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Comments on Reproductive Ethics and the Family by Professor James Lindemann Nelson

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Professor Nelson's paper raised a number of interesting and important issues. I shall concentrate on two matters: the paper's implications for the child welfare lawyer and the questions raised about the capacity of the law to deal with problems of the kind identified by Professor Nelson.

The View of a Child Welfare Lawyer

Recently lawyers interested in the promotion of children's welfare have realised that the law is ambivalent about children. The law might concern itself with children because it views them as dependent, vulnerable persons in need of protection. This response is seen, for example, in laws designed to protect children from neglect and abuse and in laws designed to ensure that special procedures are employed when children are involved in court proceedings. To take this approach is to emphasise how different children are from adults and to see them as having distinctive needs. Alternatively, the law can view children as disadvantaged beings with rights: to take this approach is to see children as persons with views that should be heard and as persons with the capacity to make choices and decisions of which the adult world may not approve. To take this approach is to emphasise children's similarities to adults and so to acknowledge their autonomy.

Prior to the 19th century, the law took little notice of children, with the exception of those from well-to-do families whose property interests led to proceedings in the Court of Chancery. The remainder were legally invisible. Gradually this changed and it was recognised that the law has a role to play in protecting children. These developments reflected a perception of childhood as a time of vulnerability and dependency. It was not until well into the 20th century that it was accepted that there were situations in which the law could promote a child's autonomy. The notion that the law should recognise children's rights – as opposed to protecting what the adult world regarded as their interests – is thus of recent origin. The extent of the change is signaled by the acceptance of the United Nations Convention on the Rights of the Child. Such a development would have been unthinkable in the early years of the 20th century.

Thus the way society views children is under challenge. Professor Nelson's paper has demonstrated that child welfare lawyers must confront an even greater challenge: the way we define a parent will be questioned. This is particularly troubling, because the law has in the past not been particularly successful in defining the legal implications of parenthood. It is not clear what role a parent must play. Should we talk of parental rights, parental powers, parental authority, or parental obligations? What is special about the parent/child relationship? What does it offer the parent? What does it offer the child? As if these questions were not difficult enough, the paper raises new questions about the source of this relationship.

Before examining this aspect, let us consider some features of the parent/child relationship. Many parents hold the view that they have rights over their children in the sense of having the power to make decisions affecting their lives. The question is whether these decisions can be made to gratify the parents' desires. In Victorian times it was accepted that parents were entitled to make decisions for this purpose. This entitlement sprang from the fact that they were the child's biological parents. For the members of the middle and upper-middle classes it was assumed that parents had the right to control a child's upbringing to ensure that the child became the sort of adult who could carry on their line and inherit their property. The training and education of children and the parents' concern that they should make suitable marriages were directed to ensuring that the children would maintain the family's prestige and place in society. It was accepted that parents would either want to make their children in their own image or, at least, ensure that they would grow up in a certain way. On this view, the parent had an interest or investment in the child and for this reason could claim rights over the child. Thus parents were seen as entitled to take a selfish as well as an altruistic interest in their children.

This analysis of the parent/child relationship depends on an acceptance of the significance of what Professor Nelson calls 'biological connectedness'. As he points out, genetic ties matter a great deal to parents and the questions which I posed earlier about parental powers and authority suggest some ways in which the lawyer might seek to explore this relationship. Inevitably, parents and the lawyers who represent them find it convenient to characterise the relationship in terms of parental rights.

This perspective has been challenged. Parents can no longer claim rights over their children in order to gratify their own purposes. The decision of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112, suggests that we can view parents as having rights only to the extent that these promote the interests of their child. Lord Fraser ruled that "parental rights to control a child do not exist for the benefit of the parent". In his view, "They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child". This is to accept that parents' rights exist to enable them to fulfil their obligations to their child.

Thus the nature of the parent/child relationship has changed even in the context of a traditional family. It is likely to change further if, as a result of assisted reproductive technology, society increasingly accepts that a child may have a limited biological connection or no biological connection with those who care for him or her. In the past, the parent who talked of **my** child was seen as laying claim to certain powers and accepting obligations arising exclusively from biology. Such a claim may now be more difficult to make. Perhaps the legal changes that I have identified and the technological changes discussed by Professor Nelson both point in the same direction. They may set the scene for a society in which the relationship between children and those responsible for their care is less close, less vivid, less special. This is to adopt one of the explanations suggested in the paper: that biological connections are just what you make of them, no more and no less.

Further, analysis of this kind paves the way for an appeal against the decision in *Troxel*, to which Professor Nelson's paper referred. The Washington Supreme Court accepted that a parent has a "constitutionally protected right to rear his or her own children without state interference". This represents an acceptance of the claims implicitly made by a parent who talks of **my** child. Such a parent may not react well to the *Gillick* formula that his or her rights exist only to allow the fulfillment of obligations relating to the promotion of the child's welfare. Yet if this view of the parents' role is adopted and the emphasis is placed on obligations, there is no reason why other persons should not also fulfil obligations towards a child. Normally, it is primarily the biological parents who will do this, but it will always be open to society to accept that other persons might have a role to play in promoting a child's welfare. While the assertion of rights excludes others, obligations can be shared. This insight has special relevance for artificially conceived children. Society might have to decide whether responsibilities for these children should be shared by those who conceived and gave birth to them as well as by those involved in their day-to-day care. The question posed for the child welfare lawyer is how these responsibilities are to be distributed.

Doubts about the Law

My second point can be made more briefly. The issues raised in the paper are difficult and complex. We must be sceptical of claims that the law and lawyers can deal with them satisfactorily. *Troxel* underlines the need for scepticism. Lawyers think about problems in a certain way and employ certain concepts. In particular, they typically reduce complex issues to individual conflicts that one party must win and the other must lose. My understanding of *Troxel* is that the action was brought by grandparents to assert a right of access. If they 'win', can their 'rights' be enforced in a way that will advance the interests of the children? Does it help to think of the situation in terms of their rights?

It is necessary to be sceptical of loose use of rights language. One commentator has referred to the impoverishment of rights talk. Too often, what is no more than a demand is dressed up in rights language. Rights claims of this kind tend to foreclose discussion and to obscure the moral and ethical issues requiring examination. Professor Nelson's paper has drawn attention to issues of this kind arising in the context of the parent/child relationship. They cannot always be resolved by analysis in terms of rights that courts can enforce. While the law undoubtedly has a role to play in resolving problems of family relationships, it is important to be realistic about its capacity and techniques.