringing of children? After all aren't the above outlined developments indirectly contesting the dominant popular morality's hold on citizens?

In order to answer these two questions, in the following subsection a set of alternative kinship living arrangements which are largely viewed as being related will be presented. These alternative kinship living arrangements are jointly called 'female headed households'. I will demonstrate that despite the fact that they are on the rise, they suffer social stigma as breeding places of social and/or psychological misfits. Furthermore those who practise these kinship living arrangements are not immune to the power of the prevailing popular moral convention.

Female-headed households

As alluded to at the end of the previous subsection, 'female-headed households' is an enveloping term used to denote various types of single mother living arrangements. In this subsection the focus will be explicitly on the former.

There are three factors that contribute to the differences within the variants of single women living arrangements. These are: 1) the different socio-economic conditions that induce women in general to form such households, 2) their divergent understandings of their situation, and, 3) their contrasting goals and aspirations.

Some women enter in a single parenting situation due to divorce or death. These may experience a poor emotional state after losing the stability of the nuclear family. This category has been assigned the label, 'lone mothers'. Another group is formed by women who deliberately choose to remain a single mother based on socio-political motives ('single feminist mothers'). Many of these are staunch feminists who wish to contest the dominance of the UK version of patriarchy, the overall male bias and idealisation within the institutional workings of society. Lastly, there is the group who more or less chooses to live as single parents because of historical antecedents that tie into the contemporary socio-economic situations they face in the UK. This is the case with women of the West Indian Diaspora who have experienced matrifocality, since the mid-1500s. A brief elaboration on these three forms of female-headed households follows.

The lone mothers are actually the category that shows the strongest inclination towards the nuclear family norm. The internalisation process of the dominant ideology, or their strong adherence to popular morality's endorsement of the nuclear household has had a tremendous impact on them. Given a chance most of these women would turn back the hand of time in order to return to the time before the divorce or death of their spouse. In the socialisation of their children, prior to and after the separation with their spouses, they will most likely reinforce the idea of psychic inheritance and the nuclear family norm. This is problematic given that the male figures are not around and these women are in process of grieving.

Several studies have been published showing the psychological trauma that these women undergo due to their sense of loss. Golombok (2001) argues that lone mothers do not build up or have an alternative social network at hand that can help them cope with the new situation or can offer them a positive reading of being a single mother. Because of this, in the case of divorced women, they "may be less affectionate, less communicative, more irritable and more punitive to their children than ever before, which in turn may exaggerate their children's difficulties in adjusting to divorce" (Golombok 2001, 6-8).

However, this sensitive reading is usually incongruent with the manner in which most lone mothers and society in general appraises their situation. Their high incidence of psychological ailments accompanied with the problematic behaviour displayed by their children has led to their stigmatisation and the reinforcement among themselves that the nuclear household is the ideal (Bortolaia 1996, 8).

Unlike the lone mothers, the second category, the 'single feminist mothers' are women on a mission to dismantle the patriarchy found in the UK, a patriarchy that in their view is constantly reconstituted through the institution of the nuclear family where men are positioned as the symbolic heads of the household. Many of these women use donated sperm in order to get pregnant. In their eyes this protects them from any controlling hassle by the father of their children. It is very likely that while the idea of psychic inheritance will still play a role in the socialisation process of their children it will only explicitly allude to their own 'input', in other words a partial deconstruction of its validity. This is due to the fact that the main focus of

'single feminist mothers' is not about the deconstruction of the myth of a psychic inheritance, but that of the dominance of the male figure.

The feminists are actually the embodiment of the legacy of the feminist movements of the early sixties and seventies. They got the equal opportunities that their mothers fought for and are asserting their rights to more equity and equality. Mason and Jensen (1995) suggest that 'single feminist mothers' came about due to "a new *viewpoint* arising from women's increased educational qualifications and employment, rather than actual increases in their earning power" (Kiernan 1998, 13).

As tremendous as its impact was, UK feminism, in all its shapes and sizes, never was able to muster a large backing. In other words it never was and still is not a mass movement. Therefore 'single feminist mothers' remains a class-based phenomenon involving the better off. Although it is too premature to ascertain its effects, it seems that these living arrangements are stable and that 'single feminist mothers' have less difficulty raising children on their own. When they do encounter these, their social and cultural capital makes it easier for them to find the right channels to lobby for more child day-care and governmental assistance. Nevertheless, because their lifestyles and politics are incongruous to that of the dominant popular morality, 'single feminist mothers' living arrangements are stigmatised and ridiculed.

Of all female-headed households the matrifocal is the most complex. It involves primarily British women of West Indian extraction who can fall back on a longer tradition of living as single parents while having to survive in a perpetual state of economic turmoil. The 'tradition' and the state of perpetual economic turmoil referred here is that of New World slavery, the post-abolition period, and its aftermath. From the mid-1500s onward many 'Black' West Indian women, especially the lower classes, were faced with a situation of having to rear their children with little or no financial or emotional help from the biological father. Under these conditions they developed a network system involving biological and non-biological kin who pitched in helping them rear their children as they worked outdoors. As with the other two forms of female-headed households, the idea of psychic inheritance also plays a role in this family type. At times it is strictly geared towards that of the mother (resembling the 'single feminist mothers'), at times towards that of both biological parents (resembling the lone mothers), and at times towards the extended kin¹⁷, often including biologically unrelated persons (a specific conjuncture which partially yet implicitly contests the idea of a psychological given linked to biological reproduction).

As many West Indians migrated to the UK, they brought their 'tradition' of matrifocality with them. As single mothers, these women take on the ambiguous role of alternating the caring mother role with that of the commanding father. This makes most of them seem more steadfast than lone mothers or even women within a nuclear household. In addition, the fact that they have to take care of their children without the help of the biological fathers may explain why there is more

employment among black woman than among white woman (Phoenix 1996, 184 following D Owen).

What must be mentioned, however, is that although no definitive study has been produced showing that children reared in matrifocal households fare worse than those reared in a nuclear family, the poverty and poor educational skills of many of these single mothers have led to the social stigmatisation of this living arrangement (Essed, 1994). An accurate analysis would take the importance of economics into consideration while assessing why some children brought up in these households have social and psychological problems, but this is usually not done. One author that avers that we do so is Golombok. "Psychological problems in children raised in single parenting families are more likely to be caused by financial hardship rather than the fact that there is only one parent available" (Golombok 2001, 7). This may be partially due to the power of the prevailing popular morality. "Family structure in itself makes little difference to children's psychological development. Instead, what really matters is the quality of family life" (ibid., 99).

Lastly what must be mentioned is that many women within matrifocal households are not against the nuclear family. An ideal for many is to get married at a later age. Their point of contention is that while seeking to rear their children to the best of their abilities, within a matrifocal setting, they are socially discriminated against and stigmatised. Unlike the 'single feminist mothers' theirs is class-based contestation, which is indirectly anti-patriarchal.

The brief exposition above of the three variants of female-headed households reveals that, while their existence alone and increasing importance is a contestation of the nuclear family ideal, with the exception of 'single feminist mothers', the women who head these kinship living arrangements still strongly adhere to the prevailing popular morality. In other words they are not exempt nor immune from its the appeal. Even 'single feminist mothers' have not explicitly or fully contested and deconstructed the idea of a psychic inheritance. It is credible to posit that these alternative kinship-based living arrangements are best understood as counter assertions within the hegemony of the dominant popular morality. For them to be more, the governing institutions would have to place them on a par with the nuclear family.

Since this is not the case, it is understandable that all the participants in the Leeds Teaching Hospitals NHS Trust v Mr & Mrs A & Others remained staking their claims based on the normative articulation between the nuclear household and biological reproduction. Herein psychic inheritance, clothed in the terminology of safeguarding the mental well-being of the "mixed race" twins played a role as well.

Conclusions

This section started out by showing how behind the general term family, within and without academia, nuclear household bias is implicit. In daily life this bias is based on the endorsement within the dominant popular morality of this family type linkage to human reproduction. Thereafter an argument as to how this endorsement

emerged and how it got internalised in the various sectors of British society was presented. In between the argumentation, reference to the case of *Leeds Teaching Hospitals NHS Trust v Mr & Mrs A & Others* showed correspondence or affinity between the judicially coloured demands of those involved and the contents of the dominant popular morality.

Lastly, while the nuclear family is being contested by alternative kinship arrangements, such as female-headed households, these contestations are stigmatised, and most of their adherents are not free from the appeal of the dominant popular morality. *In the end due to the stigma attached to them, and the fact that they are counter assertions within the hegemony of the dominant popular morality, they therefore were not considered credible in the case of Leeds Teaching Hospitals NHS Trust v Mr & Mrs A & Others.*

Final Section

I began this article with three interrelated postulations. My first postulation was that in real-life cases a wealth of information can be extracted concerning the workings of our contemporary society. I derived this assumption from the feminist axiom that the personal is always political, or otherwise said, personal occurrences are usually tied to larger institutional arrangements and structural transformations. In extraordinary cases this becomes more visible.

My second conjecture was that ARTs have the potential to unveil the socially constructed nature of the naturalised articulation between the nuclear household type and reproduction practices.

My third hypothesis was that due to these multiple articulations that ARTs make possible or strengthen, these techniques stand in tension with dominant popular conventions and the law. Persons in institutional positions of authority were likely to use the law and popular morality in order to endorse the privileged connectivity between the nuclear family and the human reproduction. In doing so, indirectly, the multiple capabilities of ARTs could be curtailed. However, the knife cuts both ways, since the law and the dominant popular morality were not left unchanged by the advent and availability of ARTs. They too had to undergo modifications in an effort to curtail the indeterminacy of ARTs.

Bringing these three presuppositions together, through a detailed analysis of *Leeds Teaching Hospitals NHS Trust v Mr & Mrs A & Others*, this article demonstrated explicitly how the law and the dominant popular morality were used to establish and reinforce the link between the nuclear household and reproduction practices. The verdict of the judge Dame Elizabeth Butler-Sloss performed a 'legal acrobatic' in that she upheld both the primacy of the nuclear family as the privileged child rearing sight, and the importance of children right and necessity to know both of their biological parents. She decided that the twins in question should remain living with couple A, but nevertheless Mr B was granted legal rights since he is the biological father. In addition, couple A was advised to file for legal adoption.

This case may leave some readers thinking that the law and the dominant popular morality have been successful in curtailing the power of ARTs but I tend to disagree. In my reading this case shows that although old habits disappear slowly, they are disappearing. The most sophisticated ART is no less than 25 years old and has already become a common place. Many children are being conceived via IVF, ICSI or through Artificial insemination with and without donated gametes. In addition the lobby of people in alternative family types is growing stronger by the day.

The 1990 Act displays this shift. Although it shows a strong congruence with older legislation it had to make provisions to fit the changing times. For all its nuclear family bias, same-sex couples or single parents are not legally prohibited from access to ARTs.

The dominant popular morality is also shifting slowly as more single families arise and more same sex couples openly display their lifestyle choices. They may be marginal but they are etching closer to normality. In addition, if one out of every six couples in the UK has attended a fertility clinic, it means that most British are acquainted with someone who has tried ART or has conceived through the help of these techniques.

Besides the story of the birds and the bees, in the future parents of various ilk will have to concoct one about the test tubes and the plates!

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¹ The original form of this article was submitted in 2003 to complete the requirements for a Masters in Biotechnological Law & Ethics, Department of Law, Sheffield University.

² "When the toy-man, the exploited man, becomes aware of the original rhythms within the oppression of the world, contradictions are bared in a manner terrifying and yet containing the secret of change...the structural potential and peril of the world, the structural understanding or growth of the world is related intimately to the human being. Man is frequently overwhelmed by the immense and alien power of the universe. But within that immense and alien power the frail heart-beat of man is the never-ending fact of creation ... this cosmic frailty (which is man) brings a terrifying authority into human affairs, into the structure of civilization, in terms of anguish and exposure, depending on the kind of world we wish to build, the kind of living substance we realize and cherish, or the kind of dominating spirit or God we set up to chastise us," (Harris 1967, 19-20). What Harris was getting at, and which I concur with, is that we human beings have the capacity to build any world we choose to. However we often forget this and make the institutions, social arrangements, and Spirits, we have imagined and created omnipotent. What we created we can dismantle.

³ This technique will be discussed in the next section.

⁴ The Human Fertilisation and Embryology Authority is a statutory body established under the Human Fertilisation and Embryology Act 1990 (hereafter 1990 Act). The Authority licenses clinics that provide infertility treatments and institutes that conduct embryo research.

⁵ This technique will be discussed in the next section.

⁶ The difficult concept of *family life* is not defined in *the Convention* and thus is open for interpretation by the judge based on common law and other legal instruments.

⁷ Art 8(2) states " [t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others" (*Convention on Human Rights* 1950).

⁸ There are many more treatments such as egg or embryo donation, surrogacy, several surgery methods and several hormonal treatments; because they are not relevant to the case study they are not mentioned here.

⁹ The actual number is slightly higher since also non HFEA licensed clinics can provide donor sperm.

¹⁰ When a man has a low sperm count it means there is a reduced number of sperm cells present in the semen. Sometimes there are no sperm cells in the semen at all.

¹¹ Sexual incompatibility refers to the fact that at times a woman may be 'hostile' to the partner's sperm, meaning when the sperm passes through the cervix the sperm cells are made inactive, or intercourse itself is problematic. In the latter case psychotherapy is recommended.

¹² Recently the 'Man Not Included New Life Centre' in London, a virtual clinic aiming at lesbian and single woman, has no HFEA license yet and bypasses the law in offering fresh sperm. This clinic is contributing to constitute family situations where no father is around.

¹³ In other work (Gill'ard 2003), I dealt extensively with this issue. My main conclusion was that the streamlining of IVF and other ART regulation in the developed and developing countries is severely needed. This is the case due to the fact that three important developments are taking place. One is that parents are demanding the right to use IVF in combination with genetic testing in order to bypass certain diseases. The second is a demand to be able to select embryos that display specific traits for many reasons. The third is that in a globally interconnected world, persons with financial means and the right networks can bypass UK regulation and travel to other countries where regulation is less strict or secure. Let me give some illustrations. In the much-publicised case of the Hashmi's, the couple asked that embryos be tested on the absence of the hereditary disease beta-thalassaemia and on the presence of a specific tissue type. The latter characteristic could then be used to cure an older sibling by transferring cells from the bone marrow. After much legal debate the Hashmi's won a high court ruling. In contrast, the Whitaker family was denied permission by UK authorities and had to travel to the US to get a specific form of IVF treatment in order to cure their older child. The reason they were denied had to do with the fact that their child's illness did not stem from a hereditary disease. Nonetheless, through the transfer of bone marrow stem cells with the right tissue match, of a specially selected embryo, their older child stood a chance of being cured. Lastly, some couples with the right means are simply bypassing UK regulations and flying to countries such as Spain where it is possible to select an embryo based on sex preference.

¹⁴ DI treatment can cost between about £100 and £500, and IVF can cost between about £800 and £3,000 per treatment cycle. One in six IVF/ICSI treatment cycles results in a pregnancy (HFEA Website). This is a considerable amount for the British working class.

¹⁵ By no means am I implying that in accepting their subordinate position these women had it easy. In fact many a time due to the terrible working conditions of the factories or mines their men died quite quickly leaving them to fend for themselves. As Kiernan points out: "...marriages at the beginning of this century were just as likely to be broken as marriages of the beginning of the 1980s but by death rather than divorce" (Kiernan, 1998, p4).

¹⁶ Several authors have argued that with the logic of industrialisation came the commodification of all areas of human interaction (Abelove 1992), even the manner in which the relationship between children and parents was understood, namely that of 'property' owned by their biological progenitors ideally within the nuclear family unit. This idea remains alive and well even up to this day. "...[T]he property model of children is no longer relevant or defensible at a time when questions of property and succession are socially pressing and when that model in fact militates against children's interests. That is, given the multiplicity of family arrangements, the ownership model just doesn't help in determining parenthood, and it leads to the commodification of children (Mahony 1995, 43-4).

¹⁷ Although kinship in general refers to the realm of biological affiliation it can, and often does, overstep this realm. And this is not only due to the development of donor gametes in ART or as is the case where twins of Mrs A and Mr B are born through a sperm mix up. Kinship ties regularly include persons with whom there is no direct biological affiliation (Mintz and Price 1979).