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CHILDREN OF CHOICE

FREEDOM AND THE
NEW REPRODUCTIVE TECHNOLOGIES

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The Presumptive Primacy of Procreative Liberty

PROCREATIVE liberty has wide appeal but its scope has never been fully elaborated and often is contested. The concept has several meanings that must be clarified if it is to serve as a reliable guide for moral debate and public policy regarding new reproductive technologies.

WHAT IS PROCREATIVE LIBERTY?

At the most general level, procreative liberty is the freedom either to have children or to avoid having them. Although often expressed or realized in the context of a couple, it is first and foremost an individual interest. It is to be distinguished from freedom in the ancillary aspects of reproduction, such as liberty in the conduct of pregnancy or choice of place or mode of childbirth.

The concept of reproduction, however, has a certain ambiguity contained within it. In a strict sense, reproduction is always genetic. It occurs by provision of one's gametes to a new person, and thus includes having or producing offspring. While female reproduction has traditionally included gestation, in vitro fertilization (IVF) now allows female genetic and gestational reproduction to be separated. Thus a woman who has provided the egg that is carried by another has reproduced, even if she has not gestated and does not rear resulting offspring. Because of the close link between gestation and female reproduction, a woman who gestates the embryo of another may also reasonably be viewed as having a reproductive experience, even though she does not reproduce genetically.¹

In any case, reproduction in the genetic or gestational sense is to be distinguished from child rearing. Although reproduction is highly valued in part because it usually leads to child rearing, one can produce offspring without rearing them and rear children without reproduction. One who rears an adopted child has not reproduced, while one who has genetic progeny but does not rear them has.

In this book the terms "procreative liberty" and "reproductive freedom" will mean the freedom to reproduce or not to reproduce in the

genetic sense, which may also include rearing or not, as intended by the parties. Those terms will also include female gestation whether or not there is a genetic connection to the resulting child.

Often the reproduction at issue will be important because it is intended to lead to child rearing. In cases where rearing is not intended, the value to be assigned to reproduction *tout court* will have to be determined. Similarly, when there is rearing without genetic or gestational involvement, the value of nonreproductive child rearing will also have to be assessed. In both cases the value assigned may depend on the proximity to reproduction where rearing is intended.

Two further qualifications on the meaning of procreative liberty should be noted. One is that "liberty" as used in procreative liberty is a negative right. It means that a person violates no moral duty in making a procreative choice, and that other persons have a duty not to interfere with that choice.² However, the negative right to procreate or not does not imply the duty of others to provide the resources or services necessary to exercise one's procreative liberty despite plausible moral arguments for governmental assistance.

As a matter of constitutional law, procreative liberty is a negative right against state interference with choices to procreate or to avoid procreation. It is not a right against private interference, though other laws might provide that protection. Nor is it a positive right to have the state or particular persons provide the means or resources necessary to have or avoid having children.³ The exercise of procreative liberty may be severely constrained by social and economic circumstances. Access to medical care, child care, employment, housing, and other services may significantly affect whether one is able to exercise procreative liberty. However, the state presently has no constitutional obligation to provide those services. Whether the state should alleviate those conditions is a separate issue of social justice.⁴

The second qualification is that not everything that occurs in and around procreation falls within liberty interests that are distinctively procreative. Thus whether the father may be present during childbirth, whether midwives may assist birth, or whether childbirth may occur at home rather than in a hospital may be important for the parties involved, but they do not implicate the freedom to reproduce (unless one could show that the place or mode of birth would determine whether birth occurs at all). Similarly, questions about a pregnant woman's drug use or other conduct during pregnancy, a controversial topic treated in chapter 8, implicates liberty in the course of reproduction but not procreative liberty in the basic sense. Questions about whether the use of a technology is distinctively procreative recur throughout this book.

THE IMPORTANCE OF PROCREATIVE LIBERTY

Procreative liberty should enjoy presumptive primacy when conflicts about its exercise arise because control over whether one reproduces or not is central to personal identity, to dignity, and to the meaning of one's life. For example, deprivation of the ability to avoid reproduction determines one's self-definition in the most basic sense. It affects women's bodies in a direct and substantial way. It also centrally affects one's psychological and social identity and one's social and moral responsibilities. The resulting burdens are especially onerous for women, but they affect men in significant ways as well.

On the other hand, being deprived of the ability to reproduce prevents one from an experience that is central to individual identity and meaning in life. Although the desire to reproduce is in part socially constructed, at the most basic level transmission of one's genes through reproduction is an animal or species urge closely linked to the sex drive. In connecting us with nature and future generations, reproduction gives solace in the face of death. As Shakespeare noted, "nothing 'gainst Time's scythe can make defense/save breed."⁵ For many people "breed"—reproduction and the parenting that usually accompanies it—is a central part of their life plan, and the most satisfying and meaningful experience they have. It also has primary importance as an expression of a couple's love or unity. For many persons, reproduction also has religious significance and is experienced as a "gift from God." Its denial—through infertility or governmental restriction—is experienced as a great loss, even if one has already had children or will have little or no rearing role with them.

Decisions to have or to avoid having children are thus personal decisions of great import that determine the shape and meaning of one's life. The person directly involved is best situated to determine whether that meaning should or should not occur. An ethic of personal autonomy as well as ethics of community or family should then recognize a presumption in favor of most personal reproductive choices. Such a presumption does not mean that reproductive choices are without consequence to others, nor that they should never be limited. Rather, it means that those who would limit procreative choice have the burden of showing that the reproductive actions at issue would create such substantial harm that they could justifiably be limited. Of course, what counts as the "substantial harm" that justifies interference with procreative choice may often be contested, as the discussion of reproductive technologies in this book will show.

A closely related reason for protecting reproductive choice is to avoid the highly intrusive measures that governmental control of reproduction

usually entails. State interference with reproductive choice may extend beyond exhortation and penalties to gestapo and police state tactics. Margaret Atwood's powerful futuristic novel *The Handmaid's Tale* expresses this danger by creating a world where fertile women are forcibly impregnated by the ruling powers and their pregnancies monitored to replenish a decimated population.⁶

Equally frightening scenarios have occurred in recent years when repressive governments have interfered with reproductive choice. In Romania and China, men and women have had their most private activities scrutinized in the service of state reproductive goals. In Ceausescu's Romania, where contraception and abortion were strictly forbidden, women's menstrual cycles were routinely monitored to see if they were pregnant.⁷ Women who did not become pregnant or who had abortions were severely punished. Many women nevertheless sought illegal abortions and died, leaving their children orphaned and subject to sale to Westerners seeking children for adoption.⁸

In China, forcible abortion and sterilization have occurred in the service of a one-child-per-family population policy. Village cadres have seized pregnant women in their homes and forced them to have abortions.⁹ A campaign of forcible sterilization in India in 1977 was seen as an "attack on women and children" and brought Indira Gandhi's government down.¹⁰ In the United States, state-imposed sterilization of "mental defectives," sanctioned in 1927 by the United States Supreme Court in *Buck v. Bell*, resulted in 60,000 sterilizations over a forty-year period.¹¹ Many mentally normal people were sterilized by mistake, and mentally retarded persons who posed little risk of harm to others were subjected to surgery.¹² It is no surprise that current proposals for compulsory use of contraceptives such as Norplant are viewed with great suspicion.

TWO TYPES OF PROCREATIVE LIBERTY

To see how values of procreative liberty affect the ethical and public policy evaluation of new reproductive technologies, we must determine whether the interests that underlie the high value accorded procreative liberty are implicated in their use. This is not a simple task because procreative liberty is not unitary, but consists of strands of varying interests in the conception and gestation of offspring. The different strands implicate different interests, have different legal and constitutional status, and are differently affected by technology.

An essential distinction is between the freedom to avoid reproduction and the freedom to reproduce. When people talk of reproductive rights, they usually have one or the other aspect in mind. Because different inter-

ests and justifications underlie each and countervailing interests for limiting each aspect vary, recognition of one aspect does not necessarily mean that the other will also be respected; nor does limitation of one mean that the other can also be denied.

However, there is a mirroring or reciprocal relationship here. Denial of one type of reproductive liberty necessarily implicates the other. If a woman is not able to avoid reproduction through contraception or abortion, she may end up reproducing, with all the burdens that unwanted reproduction entails. Similarly, if one is denied the liberty to reproduce through forcible sterilization, one is forced to avoid reproduction, thus experiencing the loss that absence of progeny brings. By extending reproductive options, new reproductive technologies present challenges to both aspects of procreative choice.

AVOIDING REPRODUCTION: THE LIBERTY NOT TO REPRODUCE

One sense in which people commonly understand procreative liberty is as the freedom to avoid reproduction—to avoid begetting or bearing offspring and the rearing demands they make.¹³ Procreative liberty in this sense could involve several different choices, because decisions to avoid procreation arise at several different stages. A decision not to procreate could occur prior to conception through sexual abstinence, contraceptive use, or refusal to seek treatment for infertility. At this stage, the main issues concern freedom to refrain from sexual intercourse, the freedom to use contraceptives, and the freedom to withhold gametes for use in non-coital conception. Countervailing interests concern societal interests in increasing population, a partner's interest in sexual intimacy and progeny, and moral views about the unity of sex and reproduction.

Once pregnancy has occurred, reproduction can be avoided only by termination of pregnancy. Procreative freedom here would involve the freedom to abort the pregnancy. Competing interests are protection of embryos and fetuses and respect for human life generally, the most heated issue of reproductive rights. They may also include moral or social beliefs about the connectedness of sex and reproduction, or views about a woman's reproductive and work roles.

Once a child is born, procreation has occurred, and the procreators ordinarily have parenting obligations. Freeing oneself from rearing obligations is not strictly speaking a matter of procreative liberty, though it is an important personal interest. Even if parents relinquish the child for adoption, the psychological reality that one has reproduced remains. Opposing interests at this stage involve the need to provide parenting, nur-

turing, and financial support to offspring. The right to be free of those obligations, as well as the right to assume them after birth occurs, is not directly addressed in this book except to the extent that those rights affect reproductive decisions.¹⁴

Technology and the Avoidance of Reproduction

Many reproductive technologies raise questions about the scope of the liberty interest in avoiding reproduction. New contraceptive, contragestive, and abortion technologies raise avoidance issues directly, though the issues raised are not always novel. For example, an important issue in voluntary use of long-lasting contraceptives concerns access by minors and the poor, an issue of justice in the distribution of medical resources that currently exists with other contraceptives. The more publicized issue of whether the state may require child abusers or women on welfare to use Norplant implicates the target group's right to procreate, not their liberty interest in avoiding reproduction.¹⁵

Contragestive agents such as RU486, which prevent reproduction after conception has occurred, raise many of the current issues of the abortion debate. Because RU486 operates so early in pregnancy, however, it focuses attention on the moral status of very early abortions and the moral differences, if any, between postcoital contraceptives and abortifacients. Ethical assessment and legal rights to use contragestives will depend on the ethical and legal status of early prenatal stages of human life.

More novel avoidance issues will arise with IVF and embryo cryopreservation technology. IVF often produces more embryos than can be safely implanted in the uterus. If couples must donate rather than discard unwanted embryos, they will become biologic parents against their will. This prospect raises the question of whether the liberty interest in avoiding reproduction includes avoiding genetic offspring when no rearing obligations will attach—reproduction *tout court*. Is one's fundamental interest in avoiding reproduction seriously implicated if one will never know or have contact with one's offspring? The resulting moral and policy issue is how to balance the interest in avoiding genetic offspring *tout court* with respect for preimplantation stages of human life.

Technologies of quality control and selection through genetic screening and manipulation will also raise novel questions about the right to avoid reproduction. Prenatal screening enables couples to avoid reproduction because of the genetic characteristics of expected offspring. Are the interests that support protecting the freedom to avoid reproduction present when that freedom is exercised selectively? Because some reasons for rejecting fetuses are more appealing than others, would devising crite-

ria for such choices violate the right not to procreate? For example, should law or morality permit abortion of a fetus with Tay-Sachs disease or Down's syndrome but not female fetuses or fetuses with a disease of varying expressivity such as cystic fibrosis?

Legal Status of Avoiding Reproduction

Legally, the negative freedom to avoid reproduction is widely recognized, though great controversy over abortion persists, and there is no positive constitutional right to contraception and abortion.¹⁶ The freedom to avoid reproduction is clearest for men and women prior to conception. In the United States and most developed countries, marriage and sexual intercourse are a matter of choice. However, rape laws do not always effectively protect women, and some jurisdictions do not criminalize marital rape.¹⁷ Legal access to contraception and sterilization is firmly established, though controversy exists over providing contraception to adolescents because of fears that it would encourage nonmarital sexual intercourse.

Constitutional recognition of the right to use contraceptives—to have sex and not reproduce—occurred in the 1965 landmark case of *Griswold v. Connecticut*.¹⁸ A doctor and a married couple challenged a Connecticut law that made it a crime to use or distribute contraceptives. The United States Supreme Court found that the law violated a fundamental liberty right of married couples, which it later extended to unmarried persons, to use contraceptives as a matter of personal liberty or privacy.¹⁹ Although the Court alluded to the unsavory prospect of police searching the marital bedroom for evidence of the crime as a reason for invalidating the law, it is clear that the Court was protecting the right of persons who engage in sexual intimacy to avoid unwanted reproduction.²⁰ The right to avoid reproduction through contraception is thus firmly protected, even where fornication laws remain in effect.

Legal protection also exists for other activities tied to avoiding reproduction prior to pregnancy. Thus both men and women are deemed owners of gametes within or outside their bodies, so that they may prevent them from being used for reproduction without their permission. Men and women also have rights to prevent extracorporeal embryos formed from their gametes from being placed in women and brought to term without their consent.²¹

Once conception has occurred, the right to avoid reproduction differs for the woman and man involved. In the United States and most of Western Europe, abortion in early stages of the pregnancy is widely permitted.

Under *Roe v. Wade*, whose central holding was reaffirmed in 1992 in *Planned Parenthood v. Casey*, women, whether single or married, adult or minor, have a right to terminate pregnancy up to viability.²² However, the state may inform them of its views concerning the worth of the fetus and require them to wait 24 hours before obtaining an abortion.²³ Parental consent or notification requirements can be imposed on minors, as long as a judicial bypass is provided in cases in which the minor does not wish to inform her parents.²⁴ Also, because the right to abortion is a negative right, the state has no obligation to fund abortions for indigent women.²⁵

Although pregnancy termination usually kills the fetus, the right to end pregnancy does not protect the right to cause the death of a fetus that has emerged alive from the abortion process, or even to choose a method of abortion that is most likely to cause fetal demise.²⁶ Nor does it give a woman the right to engage in prenatal conduct that poses unreasonable risks to the health of future offspring when she is choosing to go to term.²⁷ After birth occurs, the mother and father have obligations to the child until custody is formally relinquished or transferred to others.

The father, once conception through sexual intercourse has occurred, has no right to require or prevent abortion, and cannot avoid rearing duties of financial support once birth occurs.²⁸ This is true even if the woman has lied to him about her fertility or her use of contraceptives.²⁹ However, he is free to relinquish custody and give up for adoption. He is also free to determine whether IVF embryos formed from his sperm should be implanted in the uterus.³⁰

The law's recognition of a right to avoid reproduction both prior to and after conception provides the legal framework for resolving conflicts presented by new reproductive technologies that affect interests in avoiding reproduction. While many technologies raise the same issues confronted in *Griswold* and *Roe*, new twists will arise that directly challenge the scope of that right. To resolve those conflicts, the separate elements that comprise the interest in avoiding reproduction must be analyzed and evaluated against the competing interests affected by those technologies.

THE FREEDOM TO PROCREATE

In addition to freedom to avoid procreation, procreative liberty also includes the freedom to procreate—the freedom to beget and bear children if one chooses. As with avoiding reproduction, the right to reproduce is a negative right against public or private interference, not a positive right to the services or the resources needed to reproduce. It is an important freedom that is widely accepted as a basic, human right.³¹ But its various

components and dimensions have never been fully analyzed, as technologies of conception and selection now force us to do.

As with avoiding reproduction, the freedom to procreate involves the freedom to engage in a series of actions that eventuate in reproduction and usually in child rearing. One must be free to marry or find a willing partner, engage in sexual intercourse, achieve conception and pregnancy, carry a pregnancy to term, and rear offspring. Social and natural barriers to reproduction would involve the unavailability of willing or suitable partners, impotence or infertility, and lack of medical and child-care resources. State barriers to marriage, to sexual intercourse, to conception, to infertility treatment, to carrying pregnancies to term, and to certain child-rearing arrangements would also limit the freedom to procreate. The most commonly asserted reasons for limiting coital reproduction are overpopulation, unfitness of parents, harm to offspring, and costs to the state or others. Technologies that treat infertility raise additional concerns that are discussed below.

The moral right to reproduce is respected because of the centrality of reproduction to personal identity, meaning, and dignity. This importance makes the liberty to procreate an important moral right, both for an ethic of individual autonomy and for ethics of community or family that view the purpose of marriage and sexual union as the reproduction and rearing of offspring. Because of this importance, the right to reproduce is widely recognized as a *prima facie* moral right that cannot be limited except for very good reason.

Recognition of the primacy of procreation does not mean that all reproduction is morally blameless, much less that reproduction is always responsible and praiseworthy and can never be limited. However, the presumptive primacy of procreative liberty sets a very high standard for limiting those rights, tilting the balance in favor of reproducing but not totally determining its acceptability. A two-step process of analysis is envisaged here. The first question is whether a distinctively procreative interest is involved. If so, the question then is whether the harm threatened by reproduction satisfies the strict standard for overriding this liberty interest.

The personal importance of procreation helps answer questions about who holds procreative rights and about the circumstances under which the right to reproduce may be limited. A person's capacity to find significance in reproduction should determine whether one holds the presumptive right, though this question is often discussed in terms of whether persons with such a capacity are fit parents. To have a liberty interest in procreating, one should at a minimum have the mental capacity to understand or appreciate the meanings associated with reproduction. This minimum would exclude severely retarded persons from having reproductive

interests, though it would not remove their right to bodily integrity. However, being unmarried, homosexual, physically disabled, infected with HIV, or imprisoned would not disqualify one from having reproductive interests, though they might affect one's ability to rear offspring. Whether those characteristics justify limitations on reproduction is discussed later.³² Nor would already having reproduced negate a person's interest in reproducing again, though at a certain point the marginal value to a person of additional offspring diminishes.³³

What kinds of interests or harms make reproduction unduly selfish or irresponsible and thus could justifiably limit the presumptive right to procreate? To answer this question, we must distinguish coital and noncoital reproduction. Surprisingly, there is a widespread reluctance to speak of coital reproduction as irresponsible, much less to urge public action to prevent irresponsible coital reproduction from occurring. If such a conversation did occur, reasons for limiting coital reproduction would involve the heavy costs that it imposed on others—costs that outweighed whatever personal meaning or satisfaction the person(s) reproducing experienced. With coital reproduction, such costs might arise if there were severe overpopulation, if the persons reproducing were unfit parents, if reproduction would harm offspring, or if significant medical or social costs were imposed on others.

Because the United States does not face the severe overpopulation of some countries, the main grounds for claiming that reproduction is irresponsible is where the person(s) reproducing lack the financial means to raise offspring or will otherwise harm their children. As later discussions will show, both grounds are seriously inadequate as justifications for interfering with procreative choice. Imposing rearing costs on others may not rise to the level of harm that justifies depriving a person of a fundamental moral right. Moreover, protection of offspring from unfit parenting requires that unfit parents not rear, not that they not reproduce. Offspring could be protected by having others rear them without interfering with parental reproduction.

A further problem, if coital reproduction were found to be unjustified, concerns what action should then be taken. Exhortation or moral condemnation might be acceptable, but more stringent or coercive measures would act on the body of the person deemed irresponsible. Past experience with forced sterilization of retarded persons and the inevitable focus on the poor and minorities as targets of coercive policies make such proposals highly unappealing. Because of these doubts, there have been surprisingly few attempts to restrict coital reproduction in the United States since the era of eugenic sterilization, even though some instances of reproduction—for example, teenage pregnancy, inability to care for offspring—appear to be socially irresponsible.

An entirely different set of concerns arises with noncoital reproductive techniques. Charges that noncoital reproduction is unethical or irresponsible arise because of its expense, its highly technological character, its decomposition of parenthood into genetic, gestational, and social components, and its potential effects on women and offspring. To assess whether these effects justify moral condemnation or public limitation, we must first determine whether noncoital reproduction implicates important aspects of procreative liberty.

The Right to Reproduce and Noncoital Technology

If the moral right to reproduce presumptively protects coital reproduction, then it should protect noncoital reproduction as well. The moral right of the coitally infertile to reproduce is based on the same desire for offspring that the coitally fertile have. They too wish to replicate themselves, transmit genes, gestate, and rear children biologically related to them. Their infertility should no more disqualify them from reproductive experiences than physical disability should disqualify persons from walking with mechanical assistance. The unique risks posed by noncoital reproduction may provide independent justifications for limiting its use, but neither the noncoital nature of the means used nor the infertility of their beneficiaries mean that the presumptively protected moral interest in reproduction is not present.

A major question about this position, however, is whether the noncoital or collaborative nature of the means used truly implicates reproductive interests. For example, what if only one aspect of reproduction—genetic transfer, gestation, or rearing—occurs, as happens with gamete donors or surrogates who play no rearing role? Is a person's procreative liberty substantially implicated in such partial reproductive roles? The answer will depend on the value attributed to the particular collaborative contribution and on whether the collaborative enterprise is viewed from the donor's or recipient's perspective.

Gamete donors and surrogates are clearly reproducing even though they have no intention to rear. Because reproduction *tout court* may seem less important than reproduction with intent to rear, the donor's reproductive interest may appear less important. However, more experience with these practices is needed to determine the inherent value of "partial" reproductive experiences to donors and surrogates.³⁴ Experience may show that it is independently meaningful, regardless of their contact with offspring. If not, then countervailing interests would more easily override their right to enter these roles.

Viewed from the recipient's perspective, however, the donor or surrogate's reproduction *tout court* does not lessen the reproductive impor-

tance of her contribution. A woman who receives an egg or embryo donation has no genetic connection with offspring but has a gestational relation of great personal significance. In addition, gamete donors and surrogates enable one or both rearing partners to have a biological relation with offspring. If one of them has no biological connection at all, they will still have a strong interest in rearing their partner's biologic offspring. Whether viewed singly through the eyes of the partner who is reproducing, or jointly as an endeavor of a couple seeking to rear children who are biologically related to at least one of the two, a significant reproductive interest is at stake. If so, noncoital, collaborative treatments for infertility should be respected to the same extent as coital reproduction is.

Questions about the core meaning of reproduction will also arise in the temporal dislocations that cryopreservation of sperm and embryos make possible. For example, embryo freezing allows siblings to be conceived at the same time, but born years apart and to different gestational mothers. Twins could be created by splitting one embryo into two. If one half is frozen for later use, identical twins could be born at widely different times. Sperm, egg, and embryo freezing also make posthumous reproduction possible.

Such temporally dislocative practices clearly implicate core reproductive interests when the ultimate recipient has no alternative means of reproduction. However, if the procreative interests of the recipient couple are not directly implicated, we must ask whether those whose gametes are used have an independent procreative interest, as might occur if they directed that gametes or embryos be thawed after their death for purposes of posthumous reproduction. In that case the question is whether the expectancy of posthumous reproduction is so central to an individual's procreative identity or life-plan that it should receive the same respect that one's reproduction when alive receives.³⁵ The answer to such a question will be important in devising policy for storing and posthumously disposing of gametes and embryos. The answer will also affect inheritance questions and have implications for management of pregnant women who are irreversibly comatose or brain dead.

The problem of determining whether technology implicates a major reproductive interest also arises with technologies that select offspring characteristics, a topic addressed in chapter 7. Some degree of quality control would seem logically to fall within the realm of procreative liberty. For many couples the decision whether to procreate depends on the ability to have healthy children. Without some guarantee or protection against the risk of handicapped children, they might not reproduce at all.

Thus viewed, quality control devices become part of the liberty interest in procreating or in avoiding procreation, and arguably should receive the same degree of protection. If so, genetic screening and selective abortion, as well as the right to select a mate or a source for donated eggs,

sperm, or embryos should be protected as part of procreative liberty. The same arguments would apply to positive interventions to cure disease at the fetal or embryo stage. However, futuristic practices such as non-therapeutic enhancement, cloning, or intentional diminishment of offspring characteristics may so deviate from the core interests that make reproduction meaningful as to fall outside the protective canopy of procreative liberty.³⁶

Finally, technology will present questions of whether one may use one's reproductive capacity to produce gametes, embryos, and fetuses for nonreproductive uses in research or therapy. Here the purpose is not to have children to rear, but to get material for research or transplant. Are such uses of reproductive capacity tied closely enough to the values and interests that underlie procreative freedom to warrant similar respect? Even if procreative choice is not directly involved, other liberties may protect the activity.

Are Noncoital Technologies Unethical?

If this analysis is accepted, then procreative liberty would include the right to use noncoital and other technologies to form a family and shape the characteristics of offspring. Neither infertility nor the fact that one will only partially reproduce eliminates the existence of a *prima facie* reproductive experience for someone. However, judgments about the proximity of these partial reproductive experiences to the core meanings of reproduction will be required in balancing those claims against competing moral concerns.

Judgment about the reproductive importance of noncoital technologies is crucial because many people have serious ethical reservations about them, and are more than willing to restrict their use. The concerns here are not the fears of overpopulation, parental unfitness, and societal costs that arise with allegedly irresponsible coital reproduction. Instead, they include reduction of demand for hard-to-adopt children, the coercive or exploitive bargains that will be offered to poor women, the commodification of both children and reproductive collaborators, the objectification of women as reproductive vessels, and the undermining of the nuclear family.

However, often the harms feared are deontological in character. In some cases they stem from a religious or moral conception of the unity of sex and reproduction or the definition of family. Such a view characterizes the Vatican's strong opposition to IVF, donor sperm, and other non-coital and collaborative techniques.³⁷ Other deontological concerns derive from a particular conception of the proper reproductive role of

women. Many persons, for example, oppose paid surrogate motherhood because of a judgment about the wrongness of a woman's willingness to sever the mother-child bond for the sake of money.³⁸ They also insist that the gestational mother is always morally entitled to rear, despite her pre-conception promise to the contrary. Closely related are dignitary objections to allowing any reproductive factors to be purchased, or to having offspring selected on the basis of their genes.

Finally, there is a broader concern that noncoital reproduction will undermine the deeper community interest in having a clear social framework to define boundaries of families, sexuality, and reproduction. The traditional family provides a container for the narcissism and irrationality that often drives human reproduction. This container assures commitments to the identifications and taboos that protect children from various types of abuse. The technical ability to disaggregate and recombine genetic, gestational, and rearing connections and to control the genes of offspring may thus undermine essential protections for offspring, couples, families, and society.

These criticisms are powerful ones that explain much of the ambivalence that surrounds the use of certain reproductive technologies. They call into question the wisdom of individual decisions to use them, and the willingness of society to promote or facilitate their use. Unless one is operating out of a specific religious or deontological ethic, however, they do not show that all individual uses of these techniques are immoral, much less that public policy should restrict or discourage their use.

As later chapters will show, these criticisms seldom meet the high standard necessary to limit procreative choice. Many of them are mere hypothetical or speculative possibilities. Others reflect moralisms concerning a "right" view of reproduction, which individuals in a pluralistic society hold or reject to varying degrees. In any event, without a clear showing of substantial harm to the tangible interests of others, speculation or mere moral objections alone should not override the moral right of infertile couples to use those techniques to form families. Given the primacy of procreative liberty, the use of these techniques should be accorded the same high protection granted to coital reproduction.

Legal Status of the Right to Reproduce

Because there have been few attempts by government to limit reproduction, there is little explicit law concerning the right to reproduce. However, judges in dicta often refer to such a right, and there seems little doubt that the right to procreate would be protected in most circum-

stances. Such statements generally assume a married couple that seeks to reproduce coitally.

The legal status of the right to reproduce involves the legal right to choose a willing sex or marital partner, to engage in sexual intercourse, to achieve conception and pregnancy, to treat infertility, and to carry pregnancy to term. While laws restricting marriage do affect procreation, there have been few attempts in the United States to restrict the desires of married couples to procreate. No license to become pregnant is needed, contraception is not mandatory, and no laws requiring married couples to be sterilized or to abort have existed. Past laws that required the sterilization of mentally handicapped persons are clearly in disfavor.

In the United States laws restricting coital reproduction by a married couple would have to withstand the strict scrutiny applied to interference with fundamental constitutional rights. Although no right to reproduce is explicitly mentioned in the Constitution, dicta in many cases suggest that such a right exists.³⁹

The strongest precedent here is the case of *Skinner v. Oklahoma*, a 1942 case in which the Court struck down a state law that authorized thieves but not embezzlers to be sterilized without consent after a third conviction. Although relying on an equal protection rationale, the Court stressed the importance of marriage and procreation as among "the basic civil rights of man" and noted that "marriage and procreation are fundamental to the very existence and survival of the race."⁴⁰ Under this principle, persons cannot be selectively deprived of their right of procreation, and the state must justify any deprivation by showing a compelling state interest that could not be satisfied in alternative ways.

Many other Supreme Court cases contain statements that support the protected status of decisions to reproduce. In *Meyer v. Nebraska*, where the right of parents to have their children learn a foreign language was upheld, the Court stated that constitutional liberty includes "the right of an individual to marry, establish a home and bring up children."⁴¹ In *Stanley v. Illinois*, the Court, in upholding an unmarried father's right to rear his child, stated that "rights to conceive and raise one's children have been deemed 'essential,' 'basic civil rights of man,' and 'rights far more precious than property rights.'"⁴² *Cleveland Bd. of Education v. LaFleur* recognized a pregnant teacher's right to continue to teach in part because "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process clause of the Fourteenth Amendment."⁴³ The most ringing endorsement of this right occurred in *Eisenstadt v. Baird* when the Court extended the right to obtain contraceptives to unmarried persons. Justice Brennan, in an opinion for the Court, stated:⁴⁴ "If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental

intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Most recently, in the 1992 decision in *Casey v. Planned Parenthood*, Justices O'Connor, Kennedy, and Souter stated that "our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, childrearing and education. [These] matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."⁴⁵

Such statements suggest that a married couple's right to reproduce would be recognized even by conservative justices if a case restricting coital reproduction ever reached the Supreme Court. Coital reproduction has been traditionally recognized as one of the main functions of marriage and family.⁴⁶ The right of bodily integrity would also protect the right to procreate coitally to the extent that state interference with procreation mandated sterilization, contraception, or abortion.

As a consequence, married couples would have a fundamental constitutional right against state limits on coital reproduction, whether it takes the form of penalizing them for having more than a set number of children, requiring licenses to parent, or mandating sterilization, contraception, or abortion.⁴⁷ Restrictions on marital reproduction are theoretically possible only if the state can show great harm to others from the reproduction in question.

A situation that might justify such a limitation would be severe overpopulation, but such a restriction would have to be equitably distributed and structured to minimize coercion and unwanted bodily intrusion. Other situations involving harm to offspring or great costs to others can be envisaged, but it is unclear whether they would satisfy the high level of substantive justification necessary. For example, women on welfare who have more than a designated number of children could not be criminally punished for additional reproduction, much less forcibly sterilized or aborted, though they might not qualify for additional welfare payments.⁴⁸ Similarly, married couples with HIV could not be punished for having offspring.⁴⁹ A child infected with HIV who has no other way to be born disease-free has not been harmed, and the avoidance of medical costs is not a compelling justification for limiting reproduction.

One of the few court cases that has dealt directly with limitations on marital reproduction denied a married federal prison inmate the right to hand his wife a container of his sperm so that she might be artificially inseminated outside of prison and thus produce offspring of the marriage.⁵⁰ The federal appeals court's analysis of the competing interests in that case gave insufficient weight to the couple's reproductive interest and too much weight to the prison authorities' claims of administrative incon-

venience.⁵¹ Because the case arose in the special setting of a prison, it is not a strong precedent for limiting procreative choice in nonprison settings.

Unmarried persons may have strong interests in reproducing outside of marriage, and in many cases may be excellent child rearers. It is unclear, however, whether unmarried persons have the same constitutional rights to reproduce coitally that married persons do. Although the Court has recognized the right of unmarried persons to use birth control and terminate pregnancies, this is a right to avoid pregnancy and reproduction. It does not necessarily imply a right to engage in coitus in order to get pregnant. The Supreme Court has never recognized a right to engage in fornication, adultery, or incest, even though those actions could lead to procreation.⁵² Because those laws have a pedigree and tradition as long as the practice of marital reproduction, the Court might be extremely reluctant to strike down fornication laws on the ground that they interfere with nonmarital procreation, much less recognize the right to engage in adulterous, polygamous, incestuous, or nonconsensual sex in order to procreate.

As a practical matter, however, the state's possible constitutional power to ban nonmarital forms of sexual intercourse gives it only a limited tool to restrict nonmarital reproduction. With over 28 percent of births in 1990 occurring out of wedlock, it is unrealistic to think that laws prohibiting nonmarital sex or penalizing unmarried reproduction would accomplish much.⁵³ Only a minority of states have such laws, and they are seldom enforced. Moreover, this power would not imply the right to require that unmarried persons be sterilized, use contraception, undergo involuntary abortion, or lose custody of illegitimate children.⁵⁴

The main significance of denying unmarried persons a constitutional right to procreate would arise with state restrictions on access to infertility treatment and assisted conception. If an unmarried person's right to procreate is not constitutionally recognized, states could limit access to infertility treatments on the basis of marital status, sexual orientation, disability, or other factors that are not prohibited by state or federal antidiscrimination laws. Such a status could effectively bar some persons with valid interests in reproducing from access to noncoital means of reproduction.

The Legal Status of Noncoital Reproduction

The law has not yet dealt with legal claims of infertile persons to procreate, yet the principles that underlie a constitutional right to reproduce would seem to apply to the infertile as well. If so, they would have a

negative constitutional right to use a wide variety of reproductive technologies to have offspring.⁵⁵

If married (and possibly even single) persons have a presumptive right to reproduce coitally, what then about persons who cannot reproduce coitally? Coital infertility is no indication of a couple's adequacy as child rearers. Their desire to have a family—to beget, bear, and rear offspring—is as strong as in fertile couples. Because the values and interests that undergird the right of coital reproduction clearly exist with the coitally infertile, their actions to form a family also deserve respect. If so, the same standard of scrutiny applied to state action that restricts coital reproduction should apply to state restrictions on noncoital means of treating infertility.

Yet some people have challenged this notion, arguing that there is no legal right to reproduce if one lacks the physical ability to do so. But consider the analogous effect of blindness on the First Amendment right to read books. Surely a blind person has the same right to acquire information from books that a sighted person has. The inability to read visually would not bar the person from using braille, recordings, or a sighted reader to acquire the information contained in the book. Because receipt of the book's information is protected by the First Amendment, the means by which the information is received does not itself determine the presence or absence of First Amendment rights.

Similarly, if bearing, begetting, or parenting children is protected as part of personal privacy or liberty, those experiences should be protected whether they are achieved coitally or noncoitally. In either case they satisfy the basic biologic, social, and psychological drive to have a biologically related family. Although full genetic reproduction might not exist in each case, the interest of the couple in rearing children who are biologically related to one or both rearing partners is so close to the coital model that it should be treated equivalently. Noncoital reproduction should thus be constitutionally protected to the same extent as is coital reproduction, with the state having the burden of showing severe harm if the practice is unrestricted.

This conclusion is clearest with noncoital techniques that employ the couple's egg and sperm, as occurs with IVF or artificial insemination with husband sperm. Religious or moral objections to the separation of sex and reproduction should not override the use of these techniques for forming a family. However, because the only case dealing with artificial insemination with husband sperm arose in a prison setting, a direct precedent for the right to use these techniques has not yet been established.⁵⁶

Similar protection should extend to the use of gamete donation to overcome gametic infertility in one member of the couple, as occurs in sperm and egg donation. Gamete donation permits the married couple to

raise offspring biologically related to one or both parents (as in the case of egg donation). Again, moral objections to the noncoital nature per se of the conception or to the involvement of a third party without further indication of harm should not suffice to ban such procedures.

Use of a surrogate should also be presumptively protected, since it enables an infertile couple to have and rear the genetic offspring of both husband and wife in the case of gestational surrogacy, and of the husband in the case of full surrogacy. Indeed, recognizing the couple's right to use a surrogate is necessary to avoid discrimination against infertile wives. If an infertile male can parent his wife's child through the use of donor sperm, an infertile woman should be free to parent her husband's child through use of a surrogate. This is all the clearer if the surrogate is carrying the embryo of the couple.⁵⁷

Of course, finding that the interests that underlie coital reproduction are present in noncoital and collaborative reproduction does not eliminate the harms or ill effects that some persons fear. Presumptive protection of these techniques, however, shifts the burden to those who would restrict them to establish the compelling harm that would outweigh the couple's reproductive liberty. As later chapters will show, it is difficult to show that the alleged harms of noncoital reproduction are sufficient to justify overriding procreative liberty.

Similar issues arise with legal regulation of technologies that alter the temporal sequence of reproduction, that affect the genetic makeup of offspring, and that allow tissue or embryos to be produced for research or transplant. In resolving these legal disputes, the constitutional primacy of procreative liberty and the need for strict scrutiny of competing state interests should be recognized.

RESOLVING DISPUTES OVER PROCREATIVE LIBERTY

As this brief survey shows, new reproductive technologies will generate ethical and legal disputes about the meaning and scope of procreative liberty. Because procreative liberty has never been fully elaborated, the importance of procreative choice in many novel settings will be a question of first impression. The ultimate decision reached will reflect the value assigned to the procreative interest at stake in light of the effects causing concern. In an important sense, the meaning of procreative liberty will be created or constituted for society in the process of resolving such disputes.

If procreative liberty is taken seriously, a strong presumption in favor of using technologies that centrally implicate reproductive interests should be recognized. Although procreative rights are not absolute, those who would limit procreative choice should have the burden of establish-

ing substantial harm. This is the standard used in ethical and legal analyses of restrictions on traditional reproductive decisions. Because the same procreative goals are involved, the same standard of scrutiny should be used for assessing moral or governmental restrictions on novel reproductive techniques.

In arbitrating these disputes, one has to come to terms with the importance of procreative interests relative to other concerns. The precise procreative interest at stake must be identified and weighed against the core values of reproduction. As noted, this will raise novel and unique questions when the technology deviates from the model of two-person coital reproduction, or otherwise disaggregates or alters ordinary reproductive practices. However, if an important reproductive interest exists, then use of the technology should be presumptively permitted. Only substantial harm to tangible interests of others should then justify restriction.

In determining whether such harm exists, it will be necessary to distinguish between harms to individuals and harms to personal conceptions of morality, right order, or offense, discounted by their probability of occurrence. As previously noted, many objections to reproductive technology rest on differing views of what "proper" or "right" reproduction is aside from tangible effects on others. For example, concerns about the decomposition of parenthood through the use of donors and surrogates, about the temporal alteration of conception, gestation and birth, about the alienation or commercialization of gestational capacity, and about selection and control of offspring characteristics do not directly affect persons so much as they affect notions of right behavior. Disputes over early abortion and discard or manipulation of IVF-created embryos also exemplify this distinction, if we grant that the embryo/previable fetus is not a person or entity with rights in itself.

At issue in these cases is the symbolic or constitutive meaning of actions regarding prenatal life, family, maternal gestation, and respect for persons over which people in a secular, pluralistic society often differ. A majoritarian view of "right" reproduction or "right" valuation of prenatal life, family, or the role of women should not suffice to restrict actions based on differing individual views of such preeminently personal issues. At a certain point, however, a practice such as cloning, enhancement, or intentional diminishment of offspring may be so far removed from even pluralistic notions of reproductive meaning that they leave the realm of protected reproductive choice.⁵⁸ People may differ over where that point is, but it will not easily exclude most reproductive technologies of current interest.

To take procreative liberty seriously, then, is to allow it to have presumptive priority in an individual's life. This will give persons directly involved the final say about use of a particular technology, unless tangible

harm to the interests of others can be shown. Of course, people may differ over whether an important procreative interest is at stake or over how serious the harm posed from use of the reproductive technology is. Such a focused debate, however, is legitimate and ultimately essential in developing ethical standards and public policy for use of new reproductive technologies.

THE LIMITS OF PROCREATIVE LIBERTY

The emphasis on procreative liberty that informs this book provides a useful but by no means complete or final perspective on the technologies in question. Theological, social, psychological, economic, and feminist perspectives would emphasize different aspects of reproductive technology, and might be much less sanguine about potential benefits and risks. Such perspectives might also offer better guidance in how to use these technologies to protect offspring, respect women, and maintain other important values.

A strong rights perspective has other limitations as well. Recognition of procreative liberty, whether in traditional or in new technological settings, does not guarantee that people will achieve their reproductive goals, much less that they will be happy with what they do achieve. Nature may be recalcitrant to the latest technology. Individuals may lack the will, the perseverance, or the resources to use effective technologies. Even if they do succeed, the results may be less satisfying than envisaged. In addition, many individual instances of procreative choice may cumulate into larger social changes that from our current vantage point seem highly undesirable. But these are the hazards and limitations of any scheme of individual rights.

Recognition of procreative liberty will protect the right of persons to use technology in pursuing their reproductive goals, but it will not eliminate the ambivalence that such technologies engender. Societal ambivalence about reproductive technology is recapitulated at the individual level, as individuals and couples struggle with whether to use the technologies in question. Thus recognition of procreative liberty will not eliminate the dilemmas of personal choice and responsibility that reproductive choice entails. The freedom to act does not mean that we will act wisely, yet denying that freedom may be even more unwise, for it denies individuals' respect in the most fundamental choices of their lives.