

Procreative Pluralism

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ABSTRACT

This article offers a modern approach to evaluating the right to non-coital reproduction that centers on the concept of procreative pluralism. Using lessons taught by reproductive justice scholars and advocates, the article reframes reproductive autonomy and reproductive equality so as to avoid the pitfalls of each and offers a justice account of why constitutional protection of assisted reproduction is critical.

The article argues that the fundamental right to procreate as protected by the Constitution includes a fundamental right to use assisted reproduction. Unlike other scholarship, the article rejects the basis of this right as liberty/autonomy or equality standing alone and posits that a justice framework is best for protecting and balancing the procreative interests at play when people use assisted reproduction. Given the fundamental rights argument, the article argues that justice requires extensive protection of the right to procreate and exacting scrutiny of legislative attempts to interfere with that right. It goes beyond other scholars who have made this claim by also determining that the state may have positive obligations to provide some people with access to assisted reproduction services. To reconcile the importance of the procreative right with the compelling nature of state interests in procreation, the article offers a two-tiered system of constitutional review of the fundamental right to non-coital procreation in which those who wish to procreate and parent receive greater protection than those who wish to procreate for profit. Finally, the article articulates principles for regulation based on the structure of a two-tiered right and offers ideas for how to reconcile the fundamental rights analysis with legitimate justice concerns about potential harms to individuals and society from the use of assisted reproduction.

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Who lets so fair a house fall to decay,
Which husbandry in honour might uphold,
Against the stormy gusts of winter’s day
And barren rage of deaths eternal cold?
O! none but unthrifths. Dear my love, you know,
You had a father: let your son say so.¹

INTRODUCTION

In the not-so-distant past, those living with infertility consigned themselves to a life without genetically related children, and perhaps without children at all. In our modern world, though, making babies is big business as reproductive

1. WILLIAM SHAKESPEARE, SONNET XIII (1609) (The Procreation Sonnets).

technology has substantially expanded the realm of possibilities for procreation. But along with the rise of technology has come a steady call for tighter regulation of the market in baby making. Regulations of procreation are likely to have significant constitutional implications, so efforts to regulate must contend with the nature of the right at stake. At the intersection of two procreation-related anniversaries, the moment is ripe for reconsidering the right to procreate and assisted reproduction in a twenty-first century context.

The first anniversary is of the birth of the reproductive justice (RJ) movement. In 1994, a group of women of color activists coined the term *reproductive justice* to distinguish their movement from traditional modes of activism about issues of reproduction. In the two decades since the term reproductive justice was coined, it has become an important locus of organization for activists in groups like SisterSong and Forward Together (formerly Asian Communities for Reproductive Justice) whose work focuses on a range of issues related to reproduction and families. Scholars have also come to use the term to distinguish their work from liberal autonomy and choice-based rhetoric, especially around issues of abortion, which have dominated the mainstream reproductive rights movement for decades. While the RJ movement is strong, the depth of its impact on the legal academy is still being discovered. There remains much work to be done in considering how the RJ frame illuminates a range of procreative dilemmas, including those created by advances in reproductive technology.

The second anniversary is of the publication of John Robertson's seminal book, *Children of Choice: Freedom and the New Reproductive Technologies* ("*Children of Choice*"). In that book, Robertson made a strong legal and ethical case for a fundamental right to procreate broad enough to encompass at least some uses of assisted reproductive technology.² Robertson's book and many of his other published works remain relevant and are widely cited for the proposition that coital and non-coital reproduction, as a legal and ethical matter, stand on equal footing. Since technology has continued to advance in the past twenty years, the issues that Robertson addressed in his book remain salient and demand updated analysis.

The convergence of the anniversary of RJ and the publication of *Children of Choice* presents an apt moment for re-invigorating the scholarly discussion about the meaning of the right to procreate in a post-coital world. The work must also take account of technological, societal, and scholarly shifts over the past decades as assisted reproduction has become a widely accepted form of procreation and as courts and legislatures have continued to shy away from

2. JOHN ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 22-44 (1994). One author describes Robertson's account of procreative liberty as "possibly the most well-known and influential comprehensive approach to reproductive autonomy." ERIN NELSON, LAW, POLICY AND REPRODUCTIVE AUTONOMY 32 (2013).

explicit consideration of the nature of the right to procreate with technological assistance. Specifically, this article considers multiple changes to the landscape of reproduction and family life that impact the relationship between the law and those who procreate.

The first change is the increased number of non-traditional users of reproductive technology, including single women and same-sex couples. This shift suggests that arguments about procreation steeped in heterosexual relationships are insufficiently attentive to the ways in which non-traditional families positively transgress societal norms by using technology to become procreative units. The second change is the decreasing status of marriage between opposite sex couples as the central unit for procreation followed by parenting. Again, this alters the normative frame about the “proper” site for procreation. The third change is the legal expansion of protection for parents who do not have genetic or biological links to children. Thus, the understanding of the meaning and importance of the genetic tie between parents and children has become more complex. The fourth change is expanded opportunities for procreation across geographic borders, sometimes referred to as cross-border fertility care, as people engage in reproductive travel to satisfy desires for parenthood. This form of travel increases chances to procreate as well as opportunities for exploitation of the reproductive labor of women in developing nations. These changes invite renewed analysis of the fundamental right to procreate, the underpinnings of that right as a matter of law and policy, and its implications for diverse communities of people who procreate non-coitally.

Part I begins with the mostly uncontroversial claim that procreation is a valued and valuable part of the human experience. It disentangles procreation from sex, pregnancy, and parenting and then considers how the advent of assisted reproductive technology (“ART”) has made the story of procreation increasingly multifaceted, thus creating a need for greater nuance and clarity from the laws that regulate it.

Part II considers reproductive justice, equality, and autonomy as frameworks for understanding the law’s relationship to assisted reproduction. After critiquing the limitations of autonomy and equality standing alone, this section concludes that reproductive justice is the most useful and critical foundational organizing framework for understanding the law and assisted procreation.

Based on the arguments made in the previous sections, Part III makes the case for a fundamental right to assisted reproduction as a logical and necessary companion to the fundamental right to coital reproduction. It then argues that such a right should be tiered so that procreation for profit is more susceptible to regulation and limitation than procreation combined with an intent to parent.

Part IV uses reproductive justice as a framing device to consider how and why states might choose to regulate assisted reproduction and offers basic principles to which regulators should adhere if and when they choose to regulate in the realm of assisted reproduction. This section concludes that just as

individuals should be cautious in their decisions to procreate, a state's choice to regulate access to procreative tools also demands reflection and care.

I. DEFINING PROCREATION

“It seems unlikely that most procreation is the product of decisions to bring new people into existence. Instead, it is usually merely a consequence of sex. That so little thought is given to procreation implies nothing about the desirability of this state of affairs.”³

This Part considers procreation as valuable and worthy of the law's respect and protection, and disentangles procreation from sex, pregnancy, and parenting. It then evaluates how assisted reproduction has complicated the legal story about procreation and ends by tackling the ostensibly self-evident issue of why procreation matters especially in light of the claim that procreation is not synonymous with sex, pregnancy, or parenting.

Who procreates and with whom has long been an issue of social policy in the United States.⁴ Our nation is both historically and currently replete with legal battles over the level of control states may or should exercise over individual procreative choices.⁵ That a private act garners such public frenzy is evidence that the social perception of procreation is a dynamic phenomenon that creates deep public interest.

For a very long time, there was a common understanding of procreation or reproduction, at least in most societies.⁶ That common meaning referenced

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3. DAVID ARCHARD & DAVID BENATAR, PROCREATION AND PARENTHOOD-THE ETHICS OF BEARING AND REARING CHILDREN 2 (2010).
 4. For instance, state prohibitions on marriages between white and non-white people were in no small measure about avoiding the birth of multi-racial children. Keith E. Sealing, *Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation*, 5 MICH. J. RACE & L. 559, 567 (2000). Those who legislated against interracial marriages believed that biracial children would be “inferior in health to either parent . . . [and] have reduced fertility.” *Id.* at 567-68. Further, it was thought that this blending of races “brings the better down to the level of the lower, rather than improving the lower,” thus leading to a weakening of the white race. *Id.* at 568. Similarly, eugenic efforts to sterilize people living with developmental disabilities or perceived to be living with developmental disabilities were also an attempt to exercise control over who got to procreate as a way of improving the citizenry. MARK LARGENT, BREEDING CONTEMPT: THE HISTORY OF COERCED STERILIZATION IN THE UNITED STATES (2008). See also *LOVING v. VIRGINIA IN A POST-RACIAL WORLD* (Kevin Noble Maillard & Rose Cuisson Villazor eds., 2012); MD. CODE ANN. art. 27, § 416 (1957) (cited in JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 396 (1959)) (making it a criminal offense to conceive and bear an interracial child).
 5. From cases about compulsory sterilization like *Buck v. Bell*, 274 U.S. 200 (1927), to those about access to birth control for married couples like *Griswold v. Connecticut*, 381 U.S. 479 (1965) and abortion, *Roe v. Wade*, 410 U.S. 113 (1973), and finally back to sterilization abuse in *Relf v. Weinberger*, 565 F.2d 722 (1977), issues of procreation have regularly found their way into our legal discourse.
 6. This article will use the terms procreation and reproduction interchangeably throughout. Similarly, ART and assisted reproduction will be used interchangeably.

sexual intercourse between two people of the opposite sex leading to the female member of the pair getting pregnant. If the pregnancy progressed as expected (and perhaps desired), the woman gave birth to a child who was the genetic product of the man and woman who started the whole process. The story was a simple one and its variations were not about process so much as they were about the characteristics of the actors who were on the road to parenthood. Were they married? Too old or too young? Was the couple interracial? Had there been infidelity? No doubt procreation created opportunities for soap opera intrigue, but the basic story was on constant repeat.

Today, the repetitive story comes with variations. With ART, procreation can now involve three, four, or even five or more parties, including an intended mother, an intended father, a gestational surrogate, an egg donor (more often seller), and a sperm donor (also often a seller). These parental figures may or may not have genetic or biological⁷ connections to the children they help to create and whom they eagerly parent. This number does not even factor in the lab technicians and physicians who might also play a role in creating a pregnancy. New technology also allows for children to have three biological parents, two mothers and a single father, as cytoplasmic transfers lead to the birth of children made from one woman's DNA and another woman's mitochondria.⁸ While procreation is still profound and meaningful, for thousands of individuals around the globe, the process of creating a pregnancy has become a key element of reaching that profound moment of becoming a parent. And as the process has become more important, so too has it become necessary to reconsider what makes procreation a central part of the human experience and to reconfigure our legal framework to explicitly consider ways to protect procreative choice and procreative acts in a world in which both process and product matter.

The expansion of the physical ways in which conception can happen is one way in which procreation is pluralistic. Beyond the physical, this article invokes the idea of procreative pluralism to signal commitment to a capacious view of families and family formation. Imagining a world that celebrates the pluralism of procreation mirrors efforts to imagine and protect pluralism in families. That work includes demands for the law and society to take account of and value a

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7. The author draws a distinction between genetic and biological here to make explicit the fact that an individual participating in a procreative process might have a biological link to a child through the process of gestation though she does not have a genetic link to the child because her ova were not used to create the embryo that she gestates. This circumstance occurs when a gestational surrogate carries to term an embryo created using the gametes of others. To suggest that the gestational surrogate has no biological link to the child to whom she is intimately connected over the period of gestation is disturbing in its discounting of the critical and intimate nature of the gestational experience.
 8. Karen Weintraub, *Three Biological Parents and a Baby*, N.Y. TIMES, Dec. 16, 2013, http://well.blogs.nytimes.com/2013/12/16/three-biological-parents-and-a-baby/?_r=0.

range of families.⁹ Calling for an understanding and appreciation of procreative pluralism is also related to the demand that the law and society take account of pluralistic manners of sexual expression¹⁰ and a range of sexual orientations.¹¹ All of this work asks that the respect accorded to those whose path to family and parenting is more traditional be extended to those whose journey may be different, but whose goals are the same or similar.

Within the family law context, the law, to varying degrees, now embraces single-parent families,¹² unwed fathers,¹³ same-sex marriages,¹⁴ and even polygamous marriages.¹⁵ The law is even seeking ways to acknowledge non-traditional parenting arrangements including those that involve more than two parents¹⁶ or two parents who are not in a committed relationship.¹⁷ Whereas in the not-so-distant past, work on assisted reproduction rightly focused on opposite-sex, married couples,¹⁸ it is critical at this juncture in the study of the

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9. See, e.g., CARLOS BALL, *THE RIGHT TO BE PARENTS: LGBT FAMILIES AND THE TRANSFORMATION OF PARENTHOOD* (2012); STEPHANIE COONTZ, *THE WAY WE REALLY ARE* (1997); RANDALL KENNEDY, *INTERRACIAL INTIMACIES* (2003); AMY AGIGIAN, *BABY STEPS: HOW LESBIAN ALTERNATIVE INSEMINATION IS CHANGING THE WORLD* (2004).
 10. See, e.g., David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111 (1994); Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89 (2014).
 11. As Emily Jackson wrote, "Just as the capacity to exercise and explore one's sexuality with other consenting adults may be a necessary constituent element of a fulfilling existence, so I would argue that having one's reproductive choices taken seriously and treated with respect may be similarly integral to a satisfying and self-authored life." EMILY JACKSON, *REGULATING REPRODUCTION* 323 (2001).
 12. See Penelope L. Maza, *About Single Mother Adoption: The Role of the Single Mother in Adoption of Children from the Child Welfare System*, CWLA, (describing the important roles that single women play in creating permanent homes for children placed in the child welfare system), <http://66.227.70.18/programs/adoption/singlemother.htm> (last visited Nov. 5, 2014).
 13. See *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that a state statute that classified children of an unwed father as wards of the state after their mother's death violated equal protection).
 14. See *United States v. Windsor*, 133 S. Ct. 2675 (2013) (invalidating the section of the Defense of Marriage Act that did not recognize same-sex couples lawfully married under state law as spouses under federal law).
 15. See *Brown v. Buhman*, 947 F.2d 1170 (D. Utah 2013) (striking down portion of Utah law against polygamy that defined polygamy as cohabitation between a legally married person and another to whom he was not married).
 16. See Susan Donaldson James, *My Three Daddies: California Eyes Multiple Parenting Law*, ABC NEWS (July 3, 2012); <http://abcnews.go.com/Health/GMAHealth/california-considers-bill-multiple-legal-parents/story?id=16705628>.
 17. See Tyler O'Neil, *Judge Redefines Family; Rules Platonic Friends Can Be Parents to Adopted Child*, CHRISTIAN POST U.S. (Jan. 11, 2014), <http://www.christianpost.com/news/judge-redefines-family-rules-platonic-friends-can-be-parents-to-adopted-child-112429/> (describing New York judge who allowed friends to adopt a child together despite their lack of a marriage or committed romantic partnership).
 18. While Robertson's work does not ignore the reality of single parenting or LGBT parents, it also does not center those experiences. For instance, in writing about collaborative reproduction, Robertson explains, "Resort to donor gametes or surrogates is not an easy choice for infertile couples. The decision arises after previous efforts at pregnancy have

world of non-coital reproduction to take serious account of procreation by single people, LGBT individuals, and couples whose interests in procreation are substantial even if their access to the tools of procreation is not always unfettered.

Procreative pluralism imagines a world in which the law acknowledges and protects the right to create children for a range of actors in a range of circumstances because procreation “encompasses both the biological and social processes related to conception, birth, nurturing and raising of children.”¹⁹ To take full account of procreation, the law cannot myopically focus on biology or genetics, but must simultaneously consider the social conditions under which procreation happens and the societal consequences that procreation creates. This imagined world requires an accounting of what procreation is and what it is not. In other words, if procreation is worthy of our respect and protection, what precisely are we respecting and protecting?

A. Procreation as Biology

“It is at least arguable that assisted conception techniques represent one of the most important and spectacular scientific developments of the last 25 years.”²⁰

Procreation is a biologically and socially complex process that incorporates multiple acts and outcomes. Consensual and intentional acts of coital, sometimes called “natural,” reproduction involve multiple steps, including heterosexual intercourse, the union of sperm and egg to form a fertilized egg, the implantation of that egg in a uterine lining, and the growth of an embryo into a fetus over the course of a pregnancy. The pregnant woman shares a strong and unique biological link with her fetus and often, but not always, experiences a strong

failed, thus confronting people with the fact of one of both partners’ infertility.” ROBERTSON, *supra* note 2, at 119. While this story resonates for many ART users, there are significant others for whom it is irrelevant. Same-sex couples may come to ART having experienced medical infertility, but many more use assisted reproduction because it is the only way to access the gamete of the opposite sex or, for male couples, to find a woman willing to gestate a child on their behalf. For couples where one partner is HIV-positive, assisted reproduction techniques might involve sperm washing and AI, which also does not pre-suppose medical infertility. For a further discussion of the importance of considering both inside and outside stories about access to ART, see Kimberly M. Mutcherson, *Transformative Reproduction*, 16 J. GENDER RACE & JUST. 187 (2013).

19. Asian Communities for Reproductive Justice, *A New Vision for Advancing Our Movement for Reproductive Health, Reproductive Rights, and Reproductive Justice*, in ABORTION UNDER ATTACK (Krista Jacob ed., 2006); see also *What is RJ?*, SISTERSONG, http://www.sistersong.net/index.php?option=com_content&view=article&id=141&Itemid=81 (last visited Nov. 4, 2014) (“The reproductive justice framework—the right to have children, not have children, and to parent the children we have in safe and healthy environments—is based on the human right to make personal decisions about one’s life, and the obligation of government and society to ensure that the conditions are suitable for implementing one’s decisions is important for women of color.”).
20. JACKSON, *supra* note 11, at 161.

psychological or emotional link as well. This is followed by childbirth and perhaps breastfeeding along with other intimate (and exhausting) forms of caretaking. Many steps were omitted from this list. If one wished to be more precise, the steps of procreation could include finding a willing sexual partner, opting not to use contraception, and discussing and agreeing upon a desire to have children. Thus, procreation is a single process or a series of processes culminating in the birth of a child. Put another way, procreation, as discussed in this article, is a reproductive process, assisted or not, by which a person creates offspring who may or may not have genetic or biological ties to the intended parent(s).

Despite a deceptive simplicity (have sex, get pregnant, have a baby), scientific advances in the field of reproductive medicine prove that procreation is in fact quite dynamic, as capacity to procreate has expanded with the advent of new technologies. Since at least the 1970s, the world has seen the rise of a baby-creating business that has a wealth of acronyms.²¹ In addition to ART, there is AI (artificial or alternative insemination),²² ICSI (intracytoplasmic sperm injection),²³ IVF (in vitro fertilization),²⁴ SMs (surrogate mothers),²⁵ and GSs (gestational surrogates).²⁶ With all of these awkward acronyms, what it means to assert a right to procreate is muddled.

Not only do new technologies confound simple biology, they also confound the law. Until the advent of assisted reproduction, the law had no reason to parse the component parts of procreation and deal with procreation as a process rather than a singular act. The law before ART did sometimes have to cope with questions about legitimate genetic ties to a child, such as when a married woman had an affair and gave birth to a child whose legal father, her

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21. Louise Brown, the world's first baby born through in vitro fertilization ("IVF"), entered the world in 1978. The fertility industry has continued to expand since that birth and is now a multi-million dollar global force. DEBRA SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 24, 28-29 (2006); MARGARET MARSH & WANDA RONNER, *THE EMPTY CRADLE: INFERTILITY IN AMERICA FROM COLONIAL TIMES TO THE PRESENT* 236 (1999).
 22. Artificial insemination is a technique by which sperm is introduced into a woman's uterus, cervix, or fallopian tubes in order to facilitate conception. *Infertility and Artificial Insemination*, WEBMD, <http://www.webmd.com/infertility-and-reproduction/guide/artificial-insemination> (last visited Nov. 4, 2014).
 23. ICSI is a technique used to help men with very low sperm counts become genetic fathers. It involves injecting a single sperm into an egg that can be transferred to a woman's uterus once it is successfully fertilized. *Intracytoplasmic Sperm Injection: ICSI*, AM. PREGNANCY ASS'N, <http://www.americanpregnancy.org/infertility/icsi.html> (last updated Mar. 2014).
 24. IVF or in vitro fertilization refers to fertilization outside of the body. *Infertility FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/reproductivehealth/Infertility/index.htm#k> (last updated June 20, 2013).
 25. *Surrogacy, HUMAN FERTILISATION & EMBRYOLOGY AUTH.*, <http://www.hfea.gov.uk/fertility-treatment-options-surrogacy.html> (last updated Aug. 5, 2014).
 26. *Id.*

husband, was not the child's genetic father²⁷ or where a child was born out of wedlock, creating confusion about legal parentage.²⁸ But assisted reproduction makes questions of parentage, genetics, biology, and connection ever more intricate.

For instance, family law has traditionally focused on having at least two, but no more than two, parents for a child.²⁹ This legal limitation has been the focus of a range of critiques as it ignores or, even worse, consciously denigrates other family forms.³⁰ ART involves many opportunities for more than two people to stake a claim to the title of parent. Situations include when a couple hires a surrogate to bear a child for them or purchases sperm or eggs from a cryobank. It might also include third-party reproduction arrangements with an agreement that the third party will be an active participant in raising a child.³¹ In fact, some family courts allow adoptions that create three legal parents for a child as an acknowledgement of such arrangements.³²

Ultimately, biology is a critical and foundational component of the law's understanding of procreation and a valid legal analysis of the right to procreate should start with an expansive biological definition of procreation. This is a crucial tool for capturing a full range of reproductive activity from coital reproduction to the sale of gametes to IVF and surrogacy arrangements. Protecting procreation as a biological category is one way to consider the law's relationship to procreation, but as the mechanics of creating babies become more intricate and susceptible to manipulation, focus on one narrow understanding of procreation fades into obscurity. As such, analyzing the law and procreation must do more than just consider biology.

B. Procreation as Social Construction

Procreation is not just biology; it is also a social construction. As suggested in the previous section, embracing biological pluralism in procreation means

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27. *See, e.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (upholding California paternity statute).
 28. *See, e.g.*, *Lehr v. Robertson*, 463 U.S. 248 (1983) (holding that putative father's rights were not violated when he was not notified of adoption proceeding when he had never established a substantial relationship with his child).
 29. The two legal parents paradigm is in flux as California now has a law that allows more than two people to be a child's legal parents. *See* Patrick McGreevy, *Brown Signs Bill to Allow Children More Than Two Legal Parents*, L.A. TIMES (Oct. 4, 2013), <http://www.latimes.com/local/la-me-brown-bills-parents-20131005,0,7226241.story>.
 30. *See, e.g.*, STEPHANIE COONTZ, *THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA'S CHANGING FAMILIES* 92-93 (1997) (arguing that traditional definitions of parental rights must change to encompass new family structures that reproductive technologies enable).
 31. *AND BABY MAKES MORE: KNOWN DONORS, QUEER PARENTS AND OUR UNEXPECTED FAMILIES* (Susan Goldberg & Chloe Brushwood Rose eds., 2009).
 32. Elizabeth Marquardt, Op-Ed., *When 3 Really Is a Crowd*, N.Y. TIMES (July 16, 2007), http://www.nytimes.com/2007/07/16/opinion/16marquardt.html?_r=1&

understanding the multiple physical/biological ways in which pregnancies come about and children are made. Equally as important to biology is the way that the society constructs procreation. Through law, policy, socialization, tradition, and culture, procreation is in regular flux and continually reconstructed as the culture shifts and as technology pushes the boundaries of possibility. The society places different legal value upon procreation across race, class, gender, sexual orientation, immigration status, and other categories of difference.³³ As this discussion alone could consume multiple articles, it begs for restraint. However, offering a few relevant examples to demonstrate the constructed nature of procreation is critical to an argument about how the law regulates procreation.

Feminist scholars have written eloquently about how the regulation of procreation and procreative acts differs between women and men, and how the regulation of women's procreation and procreative acts differ across time, place, and varying identities. In *Children of Choice*, John Robertson observed: "Surprisingly, there is a widespread reluctance to speak of coital reproduction as irresponsible, much less urge to public action to prevent irresponsible coital reproduction from occurring."³⁴ This claim belies the historic reality of reproductive oppression. Such oppression has long been pernicious and widespread in ways that have a disparate impact based on sex, so that women who procreate, and even those who do not, pay a social price for either

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33. See, e.g., DOROTHY ROBERTS, *KILLING THE BLACK BODY* (1997) (discussing the many ways in which the U.S. government has constrained and devalued procreation and parenting by black women); *LOVING V. VIRGINIA IN A POST-RACIAL WORLD*, *supra* note 4 (describing ways in which the state use its power over marriage to police family formation and interracial intimacies); KHIARA M. BRIDGES, *REPRODUCING RACE* (2011) (exploring pregnancy and pregnancy care as a site of racialization of poor Black women); RICKIE SOLINGER, *PREGNANCY AND POWER* (2005) (describing the racialized politics of reproduction throughout American history).
34. ROBERTSON, *supra* note 2, at 31. Robertson later remarks that concerns about coercive policies, especially those targeted toward the developmentally disabled, the low-income, and/or people of color, have led to "surprisingly few attempts to restrict coital reproduction in the United States since the era of eugenic sterilization." *Id.* at 31. Of course, Robertson published his book before the welfare reform debates resulting in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193 (1996). A significant portion of the debate leading up to the passage of the law centered on concerns about halting supposedly irresponsible procreation and parenting, especially among low-income African-Americans. Further, legislators and judges during this period were perfecting their efforts to get poor women to consent or acquiesce to the use of long-term birth control methods, sometimes as a condition of access to financial assistance from the government. *Norplant: A New Contraceptive with the Potential for Abuse*, ACLU (Jan. 31, 1994), <https://www.aclu.org/reproductive-freedom/norplant-new-contraceptive-potential-abuse>. Concerns about coercive sterilization practices lasted well past the eugenic sterilization era that Robertson references. See, e.g., Alexandra Minna Stern, *Sterilized in the Name of Public Health: Race, Immigration, and Reproductive Control in Modern California*, 95 AM. J. PUB. HEALTH 1128-38 (2005) (describing the era of sterilization abuse in California lasting until the 1970s). Sterilization abuse remains a modern concern. See Alex Stern, *Sterilization Abuse in State Prisons: Time to Break With California's Long Eugenic Patterns*, HUFFINGTON POST (July 23, 2013), http://www.huffingtonpost.com/alex-stern/sterilization-california-prisons_b_3631287.html.

decision.³⁵

The term reproductive oppression refers to the myriad ways in which pregnancy, childbearing, and mothering (as distinct from simply parenting or from being a father) can deny women access to a full range of human experiences. Being born with a womb or living in a body presumed to contain a womb has traditionally required that women, far more frequently than men, take account of their reproductive capacity and deal with the ways in which others frame that capacity. Historical examples include the use of black women slaves as a breeder class for new enslaved people.³⁶ Slave owners valued these women not for their ability to mother, but for their ability to create more saleable human products and workers in a morally bankrupt system of chattel slavery.³⁷ Efforts in the early twentieth century to blame white women for the dilution of white power because of a failure to keep up with birthrates of newly arrived immigrants and others serves as another example.³⁸ Reproductive oppression also includes forced bodily interventions for pregnant women, including cesarean sections performed without consent.³⁹

Congress recognized the disparate burden of reproductive oppression when it passed the Pregnancy Discrimination Act to combat negative repercussions faced by working women who became pregnant.⁴⁰ Such targeted oppression has also been felt by women living with disabilities forced into activism to preserve their fertility from those who would see them sterilized to avoid the risk of creating more people living with disabilities, or because of a belief that individuals with disabilities should not parent.⁴¹ These are but a few examples of a broader phenomenon by which society encourages some to procreate while others are told that their desire to procreate is aberrant and even dangerous.

Although regulators seldom engage in full frontal attacks on the reproductive choice to make babies by legislating against coital reproduction,⁴²

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35. SOLINGER, *supra* note 33, at 1-25 (2005) (discussing the politics of reproduction and the impact of that politics on women); BETSY HARTMANN, *REPRODUCTIVE RIGHTS AND WRONGS: THE GLOBAL POLITICS OF POPULATION CONTROL* (1999) (discussing global reproductively oppressive policies).
 36. See JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK AND THE FAMILY* 11-13 (1985).
 37. See PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 33-35 (1984).
 38. SOLINGER, *supra* note 33, at 131-61.
 39. See, e.g., *In re A.C.*, 573 A.2d 1235 (D.C. 1990) (reversing lower court decision that allowed hospital to perform a C-section on a dying woman).
 40. See Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e et seq.
 41. See PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT AND BUCK V. BELL* (2008) (detailing the history of the notorious *Buck v. Bell* Supreme Court decision that upheld eugenic state-sponsored sterilization laws).
 42. When it comes to considering the regulation of reproduction, the distinction between people attempting to make babies and women attempting to end pregnancies is significant. Legislators, especially on the state level, have consistently attacked a woman's right to end a pregnancy as evidenced by contemporary abortion regulation bills winding their way through

procreation is frequently a site of lawmaking. Tax breaks for childcare expenses and reductions in state benefits for children born while one is receiving such benefits⁴³ are but two forms of procreative regulation. Similarly, laws governing access to birth control or abortion also regulate the terms of procreation by creating consequences for procreative acts or erecting barriers that interfere with the ability to control the timing of procreation even if they do not regulate the act itself. And subjecting women to criminal prosecution if they use illegal drugs while pregnant⁴⁴ or creating parole conditions that demand that people refrain from having children if they want to avoid imprisonment obviously influence reproductive decision making.⁴⁵ In this way, the law creates context that can impact action and choice. And while shaping the context of choice is not the same as denying choice, it can make certain choices disfavored or impossible.

Assisted reproduction calls into question a host of potential assumptions about the basis of a right to procreate. Such assumptions include a claim that the right to procreate exists only in conjunction with a right to engage in consensual sexual encounters without undue interference from the state. A further misplaced assumption is that procreation is an important category of human experience only in connection with the embodied experience of pregnancy.⁴⁶ Finally, it has been argued that procreation matters only as connected to an interest in assuming the role of responsible parent.⁴⁷ All of these assumptions may resonate in various

Congress and state houses around the country. *See, e.g.*, Dena Potter, *Virginia OKs Bill to Likely Close Most Abortion Clinics*, ASSOCIATED PRESS (Feb. 24, 2011), <http://www.cnsnews.com/news/article/virginia-oks-bill-likely-close-most-abortion-clinics> (describing bill that would substantially change the burdens on clinics providing first-trimester abortions in Virginia which would potentially lead to abortion clinic closures); CTR. FOR REPROD. RTS., THE CENTER FOR REPRODUCTIVE RIGHTS 2009 LEGISLATIVE WRAP UP (2010), available at <http://reproductiverights.org/en/project/a-year-in-review-2009-legislative-wrap-up> (describing hundreds of pieces of legislation proposed across the country in one year that would have burdened access to abortion).

43. *Family Cap Policies*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/human-services/welfare-reform-family-cap-policies.aspx> (last visited Nov. 6, 2014) (indicating that at least nineteen states have policies capping family benefits and two additional states have a flat cash assistance grant regardless of family size).
44. Lynn M. Paltrow & Jeanne Flavin, *The Policy and Politics of Reproductive Health: Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL. POL'Y & L. 299, 313-14 (2013); BRIDGES, *supra* note 33, at 45.
45. *State v. Oakley*, 629 N.W.2d 200 (Wis. 2001) (upholding probation condition limiting procreative rights of man convicted of failing to pay child support).
46. There is substantial data available about relationships between fathers and children and how those relationships benefit both parties despite the father's inability to carry a pregnancy. *See, e.g.*, Paul Amato & Joan Gilbreth, *Nonresident Fathers and Children's Well-Being: A Meta-Analysis*, 61 J. MARRIAGE & FAM. 557-73 (1999). Similarly, data related to adoptive parents and their relationships with the children makes clear that the success of a parenting relationship with a child need not hinge on the experience of pregnancy. *See, e.g.*, Simon Cheng et al., *Adoptive Parents, Adaptive Parents: Evaluating the Importance of Biological Ties for Parental Investment*, 72 AM. SOC. REV. 95 (2007) (describing the investment that adoptive parents make in their children).
47. *See, e.g.*, David Benatar, *The Limits of Reproductive Freedom*, in PROCREATION AND

ways, but none remain unscathed when tested against the realities of assisted reproduction.

C. Procreation is Not Just Sex

There are those for whom the intertwining of procreation and sex is an assertion of biological fact and a claim about what is morally good.⁴⁸ As Emily Jackson explains, “[R]evulsion at the artificiality of infertility treatment does not consist in a general criticism of all that is unnatural, but instead embodies a much more specific belief in the impropriety of separating sex from conception.”⁴⁹ When procreation leaves the proverbial bedroom and is delinked from a right to engage in consensual sexual activity in the privacy of one’s own home, the most basic rationale for a fundamental right to procreate, “what you do in your bedroom is your business,” crumbles. Those arguing for a procreative right that embraces ART cannot simply assert that because the Constitution protects heterosexual procreative sexual activity, any other procreative activity is also protected, even if it lacks a sexual component.

From a strictly legal standpoint, after *Skinner v. Oklahoma*,⁵⁰ in which the Court articulated a fundamental right to procreate, courts have reinforced a liberty interest in sexual activity. Most notably, in *Lawrence v. Texas*, the Court held that a state could not constitutionally criminalize consensual sexual behavior between people of the same sex.⁵¹ Similarly, *Griswold v. Connecticut*,⁵² *Eisenstadt v. Baird*,⁵³ and *Roe v. Wade*,⁵⁴ read as a coherent whole, stand for the proposition that the Constitution protects nonprocreative sex for married people, single people, those who engage in sexual activity with the opposite sex, and those who engage in sexual activity with the same sex. However, the Court’s

PARENTHOOD 78-102 (David Archard & David Benatar eds., 2010).

48. Jackson writes, “According to this critique, the unity of sexuality and reproduction is not simply a biological fact, like the existence of disease, that humans can legitimately attempt to manipulate, rather it is a fundamental moral principle.” JACKSON, *supra* note 11, at 172 (citation omitted).
49. *Id.* (citation omitted).
50. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (invalidating statute that allowed involuntarily sterilization of some convicted felons).
51. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“The case . . . involve[s] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”).
52. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (invalidating state law prohibiting the use of drugs or devices of contraception as well as counseling or aiding and abetting the use of contraceptives).
53. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending *Griswold*’s analysis to unmarried people).
54. *Roe v. Wade*, 410 U.S. 113 (1973) (establishing that women have a constitutional right to terminate their pregnancies with some limitations).

endorsement of a right to sexual activity, especially as articulated based on the facts of *Lawrence*, has no connection to procreative liberty. In fact, it is much easier to find Supreme Court jurisprudence supporting the constitutional right to nonprocreative sex than to procreative sex.

As a logical extension of a right to nonprocreative sex, it is hard to imagine that the constitutional scheme, and the right to privacy found within that scheme, distinguishes between sex for recreation and sex for procreation. It would be difficult to find a compelling or even rational reason to protect one while leaving the other subject to restrictive state regulation, especially when one ponders how to legally enforce that distinction. The privacy and bodily integrity issues that protect sexual activity do not dissipate when one engages in sex with the deliberate goal of achieving pregnancy, with a hope that a pregnancy will not occur, or with indifference to whether a pregnancy occurs. Sex has inherent value and warrants respect for reasons independent of its procreative potential.⁵⁵ And, if the right at stake is limited to coital reproduction, then the right to procreate should more accurately be defined as a right to engage in heterosexual intercourse with a fertile partner. Described in this way, the limitation on the right and the broad unfairness of that limitation is manifest.

Even to the extent that a state would want to exercise greater control over coital reproduction, the difficulty of policing sexual behavior would pose a core barrier to effective pre-procreative screening. This leads squarely back to the conceptual strain created by equating procreation and sex and reinforces the necessity of separating the two and determining the value of each on an individuated basis. Analyzing the core support for a right to procreate separate and apart from support for sexual agency and freedom is rendered impossible without conceptual separation between the two.

Further, reducing the power of procreation to a reverence for sex loses sight of many of the reasons why procreation is meaningful within the human experience. For many people, especially those who are consensually and intentionally pursuing procreation through coital acts, the act itself is an expression of deeper desires. In such a coupling, we hope, the pleasure of sex is enhanced by love and companionship, the connectedness that comes from deepening a commitment by opting to share parenting with another person, and the power of creating a new person who combines the genes of her progenitors—a profound act of renewal. None of this is to say that all sex is about or should be about higher aspirations than physical pleasure, but consensual coital acts that take place when two people have made a determination to have children together are deliberate acts of procreative intent comparable to using ART. As such, the act itself is important in conjunction with the circumstances surrounding it and the goals underlying it.

Across multiple communities and cultures, creating new human life is

55. Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 90-91 (2014).

deeply cherished and valued. We talk of procreation as a gift. We celebrate it and we marvel at it. In the secular realm, to insist that this gift only has value when combined with sex denies that the power in procreation is both the procreative act itself and the product of that act.⁵⁶ Sexual agency and procreative freedom are intertwined for most people, and although a right to one reinforces the right to the other, the two rights are self-supporting and self-sustaining. Thus, it is important to be willing to disaggregate sex and procreation.

D. Procreation is Not Just Pregnancy

Pregnancy is a necessary part of the procreative process, but it is only one part of that process and it is not the definitive procreative act. The most obvious analytical failure in claiming pregnancy as the sole marker of procreation is the exclusion of men from the procreative process—an exclusion that would be nonsensical and counterproductive.

This is not to say that pregnancy is meaningless or that it is not potentially more meaningful than parts of the procreative process that are shorter, less physically cumbersome, and generally much less public. No doubt, pregnancy's physical intertwining of pregnant woman and fetus renders it a unique state of being for which only a female body with a uterus is biologically equipped. Even if one is inclined to place pregnancy as the pinnacle of the physical acts involved in procreation, that does not necessitate that other parts of the procreative process are without value. Conflating the importance of procreation with the physical act of carrying a child is unfair to men, infertile women, parents who adopt, and others who play roles of various importance in the process of making and rearing children.

E. Procreation Is Not Just Parenting

Although the link between procreation and parenting elevates procreation,

56. Some religious traditions believe process and product are important. Helen Alvare explains that in Catholic teaching, when fertilization happens outside of the body, as is the case with IVF:

In the Church's judgment . . . the procreative aspect of human sexuality has been wrongly severed from its unitive aspect, the spiritual and physical union of the parents. Procreation is thus deprived of the meanings that come from its bodily source, and from the message that a man and a woman communicate to one another when they engage in human sexual intercourse. This form of procreation is instead dominated by the rubric and standards of scientific technology: efficiency and domination over nature. It is not the result of a communion of persons in love. The child is deprived of being the result of procreation from a "fully human" communion, which involves a meeting both "of the sense and of the spirit." Love is absent at the moment of this type of fertilization; accordingly, it is not a method of procreation fit for the dignity of the human person.

Helen Alvare, *Catholic Teaching and the Law Concerning the New Reproductive Technologies*, 30 *FORDHAM URB. L.J.* 107, 116 (2002).

as is true of procreation and sex or procreation and pregnancy, the two need not depend on each other for sustenance. As argued above in the context of sexual agency, procreation and parenting are distinct but mutually supportive rights. Thus, while a right to procreate and a right to parent often work in tandem, one need not follow the other.

The Supreme Court has long protected the primacy of a parental right to the care, custody, and control of children,⁵⁷ and the line between parenting and procreation has legal significance despite being porous. This is true because most pregnant women intend to parent the children to whom they give birth. Even so, the fundamental right to parent an existing child is separate from the fundamental right to create a child. Existing practices in family formation, including but not exclusively in the realm of ART, provide multiple examples of ways in which parenting and procreation diverge.

Adoption is an obvious example of the delinking of procreation and parenting. With some exceptions, when a child is placed for adoption, the goal of that act is to give her a parent or parents who did not participate in the reproductive process that brought the child into being.⁵⁸ A second example of the divide between parenting and procreation is the existence of egg and sperm selling, which allows an individual to procreate, in the sense of participating in the creation of offspring with whom the gamete provider has a genetic link, without the legal rights or responsibilities of parenting.⁵⁹ A further example is surrogate motherhood, in which women agree, often in exchange for money, to carry a child to term for an intended parent who will have the legal and moral responsibility of raising the child.⁶⁰ Even in the case of an unintended pregnancy where a woman decides to keep a child despite the lack of a relationship with the biological father, the state can require the father to pay child support but cannot

57. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care reside first in the parents”); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down a law forbidding parents from teaching foreign languages to children who had not yet passed 8th grade); *Troxel v. Granville*, 530 U.S. 57 (2000) (striking down a statute allowing for grandparent visitation).

58. An example where this dynamic might not be in place is when a same-sex couple plans a pregnancy together with only one member of the couple having biological or genetic connection to a child. In these situations, the parent without a biological or genetic connection would need to execute a same-sex second-parent adoption in order to secure legal connection to the child, even though the parental bond was contemplated at the inception of the pregnancy. NAT’L CTR. FOR LESBIAN RIGHTS, ADOPTION BY LGBT PARENTS (2014), available at http://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf. For a deeper account of the politics of same-sex second-parent adoption, see Nancy Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201 (2009).

59. See RENE ALMELING, *SEX CELLS: THE MEDICAL MARKET FOR EGGS AND SPERM* 9 (2011) (study of the gendered commodification of gametes used for assisted reproduction).

60. For a complex treatment of the relationships between one group of surrogates and the intended parents for whom they worked, see ELLY TEMAN, *BIRTHING A MOTHER: THE SURROGATE BODY AND THE PREGNANT SELF* (2010).

otherwise obligate the father to have a relationship with his biological child. Thus, there are multiple ways in which a person contributing to the process of procreation can avoid parenting a resulting child.

Similarly, one need not procreate in order to parent. Adoption, surrogacy, and stepparent relationships are good examples of this. Without being involved in the reproductive process that creates a child, an individual can adopt a child who will become her legal responsibility in a relationship identical to that between a biological parent and her biological child. An individual or couple desirous of being parents can hire a woman to bear a child, who may or may not have a genetic link to the intended parents or the surrogate, and become parents without participating in a process of perpetuating their own genes. A stepparent can enter a child's life and assume a parental role without any participation in the process of creating that child. In these ways, parenting and procreation can be separated. This is not to say that they should always be considered separate spheres, but certainly they cannot always be considered identical acts that depend upon each other for constitutional legitimacy.

Assisted reproduction challenges the law to disentangle procreation from parenting, sex, and pregnancy and, in so doing, to flesh out distinct rationales for the right to procreate. In that process of disentangling, the goal is not to claim that procreation has no relationship to sex, parenting, and pregnancy. Rather, the point is that procreation is linked to all of these things. In fact, its relationship to all of these things is sometimes absolutely critical. However, procreation is not singularly defined by any of these other experiences to which it is linked and from which it can be extricated. To the extent that each of these elements is critical in a legal and societal context, that sense of importance lends substantial legitimacy to the claim that procreation itself, as defined earlier in this article, is important, legitimate, and worthy of protection. Most critically, though, this article makes the claim that procreation, even without reference to parenting, sex, or pregnancy, remains vital and requires constitutional concern and protection.

F. The Matter of Procreation

Perpetuating one's genes is fundamental in a primal and biological way. Life yearns for itself⁶¹ and procreation is a substantive and critical part of the human experience. References to creating progeny permeate significant religious texts and works of great literature.⁶² While it is not the case that any one

61. "Your children are not your children. They are the sons and daughters of Life's longing for itself. They come through you but not from you, And though they are with you yet they belong not to you." KHALIL GIBRAN, *THE PROPHET* 17 (Suheil Bushrui ed., Oneworld Publications 2012).

62. See, e.g., *Genesis* 1:28 (King James) ("And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the

individual must reproduce in order to live, it is the case that, for many people, a failure to procreate implicates the sense of self and diminishes perceived quality of life.⁶³ Procreation is essential in a foundational way that precedes the state and exists without it. As one state supreme court Chief Justice explained in the context of an attempt to order sterilization for a developmentally disabled adult woman:

[T]he right to procreate is more than a byproduct of a right of choice. Its roots go deeper; they are *constitutional* in the physical sense, implicating the individual's rights to physical integrity and to retention of the biological capabilities with which he or she was born into this world.⁶⁴

Thus, the right to procreate is beyond the law even though it can be shaped by the law.

For many who would otherwise be locked out of procreation, assisted reproduction allows for their integration into the community of those who procreate. The CDC estimates that two million couples in the United States experience some form of infertility.⁶⁵ For this group of people, who live with a

earth.”).

63. The author makes this claim notwithstanding research that indicates that having children decreases marital satisfaction until those children leave home. *See* DANIEL GILBERT, STUMBLING ON HAPPINESS 220-21 (2006). Gilbert describes our belief that children bring happiness as a “super replicator” meaning that “[t]he belief-transmission network of which we are a part cannot operate without a continuously replenished supply of people to do the transmitting, thus the belief that children are a source of happiness becomes a part of our cultural wisdom simply because the opposite belief unravels the fabric of any society that holds it.” *Id.* at 222. So one can claim that we have a strong societal belief that having children is an integral part of leading a happy life even if the reality of life with children is sometimes decidedly mundane and downright depressing.
64. *Conservatorship of Valerie N.*, 707 P.2d 760, 786 (Cal. 1985) (holding that developmentally disabled people have a right to sterilization).
65. According to the CDC:

In 2002, the National Survey of Family Growth (NSFG) found that two million couples in the United States were infertile (i.e., had not conceived during the previous 12 months despite trying). An estimated 7.3 million, or 12% of American women aged 15-44 years had received infertility services (including counseling and diagnosis) in their lifetime. More than 1.1 million women sought medical help to get pregnant in the previous year. Although the focus of research and services has traditionally been on women, fertility impairments may be just as common among men. A total of 7.5% of all sexually experienced men reported a visit for help with having a child; 2.2% reported a visit in the past year, equivalent to 3.3-4.7 million men reporting a lifetime visit and 787,000-1.5 million reporting a visit during the previous year. Recent trends toward postponing age at first pregnancy have highlighted the natural limits of fertility and accelerated the development and use of medical technology such as Assisted Reproductive Technology (ART) to overcome such limits. The proportion of first births to women aged 30 years and older has increased more than fourfold since 1975, from 5% to 24% in 2006. The absolute number of these births increased from more than 69,000 to approximately 405,000 during this period.

CTR. FOR DISEASE CONTROL & PREVENTION, OUTLINE FOR A NATIONAL ACTION PLAN FOR THE PREVENTION, DETECTION AND MANAGEMENT OF INFERTILITY 3 (2010), *available at*

disability as defined by the Americans with Disabilities Act (“ADA”),⁶⁶ assisted reproduction ameliorates their disability and allows them to make procreative decisions on a comparable plane with people who do not have a disability. Medical infertility is not a lifestyle choice, but a malfunction within the body for which there are corrective technological tools.⁶⁷ ART is also an important tool for leveling the procreative playing field for lesbian, gay, bisexual, and transgender (“LGBT”) individuals who seek to procreate in familial units that do not have the potential for coital reproduction. Within this context, ART allows individuals to build families with children.

Finally, while people of color and those who are low-income are not primary consumers of ART, the interests of these groups are still relevant to any discussion of ART. In fact, available data suggests that women of color, particularly African-American women, live with infertility at a much higher rate than do white women.⁶⁸ Some data suggests that there are race-based disparities in the successful use of ART.⁶⁹ For these women, the failure to think about ART as a distinctly important element of access to procreation, almost certainly coupled with a view of African American women as overly fertile and financially unworthy,⁷⁰ ignores reality and subjugates the interest that these women might have in using technology to build their families. Thus, procreation matters, and assisted reproduction matters deeply to those who cannot reproduce coitally.

II. LEGAL AND ETHICAL FRAMEWORKS FOR PROTECTING ACCESS TO PROCREATION

“Human procreation, when viewed most fully, is thus a panorama of wide import and overlapping human meanings.”⁷¹

<http://www.cdc.gov/art/PDF/NationalActionPlan.pdf>

66. *Bragdon v. Abbott*, 524 U.S. 624, 638-39 (1998) (holding that reproduction is a major life activity as defined by the Americans with Disabilities Act). Whatever questions post-*Bragdon* cases may have raised about reproduction as a major life activity whose impairment qualified as a disability were resolved by the ADA Amendments Act of 2008. Pub. L. No. 110-325 (2008) (repudiating Supreme Court cases that had significantly narrowed the definition of disability under the Americans with Disabilities Act).
67. *Infertility Definitions and Terminology*, WORLD HEALTH ORG., <http://www.who.int/reproductivehealth/topics/infertility/definitions/en/> (last visited Nov. 6, 2014).
68. Heather G. Huddleston et al., *Racial and Ethnic Disparities in Reproductive Endocrinology and Infertility*, 202 AM. J. OBSTETRICS & GYNECOLOGY 413, 413 (2010).
69. See Victor Y. Fujimoto et al., *Proceedings from the Conference of Reproductive Problems in Women of Color*, 94 FERTILITY & STERILITY, June 2010, at 7, 7.
70. See ROBERTS, *supra* note 33, at 253-54.
71. PRESIDENT’S COUNCIL ON BIOETHICS, REPRODUCTION & RESPONSIBILITY 14 (2004), available at https://repository.library.georgetown.edu/bitstream/handle/10822/559381/_pcbe_final_reproduction_and_responsibility.pdf?sequence=1.

There are multiple ways in which state regulation of the fertility industry can impact the reproductive lives of people living with medical or social infertility.⁷² The state might restrict the types of technologies that can be used or the populations that may use them.⁷³ It may also refuse financial assistance to those for whom cost is prohibitive to access.⁷⁴ Given the possibility of restrictions on access to assisted reproduction, this Part explores the standards by which to evaluate the appropriateness of such regulation, posits that a justice framework is the best way to understand the potential problems with procreative regulation, and asserts that the procreative right is both a positive and negative one.

A. Reproductive Justice

Reproductive justice (“RJ”) refers to a movement built on activism that seeks the end of reproductive oppression.⁷⁵ RJ grows from an impressive history of women of color organizing within and outside of their communities for fair and equal consideration of their right to reproduction.⁷⁶ From its moment of creation,⁷⁷ RJ “called for recognition of the limitations of emphasizing choice, which had largely come to mean the choice to have an abortion.”⁷⁸ To distinguish it from mainstream reproductive rights activism, RJ encompassed the right to not have a child as well as the right to have a child and the right to parent any child one has.⁷⁹

The RJ movement comes from a bottom-up approach because its roots are in communities that experience disenfranchisement, but “RJ’s relevance goes beyond marginalized populations because examining the reproductive disciplining some groups experience also highlights the reproductive privileging of others.”⁸⁰ Thus, RJ seeks to highlight and dismantle reproductive hierarchies that lead to disparate impacts of reproductive oppression on different communities.

72. Social infertility refers to individuals who are not medically infertile, but for whom coital reproduction is not desired or not possible for other reasons, for instance when one’s partner is of the same sex.

73. NELSON, *supra* note 2, at 238.

74. *Id.*

75. SISTERSONG, *supra* note 19.

76. See generally JENNIFER NELSON, WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT (2003) (a history of successful organizing by women of color on issues related to abortion access, coerced sterilization, and others).

77. For a fascinating history of reproductive justice organizing by women of color, see JAEL SILLIMAN ET AL., UNDIVIDED RIGHTS: WOMEN OF COLOR ORGANIZING FOR REPRODUCTIVE JUSTICE (2004).

78. Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 ANN. REV. L. & SOC. SCI. 327, 328 (2013).

79. *Id.*

80. *Id.*

The language of RJ has proliferated in activist circles and has also made significant inroads into academic literature.⁸¹ However, RJ as a form of academic inquiry has not always been in sync with RJ as a movement. The disconnect occurs because scholars may use the term RJ without putting into practice the beliefs that are the backbone of the RJ movement, including two of its central tenets: a commitment to intersectionality,⁸² and a belief that there are both positive and negative aspects of the right to procreate.⁸³ This article roots itself within an RJ framework with due regard for the belief that the important movement-sustaining nature of RJ should not be diluted by attempts to make RJ language fit neatly into a scholarly paradigm.

To that end, use of the term RJ in this article carries specific meanings. First, it means an explicit acknowledgement that rights, both positive and negative, are necessary but not sufficient in a pursuit of justice. While this article ultimately concludes that a constitutional right is at stake in the context of regulating assisted reproduction, the author does not draw that conclusion without regard for other relevant public policy concerns beyond who has rights and to what. Second, the discussion in this article is committed to understanding the ways in which overlapping identities impact what it means to be a rights holder and who gets to exercise certain rights. Finally, the article uses RJ to mark a distinction from accounts of assisted reproduction and the law that refer only to autonomy or equality without considering connections between the two.

As embodied by the RJ movement, justice in the context of reproduction is about both autonomy and equality in a basic Rawlsian sense.⁸⁴ This means simply that the foundation of justice is found both in freedom and equal access. When it comes to assisted reproduction, a just system of regulation should acknowledge the distinctly important nature of a procreative right rooted in a belief in individual control over a fundamental aspect of one's humanity. Simultaneously, the RJ intervention makes clear that the role of the state is not just to acknowledge the right but also to consider how to ameliorate or eliminate social constraints (such as those caused by poverty) on the exercise of the right. Further, the state must consider how the exercise of the right by some might be to the detriment of others. The pursuit of justice ultimately requires both respect for autonomy and attention to equality.

81. *See id.* at 330. (“Reproductive Justice, like reproductive rights before it, has rapidly attained widespread currency.”).

82. *See generally* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (elaborating on the concept of intersectionality).

83. Luna & Luker, *supra* note 78, at 328.

84. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (2d ed. 1999).

B. Autonomy

The theoretical debate about autonomy has raged for too long and in too many realms to make revisiting all of its permutations plausible here. However, it is useful to contextualize some of the critiques of autonomy in order to be clear about the kind of autonomy an RJ framework supports. This section returns to John Robertson's work as emblematic of the choice/autonomy frame and uses critiques of that work to offer a better way to conceptualize autonomy as a component of reproductive justice.

In his book, *Children of Choice*, and other texts, John Robertson makes a case for a negative right to reproductive liberty, which he defines as "the freedom either to have children or to avoid having them."⁸⁵ His negative right hinges on his assertion that "[p]rocreative 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."⁸⁶ In the context of assisted procreation, Robertson argues that the legal right to noncoital reproduction flows from the right to coital reproduction "[b]ecause the values and interests that undergird the right of coital reproduction clearly exist with the coitally infertile"⁸⁷ While the right, as Robertson articulates it, "is clearest with noncoital techniques that employ the [married opposite sex couple's] egg and sperm," he would also extend it to single people, the unmarried, and same-sex couples.⁸⁸ Thus, where a state interfered with an individual right to use assisted reproduction, a court should find those efforts constitutionally infirm unless they met the most exacting standard of fundamental rights inquiry.

Academic literature, particularly feminist literature, frequently critiques autonomy as a foundational principle upon which a right to procreate is grounded. As two feminist scholars explain, "autonomy is now generally regarded by feminist theorists with suspicion."⁸⁹ The feminist concerns about autonomy are that it is "inextricably bound up with masculine character ideals, with assumptions about selfhood and agency that are metaphysically, epistemologically, and ethically problematic from a feminist perspective, and with political traditions that historically have been hostile to women's interests and freedom."⁹⁰ At its root, autonomy in its unreconstructed form "is fundamentally individualistic and rationalistic"⁹¹ and belies the reality of

85. ROBERTSON, *supra* note 2, at 22.

86. *Id.* at 24.

87. *Id.* at 39.

88. *Id.*; see also John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J.L. & MED. 7, 31-34 (2004).

89. Catriona Mackenzie & Natalie Stoljar, *Introduction* to RELATIONAL AUTONOMY 3, 3 (Catriona Mackenzie & Natalie Stoljar eds., 2000).

90. *Id.*

91. *Id.*

reproductive experiences, which are frequently shared and are often not a product of considered and rational decision making.

Unreconstructed reproductive autonomy posits a world in which a range of reproductive decisions are made in isolation, which is far from the way in which decision making usually takes place in lived experiences. To combat this rigid notion of autonomy, some feminist scholars have embraced the idea of relational autonomy, which refers not to a single conception of autonomy, but to a range of perspectives that are “premised on a shared conviction . . . that persons are socially embedded” so that their identities as reproductive agents “are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender, and ethnicity.”⁹²

Rather than embrace relational autonomy, other feminist scholars of reproduction, like Emily Jackson, urge that we not throw out the theoretical baby with the theoretical bathwater in our haste to reject liberal theory’s constrained notion of reproductive autonomy.⁹³ Jackson argues that recognizing the complexity of the social networks within which women make decisions about reproduction does not countenance complete rejection of autonomy, but only its reconfiguration.⁹⁴ Ultimately, she agrees with other autonomy critics that freedom of choice, standing alone, guarantees nothing, so that “[a] commitment to autonomy may therefore emerge precisely from the recognition that many people’s capacity to lead a self-authored life is profoundly limited.”⁹⁵

The critique of autonomy as an organizing principle has not been limited to feminist scholars. Thomas Murray argues that the procreative liberty/autonomy frame cannot adequately capture what he argues is the foundational ethic of using reproductive technology: “the moral significance of the relationship between parents and children, the values at the heart of that relationship, and the ways in which people flourish, or shrivel—physically, emotionally, and morally.”⁹⁶ Murray takes John Robertson and other proponents of procreative liberty to task for their failure to take seriously the interests of children created using reproductive technology and procreative liberty’s failure to “acknowledge values at the heart of family life”⁹⁷ He explains:

Control and choice—the values at the heart of procreative liberty—are not entirely out of place in the relationship between parents and children. But they are hardly the entire story, or even the most

92. *Id.* at 4.

93. JACKSON, *supra* note 11, at 3.

94. She explains that criticism about how autonomy has been used and defined “should not lead us to jettison the whole concept of autonomy. Rather we should perhaps think about how we might reconfigure autonomy in a way that is not predicated upon the isolation of the self-directed and self-sufficient subject.” *Id.*

95. *Id.* at 5.

96. Thomas H. Murray, *What are Families For? Getting to an Ethics of Reproductive Technology*, 32 HASTINGS CTR. REP., May-June 2002, at 41, 41.

97. *Id.* at 42.

important themes, and excesses of control and choice can distort and destroy what is most precious in families.⁹⁸

Murray calls for an understanding of any right to access reproductive technology to be filtered through “the central relationships in our lives and the significance of those relationships for our flourishing,” rather than “by focusing exclusively on the liberty of autonomous adults.”⁹⁹

From both sides, autonomy as used in a rigid sense is a failed framework that should be moderated by other concerns in order to function properly in conversations about reproduction and proper regulation. Therefore, Robertson’s negative liberty is too shortsighted in its suggestion that the only issues at stake when thinking about law and assisted reproduction are liberty and autonomy. Robertson acknowledges this somewhat when he refers to critics of the individual rights-based approach, noting that “[r]eproduction is never exclusively a private matter and cannot be completely accounted for in the language of individual rights. Emphasizing procreative rights thus risks denying the central, social dimensions of reproduction.”¹⁰⁰ But where rights “necessarily deemphasize[] the effects of [reproductive] technologies on prenatal life, offspring, handicapped children, the family, women, and collaborators,”¹⁰¹ a justice paradigm, especially the reproductive justice paradigm as articulated by activists and increasingly by scholars, takes greater account of and, indeed, centers some of the concerns that get relegated to the fringe of the rights discourse.

Justice enables a partial reconciliation of the multiple critiques of autonomy as the foundational way of understanding access to reproductive technology. This is so because reproductive justice speaks to an ethic of familial care and responsibility in a way that is hyper-conscious of how those terms have been used to stigmatize and marginalize non-mainstream families. It does more than simply acknowledge the importance of lived experience to understanding autonomy; it is steeped in the realities of intersectional experience. Reproductive justice imagines positive state responsibilities related to both protecting reproductive decision-making and providing robust spaces in which people can make reproductive decisions with assurances of necessary governmental support for those choices.

Robertson concludes that “the need for social justice is not a compelling reason for limiting the procreative choice of those who can pay.”¹⁰² To the extent that his point is that no one should be denied access to ART because others cannot afford the services, his point is well taken, but it is no answer to the

98. *Id.*

99. *Id.* at 44.

100. ROBERTSON, *supra* note 2, at 223.

101. *Id.*

102. *Id.* at 227.

overarching question of whether there is a better way to think about access to procreation than the rights-based regime that he espouses. Robertson's way of discussing these issues leads to the conclusion that rights are a necessary, but not sufficient, basis for considering issues of justice, but he does not theorize beyond rights. Further, he claims, "[a]lthough procreative liberty gives little protection from family or internal pressures to procreate or from lack of resources, it does prevent arbitrary, moralistic, or speculative governmental impositions on a woman's procreative choice."¹⁰³ Again, this claim simply cannot stand given the nation's long history of reproductive regulation that is arguably arbitrary, moralistic, and speculative as exercised against poor women, women of color, women living with disabilities, and others.

Ultimately, the procreative liberty frame is wanting, especially to the extent that it centers on so-called "responsible use."¹⁰⁴ Arguments from this frame too often find roots in the interests and desires of straight, white, (often married) couples. This is potentially dangerous and limiting as it asks people to ape a certain mode of procreation and family formation in order to find constitutional protection for the ways in which they seek to satisfy desires and interests. Further, this rooting in majority experiences and narratives of responsibility focuses protection on what is considered most "natural," which is also a limiting principle. Done correctly, RJ provides space to move beyond these limitations and imagine a mode of regulation that derives from a need to protect those who are disenfranchised and to take full account of the complicated legal landscape of reproduction. Therefore, as used in this article, justice-supported autonomy allows individuals access to choices so that they can become entangled and create interdependence and relationships of dependence, for this is fundamentally what family formation is about.

C. Equality

Frequently accompanying arguments rooted in autonomy are arguments based on notions of equality. An equality principle requires reconsidering how the state should distribute and protect a right across categories, including categories of profound difference. Specifically writing about access to reproductive technology and state interests in regulating such access, Radhika Rao has focused on equality, rather than autonomy, as the guiding principle for regulation.¹⁰⁵ Rao fears that liberty has "no logical stopping point" as a basis for regulating ART and thus rejects it.¹⁰⁶ Instead, she urges:

[T]here may be a limited right to use ARTs as a matter of

103. *Id.* at 231.

104. *Id.* at 234.

105. Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1460 (2008).

106. *Id.*

reproductive *equality*. Accordingly, the government could prohibit use of a particular reproductive technology across the board for everyone; however, once the state permits use in some contexts, it should not be able to forbid use of the same technology in other contexts. Hence, all persons must possess an *equal* right, even if no one retains an *absolute* right, to use ARTs.¹⁰⁷

Rao's account is appealing for its perceived virtue—it does not exclude the state from regulating ARTs. Furthermore, according to Rao, it is less value-laden “because it does not call upon courts to make controversial choices as to which acts are worthy of constitutional protection[,]” and rests on the view that “courts should play the important role of representation-reinforcement and intervene only when the political process fails to represent citizens adequately.”¹⁰⁸

This article rejects Rao's broad claim that a fundamental right to procreate through assisted reproduction blocks the state from regulating ARTs. Perhaps the simplest and most relevant refutation of this claim is the state's regulation of parenting and parenthood, which is the regulation of a fundamental right. In *Prince v. Massachusetts*, even as the Court articulated a fundamental right to the care, custody, and control of one's child, it also stressed that “the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. And neither rights of religion nor rights of parenthood are beyond limitation.”¹⁰⁹ For instance, parents are obligated to educate their children,¹¹⁰ and must provide them with adequate medical care.¹¹¹ The state may mete out rights to custody and visitation with one's children, and decide who is a legal parent in the first instance in spite of or in direct contradiction of genetics.¹¹² The state can even strip a legal parent of any rights related to a child through proceedings to terminate parental rights.¹¹³

Access to assisted reproduction as a fundamental right merely sets the bar for how regulation can proceed, rather than insulating it from the realm of regulation; the state's interest must be compelling and its means narrowly

107. *Id.*

108. *Id.* at 1461.

109. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citations omitted).

110. About half of the states include educational neglect in their child abuse and neglect statutes. CHILD WELFARE INFO. GATEWAY, DEFINITIONS OF CHILD ABUSE AND NEGLECT 3 (2011), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/define.pdf (twenty-four states and the District of Columbia consider failure to education to be a type of child neglect).

111. *See id.* (“Neglect is frequently defined as the failure of a parent or other person with responsibility for the child to provide needed food, clothing, shelter, medical care, or supervision to the degree that the child's health, safety, and well-being are threatened with harm.”).

112. *See, e.g.*, WASH. REV. CODE ANN. § 26.26.051 (West 2011).

113. *See* CHILD WELFARE INFO. GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS (2013), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.pdf.

tailored. That the state has compelling interests in procreative choices is perhaps debatable, but it appears to be constitutionally sound given the significant regulation of abortion as one example of the strength of the state's interest in pregnancy from the moment of conception.¹¹⁴ The question for most regulation would not be the intensity of the state's interest, but the propriety of the means chosen to regulate. Shifting the question to the regulatory means might in many cases lead to outcomes that mirror those which Rao seeks through her equality paradigm, without undermining the right itself.

There is also little merit in Rao's claim that her approach is less value-laden. By drawing a line between coital reproduction and non-coital reproduction, her approach connotes a value judgment. The equality that she posits is actually no equality at all in that it relegates some to a life potentially without a fundamental right to procreate while preserving that right for others. Her position thus demarcates a distinction between that which is "natural" (coital reproduction) and therefore worthy of protection, and that which is "unnatural" (non-coital reproduction) and unworthy of protection. Such a distinction mimics arguments that reject assisted reproduction for a host of moral and ethical reasons that should not be the basis for lawmaking and constitutional inquiry.

In the end, though, the most disturbing element of Rao's account and its ultimate failure is that it does not take seriously the meaning of a right to procreate. First, her argument rests upon an assumption that there is some principled line to be drawn between those who must or choose to procreate with the assistance of technology and those who do not. Using a narrow notion of fundamental liberty that encompasses only those rights rooted in the nation's history and traditions,¹¹⁵ Rao concludes that assisted reproduction obviously does not fall into this category.¹¹⁶ This type of argument, of course, is the refuge of those who would see the Constitution stand still rather than grow with the nation that it governs. It is, in fact, reminiscent of arguments in marriage equality cases in which courts use equality rationales to reach positive results, while refusing to acknowledge that the right to marry for those with same-sex partners deserves the same fundamental right designation as the right to marry for those with opposite-sex partners.¹¹⁷ The implication that same-sex couples should have access to marriage not because of its intrinsic value to them, but only because it has already been given to opposite-sex couples smacks of inequality even while

114. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992) ("To promote the State's profound interest in potential life, *throughout pregnancy* the State may take measures to ensure that the woman's choice is informed" (emphasis added)).

115. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 593 (2003) (Scalia, J. dissenting).

116. Rao, *supra* note 105, at 1462.

117. The California Supreme Court is among the few in the United States that has not only declared that classifications based on sexual orientation are subject to strict scrutiny, but also that marriage is a fundamental right for same-sex couples under the state constitution. *See In re Marriage Cases*, 43 Cal. 4th 757 (2008).

courts make decisions that create a measure of legal parity. To do as Rao suggests would work the same injustice through equality in the context of assisted reproduction.

As Rao acknowledges, a constitutional regime that utterly fails to expand with the rise of technology (think for instance of a world in which free speech protections did not extend to the internet) would be a stunted regime indeed.¹¹⁸ Rao proceeds to argue, though, that the Constitution's protection of reproductive autonomy is critically tied up with concerns about "bodily integrity and inequality."¹¹⁹ She argues that cases about abortion and contraception "do not confer a broader constitutional right not to have children, let alone a right to create a child or even to genetically select a particular child with the assistance of technology."¹²⁰ It is difficult to imagine that a jurisprudence in which Justices have made so many sweeping declarations about the importance of the ability to exercise control over the conditions in which a woman becomes pregnant and bears a child, is a jurisprudence that does not, in fact, confer a broad constitutional right to have children. Perhaps not an absolute right, but absolutely a broad one.

The language that the Court has used to talk about the fundamental right to privacy in the context of family life is far more expansive than Rao suggests. Consequently, it is an unnecessarily narrow construction of the Court's jurisprudence to hone in on cases about abortion and contraception. A full understanding of the Court's protection of families and family formation includes a wide range of issues such as access to parenting for unwed fathers¹²¹ and the right of parents to educate children,¹²² in addition to the cases about contraception and abortion. As the Court wrote in *Meyer v. Nebraska*:

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right . . . to marry, establish a home and bring up children¹²³

The Court's decision was not essentially about bodily integrity or inequality; rather, it was grounded in a fundamental liberty interest.¹²⁴ Even in

118. See Rao, *supra* note 105, at 1462-63.

119. *Id.* at 1464.

120. *Id.*

121. See, e.g., *Lehr v. Robertson*, 463 U.S. 248 (1983) (finding no violation of rights of unwed father whose daughter was adopted without notice to him in the absence of a pre-existing relationship).

122. See e.g., *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (striking down a statute that made attendance at public schools compulsory for children).

123. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (striking down a state statute that forbid the teaching of foreign languages to children before they completed eighth grade).

124. See *id.*

cases that do focus on inequality, the Court has used sweeping language to consider the rights at stake in decisions about procreation. For instance, in *Eisenstadt v. Baird*, Justice Brennan famously wrote: “If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a persons as the decision whether to bear or beget a child.”¹²⁵

In some ways, placing the ability to deny access to fertility treatment in the hands of the state is akin to giving the state the ability to sterilize. If an individual or couple cannot procreate without the assistance of technology, that individual or couple has effectively been forbidden from the experience of creating a child. While there would be no bodily invasion involved, the end result—incapacitating a person from procreation—would be the same. We can again look to *Skinner v. Oklahoma* for a reminder of the negative consequences that can ensue when a government denies access to procreation through whatever means.¹²⁶ As the Court wrote in that case:

The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.¹²⁷

Thus, in the first instance, Rao is incorrect about the nature of the fundamental right to coital reproduction. If she is incorrect on this point, then her shift to a belief that this broad right to procreate is too narrow to encompass a right to procreate with the assistance of technology should also fail.

Even if Rao is correct that several of the cases involving abortion, contraception, and parenting can be reconsidered from the perspective of equality “because they all involved selective or unequal deprivations of fundamental liberties,” the cases themselves were not decided on that basis.¹²⁸ Instead, the Justices deliberately chose to focus on the fundamental nature of the right involved, using expansive language to understand that right and its privacy implications. It is an unassailable proposition that the choice of the circumstances under which to get pregnant is private, albeit with some public consequences. However, the Court has not seen fit to deny the fundamental nature of the right in deference to the interest of the state.

Further, if Rao is right that equality is the proper lens through which to view assisted reproduction, it is unclear why that lens should not also be turned on coital reproduction. Indeed, her reading of foundational cases, especially

125. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis added) (declaring a law limiting access to contraception for single persons to be unconstitutional).

126. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (invalidating statute that allowed involuntarily sterilization of some convicted felons).

127. *Id.* at 541.

128. Rao, *supra* note 105, at 1466.

Skinner, could lead to the conclusion that the issue was not the fundamental nature of a right to procreate, but only the deplorable discrimination in how that right was being conferred on some and not others. If that is the case, then perhaps the state could constitutionally play a much more aggressive role in regulating access to coital reproduction for many if not all of the same reasons to which Rao points for the regulation of non-coital reproduction. Therefore, from this perspective, Rao's equal liberty lens fails to do justice to the foundational and fundamental nature of a right to procreate whether coitally or non-coitally.

This author agrees with Rao's conclusion that a state could not constitutionally forbid access to ART based on invidious forms of discrimination. However, the underlying principle there has nothing to do with reproductive equality, though Rao argues this as the basis for the unconstitutionality. In fact, the response to such a division would not need to be about reproduction at all, but instead is solely about drawing lines that unfairly exclude some from rights available to others in the community. That the line is drawn in the context of reproduction is irrelevant. It is only by considering the right itself as fundamental that we are able to consider the nature of reproduction and its relationship to full citizenship. In so doing, we ensure equal distribution of that right. Thus, while Rao's piece is ostensibly about reproduction, the term reproductive equality is really unnecessary to her analysis of why the government should regulate in an even-handed way in whatever realm it chooses to regulate.

The failings of Rao's use of equality as the guiding principle become clear as she explains the lines that demarcate procreative rights. For instance, she argues that the principle of reproductive equality is "bounded by the contours of the woman's body" so that embryos outside of the body could be deemed "viable" and therefore subject to all manner of intrusive state interference. According to Rao, states could regulate the number of embryos that could be transferred to a woman's uterus in a given cycle of IVF,¹²⁹ ban the use of pre-implantation diagnosis to determine whether a future child would have a disease or disability,¹³⁰ allow access to ARTs only for those who are medically infertile,¹³¹ or ban the use of IVF altogether. Each of these regulatory choices, which Rao finds to be constitutionally sound under her equality approach, are deeply problematic if one takes seriously the idea that there is a fundamental right to procreate.¹³²

The limits of the line that Rao draws at the body are stark. Under Rao's

129. *Id.* at 1479.

130. *Id.* at 1481-82.

131. *See id.* at 1477. Rao does not use the term medically infertile but the context in which she makes this argument refers to those who resort to the use of ART because they are physically incapable of achieving pregnancy, medically infertile, versus those who are socially infertile, including same-sex couples and single women.

132. *See id.* at 1479.

equality regime, a woman could be placed in a position of either choosing not to procreate at all because of a personally unacceptable risk of transmitting disease or risking a pregnancy which she would later abort, thus subjecting herself to whatever physical or psychological consequences that may result from that choice. A law that made ARTs available only to the medically infertile would similarly have the impact of excluding those who use assisted reproduction for the purpose of discovering risks of disease in an embryo before pregnancy, as well as excluding people in same-sex couples or those who are single, from the pool of those given access to assisted tools of reproduction. In this case, Rao would presumably find legitimate the state's concern about the future welfare of the never-conceived child.¹³³

There is, as suggested earlier in this section, a place for equality concerns in the context of assisted reproduction. But to create a bifurcated and hierarchical system in which those who can reproduce coitally have access to a significantly more constitutionally robust right to do so than those who use assisted reproduction is to continue to build reproductive hierarchies and enshrine them in law. To the extent that states want to build such hierarchies, their efforts should at least be subject to stringent standards of constitutional scrutiny.

Ultimately, Rao's account of formal equality without regard for structural mechanisms that impede access and choice in the context of assisted reproduction is a bankrupt concept. Under the equality rubric, the right to procreate is about inclusion in a community rather than exclusion or marginalization. To the extent that individuals and the society in which they live value procreation and parenting, creating divisions in procreative access based on whether one must use technology to create a family of choice is a deep denial of a thing that is precious and, for many, defining.

The reproductive justice position offered in this article is not a compromise or middle point between autonomy and equality. Rather, it sits above both autonomy and equality by marrying the virtues of each and ameliorating their flaws. The distinction between justice and rights in this context is not mere semantics. On the question of rights and non-coital reproduction, John Robertson has written: "The lens of procreative liberty is essential because reproductive technologies are necessarily bound up with procreative choice."¹³⁴ Thus, the rights perspective focuses on the idea of choice and rights as removing barriers to largely unfettered choice. Reproductive justice, in contrast, cares about choice while simultaneously caring deeply about community, intersectionality, and equality.¹³⁵ Just as justice works to incorporate a reconstituted notion of

133. For a thorough rejection of the idea that states can legitimately use concerns about future children to regulate reproduction, see I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423 (2011).

134. ROBERTSON, *supra* note 2, at 4.

135. For a deeper discussion of the connection between reproductive justice and non-coital reproduction, see Mutcherson, *supra* note 18.

autonomy, so too does it incorporate a re-worked notion of equality. It rejects formal equality that ignores lived experiences, and embraces an equality that takes account of the ways in which rights as trumps are unevenly distributed, thus undermining attempts to create equality. Justice, ultimately, seeks the best of autonomy and equality.

III. A BIFURCATED RIGHT TO PROCREATE

“As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”¹³⁶

This section brings together the preceding arguments about the importance of procreation qua procreation, its relationship to other fundamental rights, and the need to consider both equality and autonomy in a quest for justice. If procreation is not just sex, and not just parenting, and not just pregnancy, then understanding its role in the constitutional scheme demands consideration of procreation in isolation and procreation as a right intertwined with other rights, especially a right to parent. In other words, procreation and the content of how the law regulates it might at times be a function of a both/and analysis and may at other times be an either/or analysis.¹³⁷

As described previously, modern procreation can involve multiple parties and techniques. One way to unbundle some of the bundled procreative rights is by reference to the purpose of the procreative act. For various reasons explained in greater detail in the sections that follow, a procreative right designed to end in a parenting role for those who initiated the act warrants a high level of deference because procreation has value as means of creating families. However, when a person participates in procreation for profit or solely for personal satisfaction with no intent to parent, the level of legal deference to that decision need not be as substantial—though neither should it be negligible.

136. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (declaring a law criminalizing same-sex sodomy unconstitutional).

137. For instance, imagine a circumstance in which a state legislature passed a law requiring that people seek permission from a regulatory body before having procreative sex. Failure to seek such permission could result in fines or other penalties or, in the extreme case, lead to a future child being removed from the violating parents' care at birth. A sweeping statute of this nature would implicate procreation, sex, and parenting. Thus, the constitutional regimes that govern all of those topics would be relevant. Imagine another case in which the same state passed a statute which required that any person seeking access to assisted reproduction subject herself to a battery of genetic tests to ensure the absence of genetic anomalies. In the lawsuit challenging this new rule, the court would not have the luxury of using the parenting, pregnancy, or sex regimes to determine the constitutionality of the act. Instead, it would be necessary to focus on the right to procreate as an isolated interest. Thus, as this paper proceeds, it will consider the right to procreate both as a right that is at times constituted by other rights and the right to procreate as it stands on its own.

A. Coital and Non-Coital Reproduction as Fundamental Rights

Previous parts of this article described critical interests that support an expansive right to procreate. The remaining parts turn to the task of articulating the contours of the right for which this author has argued.

The right to procreate in American legal history begins with a case about forced sterilization. In 1927, in the midst of a border-crossing eugenics movement,¹³⁸ the United States Supreme Court issued one of its most shameful decisions in *Buck v. Bell*.¹³⁹ Carrie Buck was a young woman who became pregnant out of wedlock and was forced into a home for the mentally ill as a result of that pregnancy.¹⁴⁰ Though the precise facts surrounding Ms. Buck's appearance in the state-run mental hospital do not appear in the case, historical records indicate that her pregnancy resulted from a sexual assault for which the perpetrator received no punishment, while Ms. Buck was institutionalized.¹⁴¹ The institution's administrators later sought to have her permanently sterilized without her consent based on an erroneous belief that Ms. Buck and the daughter to whom she gave birth were mentally ill or developmentally disabled.¹⁴² Famously, in that case, the Court upheld statutes allowing eugenic sterilizations and wrote, "[t]hree generations of imbeciles are enough"¹⁴³—a reference to Carrie Buck, her daughter, and Carrie's mother.

Buck highlights the reality, already discussed in earlier sections of this article, that reproduction by some, in this case those living with mental disabilities, was devalued by the state and actively and aggressively discouraged. By contrast, in *Skinner v. Oklahoma*, decided in 1942, the Court struck down an Oklahoma statute that allowed for the forced sterilization of habitual criminals guilty of certain categories of crimes. The Court declared that marriage and procreation are fundamental rights.¹⁴⁴ Since *Skinner*, courts have continually reiterated the fundamental nature of the right to coital reproduction.¹⁴⁵

Given the time frame of the Court's decisions, it is fair to surmise that in its earliest incarnation the fundamental right to procreate was about, at least, three intertwined ideas: a right to have heterosexual intercourse (perhaps limited to having such intercourse within the confines of a marital relationship), a right to initiate a pregnancy by virtue of an act of heterosexual intercourse, and a right to

138. The worldwide history of eugenics has been well documented and many states, including Virginia and California, had an extensive history of subjecting disfavored groups to unconsented sterilizations. See LOMBARDO, *supra* note 41, at 200, 264, 288.

139. See generally *Buck v. Bell*, 274 U.S. 200 (1927) (upholding Virginia statute allowing involuntary sterilization of institutionalized mentally disabled persons).

140. See LOMBARDO, *supra* note 41, at 103.

141. *Id.* at 139-141.

142. See *id.* at 108.

143. *Buck*, 274 U.S. at 207.

144. *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535, 541 (1942).

145. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

bring that pregnancy to term. In a pre-ART world, procreation was fundamentally (perhaps irrevocably) linked to sexual activity. Therefore, controlling procreation necessitated exercising control over sexual conduct, which required that the state either prevent people from having heterosexual sex or sterilize them so that their sexual activity could not result in a pregnancy as was done to Carrie Buck. For obvious reasons, this level of interference with procreative choice requires substantial faith in the good will of the state and a willingness to extend state surveillance of private choices into realms that have been considered, if not sacrosanct, at least strongly protected from state interference.

But the element of surveillance or control of sexual activity does not tell the whole story of coital reproduction as a fundamental freedom and it certainly would not be a sufficient foundation for protection of non-coital reproduction, which by its nature does not demand the same type of intrusion that is inherent in attempts to interfere with coital reproduction. As argued previously, it is proper to consider the right to procreate, coitally or non-coitally, as a constituent part of what it means to be a person worthy of respect because exercising some measure of control over when, how, and with whom one procreates is a thing of great personal import that rivals other equally intimate personal choices, including marriage and sexual relationships.¹⁴⁶

The focus of the arguments in this section is on fundamental rights claims based on the Due Process Clause of the Fourteenth Amendment rather than those based on equal protection. The fundamental rights regime is most congruent with the idea of reproductive justice described in this article, but resorting to this regime has its risks. An obvious potential pitfall of the fundamental rights claim is that if one ascribes to the narrow vision of fundamental rights analysis articulated by some members of the Supreme Court,¹⁴⁷ notably Justice Scalia,¹⁴⁸ then it is difficult, if not impossible, to make the claim that access to ART is rooted in the nation's history and traditions.¹⁴⁹ One could imagine a situation in which, just as marriage is a fundamental right for those wishing to marry a single person of the opposite sex, but not for one wishing to marry a member of the same sex, the right to procreate might be construed as belonging only to those who wish to procreate within the parameters of coital reproduction.

The claims articulated in this article rest on a belief in the primacy of the

146. See Jackson, *supra* note 11, at 323. ("Just as the capacity to exercise and explore one's sexuality with other consenting adults may be a necessary constituent element of a fulfilling existence, so I would argue that having one's reproductive choices taken seriously and treated with respect may be similarly integral to a satisfying and self-authored life.")

147. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) (finding a right to engage in same-sex sodomy is not "deeply rooted in this Nation's history and tradition.").

148. See, e.g., *Lawrence v. Texas*, 539 U.S. at 593 (Scalia, J., dissenting) (noting the precedent holding fundamental rights to be those "deeply rooted in this Nation's history and tradition.").

149. See *Bowers*, 478 U.S. at 194.

Court's more modern fundamental rights jurisprudence, especially post-*Lawrence v. Texas*, which opens a much wider door for understanding how access to ART might be a logical and acceptable interpretation of the fundamental right to procreate. As Justice Kennedy wrote in *Lawrence*, quoting himself: "[H]istory and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry."¹⁵⁰ For purposes of the fundamental rights analysis pertaining to assisted reproduction, one can reach the conclusion that such a right warrants protection by focusing not on the narrow claim of whether such a specific right exists in the nation's history, which it does not,¹⁵¹ but whether the broader right to procreate has received such protection. Undoubtedly, that broader right is of constitutional magnitude.¹⁵²

Therefore, the realm of liberty and privacy related to procreation can expand to encompass the realities of high-tech babymaking because not to do so requires a deeply circumscribed understanding of what the right encompasses in the first instance. It is quite obvious that the fertility industry creates complications in this task not present in coital reproduction, but which demand care and thought. To respond to at least some of these complications may require that we come to understand the right to procreate not as one singular right, but as a bundle of rights not all of which may merit the same level of care and protection.

B. Splitting the Baby: Two Tiers of Procreative Rights

If we can imagine the fundamental right to procreate as being tiered, the top tier (Tier I) encompasses coital reproduction and the use of ART by an intended parent(s) to create a child or children whom they plan to raise and include as a part of their family. The second tier of procreative rights (Tier II) encompasses those who wish to procreate for profit or to procreate as a means of providing an opportunity for others to have a child whom others will parent. The meaning attached to each tier is described in greater detail below.

1. Tier I—Procreation & Parenting: Protecting Individual Interests as Pre-parents & as Possessors of Inheritable Genes

This tier rests on the idea that a fundamental right to procreate is strongly associated with a desire and interest in parenting, which, as described earlier, is also at the root of legal protection for coital reproduction. As Bonnie Steinbock explains, "[p]rocreation is an important interest of individuals primarily because

150. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring).

151. The world's first so-called test tube baby, Louise Brown, was born in England in 1978. *The World's First Test Tube Baby*, PBS.ORG, <http://www.pbs.org/wgbh/americanexperience/features/general-article/babies-worlds-first/> (last visited Nov. 7, 2014).

152. *See supra* notes 50-54 and accompanying text.

it is the usual way of establishing a family, of creating children that one will rear. . . . [E]ven genetic connection has significance only within the context of establishing a family.”¹⁵³ Falling into this first protective category are those ART users who combine a desire to procreate with a desire to parent, two separate but intertwining and reinforcing interests as described earlier in this article. Within this group, the individual or couple that actively initiates attempts to create a pregnancy either through coital reproduction or assisted reproduction has a substantial and fundamental interest in creating that pregnancy.

To reproduce and create biological progeny is a profound experience for many. Countless people describe procreating, even before they begin to parent, as one of the most affirming and life-changing events they have experienced.¹⁵⁴ Coupling this desire to create and carry a pregnancy with an intention to parent and the actual experience of parenting compounds the stature of the procreative decision. Tier I procreative rights involving ART should be no different than the most heavily protected rights accorded to those who reproduce coitally under conditions of consent and intention because the procreative experiences are identical in origins and desires.

Unlike in coital reproduction where almost half of pregnancies that occur in a given year in the United States are unplanned,¹⁵⁵ pregnancies created with assisted reproduction are pregnancies of intention. The intentionality of assisted reproduction does not, standing alone, create a right, but it suggests that where such a right exists for some, it should not be withheld from others who pursue it with equal, if not greater, care and forethought. This is not to say that every decision to procreate with assisted reproduction is a worthy decision, but those decisions are not the product of accidents or whims.

In a constitutional sense, this means that attempts to regulate procreative choices within Tier I must satisfy the most exacting level of constitutional scrutiny. The state will thus bear the burden of establishing that regulatory interference is proper. In a social sense, this means that we should treat intentional acts of procreation with similar respect and deference while appreciating that these decisions have a moral dimension and potential public impact.

The level of deference to procreative decision making for which this article

153. Bonnie Steinbock, *Reproductive Rights and Responsibilities*, 24 HASTINGS CTR. REP., May-June 1994, at 15, 15-16.

154. One need only make a quick trip to a local bookstore to see the overwhelming shelves of books dedicated to extolling the virtues of parenting. In particular, memoirs of infertility treatment, pregnancy, and birth are a poignant reminder of how salient these processes are for many people, especially women. A terrific example of this is Peggy Orenstein’s book, *Waiting for Daisy* (2007), which she subtitled, *A Tale of Two Continents, Three Religions, Five Fertility Doctors, An Oscar, An Atomic Bomb, A Romantic Night, and One Woman’s Quest to Become a Mother*.

155. GUTTMACHER INST., FACT SHEET: UNINTENDED PREGNANCY IN THE UNITED STATES 1 (2013), available at <http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.html>.

argues is deliberately very strong. This is because to dismiss or overlook the power of procreation and parenting as a defining life experience for many people is simply wrong. No doubt, there are many individuals for whom procreating is not a profound experience. As noted earlier in this article, sexual pleasure without the intent to create a pregnancy is to be prized as an integral part of the human experience. There are many individuals who have no desire to procreate and who avoid the experience, as evidenced by brisk sales in the tools of pregnancy prevention.¹⁵⁶ There are others who have a desire to parent, but who do not feel strongly drawn to the act of procreating or propagating their own genes. However, our inquiry into why procreation matters should not start or end with those for whom it does not matter.¹⁵⁷ Rather, to understand what is important here, as a normative matter, we must focus on those for whom procreation is salient, purposeful, and deeply desired. It is this group for whom and to whom the right to procreate matters, and so it is the interests of this group that should inspire us to think deeply about how and why we would allow the state to impede access to the technology that some people need—not want—in order to pursue procreation.

If procreation as a whole matters, then Tier I has particular resonance as RJ advocates and scholars have offered compelling evidence of the harm to communities that flows from the deprivation of access to procreation coupled with the state's denigration of procreation by certain people and certain communities.¹⁵⁸

2. Tier II—Procreation for Profit/Procreation for Procreation's Sake and Individual Interests as Possessors of Inheritable Genes

The discussion of Tier II rights focuses on those who would procreate for

156. The U.S. Food and Drug Administration classifies at least eighteen methods of pregnancy prevention with varying levels of failure from surgical sterilization to emergency contraception to be used after unprotected heterosexual intercourse. OFFICE OF WOMEN'S HEALTH, FOOD & DRUG ADMIN., BIRTH CONTROL GUIDE, *available at* <http://www.fda.gov/downloads/ForConsumers/ByAudience/For%E2%80%A8Women/FreePublications/UCM356451.pdf>.

157. In the plurality opinion in *Planned Parenthood v. Casey*, the Court noted:
Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. For example, we would not say that a law which requires a newspaper to print a candidate's reply to an unfavorable editorial is valid on its face because most newspapers would adopt the policy even absent the law. . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.

Planned Parenthood v. Casey, 505 U.S. 833, 893 (1992).

158. *See, e.g.*, ROBERTS, *supra* note 33 (discussing in-depth the many ways in which the state has denigrated motherhood as a status for black women); Angela Davis, *Racism, Birth Control, and Reproductive Rights*, in FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT 15-26 (Marlene Gerber Fried ed., 1990) (considering the history of reproductive oppression endured by Black women from inside and outside of their community).

the benefit of others and/or for profit. This category includes people who sell or donate gametes or embryos and women who act as surrogate mothers, both gestational and traditional surrogates.¹⁵⁹ Here, the discussion of procreation as distinct from a right to parent becomes salient. If in fact a right to procreate exists apart from a right to parent, then it is critical to determine the relationship between an interest in procreating (in the sense of propagating one's genes) and parenting (in the sense of assuming the legal and moral obligation of caring for a child). By many accounts, an interest in procreating, devoid of an interest in parenting, is diaphanous and estranged from the conventional rhetoric around reasons for procreation. Bonnie Steinbock has declared that "[g]enetic replication where this is not linked to rearing children may be an interest that some people have, but it is not an interest that society should be concerned to protect."¹⁶⁰ In the context of ART, however, it is possible to see some merit in a choice to procreate separate from parenting because so many of the choices that it creates make procreation possible and parenting optional. Further, in this bridge category of procreation for profit, those who procreate through gestating or through selling their genes for others to gestate do so specifically to facilitate the prospect of parenting for others. In this scenario, Steinbock's declaration that this interest is not one that society should protect is shortsighted.

Decoupled from parenting, procreation loses some of its strong claim to protection because the right to procreate has long been so closely tied to a right to parent. However, there is a belief in various sectors that individuals have strong interests in how they do or do not share their genes. This dynamic exists where there are disputes over embryos in which one of the genetic progenitors of those embryos desires to see them become children and the other progenitor argues that allowing children to be born using those embryos will force the objecting party to procreate without consent.¹⁶¹ Cases of this sort highlight the interest that individuals have in exercising control over how and whether their genes will be perpetuated by the creation of children with whom they will have no parental relationship and for whom they will have no legal obligation.¹⁶² In these cases, then, the primary remaining question would be whether an

159. Gestational surrogates become pregnant only through in vitro fertilization and carry an embryo to whom they have no genetic link, which means that the child born of such arrangements has a biological mother who is not the child's genetic mother. LIZA MUNDY, *EVERYTHING CONCEIVABLE* 132 (2007). Traditional surrogates will likely become pregnant through artificial insemination, which means that the surrogates' own eggs will be used. As a result, traditional surrogates are both the genetic and biological mothers of the children they carry. *Id.*

160. Steinbock, *supra* note 153, at 15.

161. *See, e.g.*, *Kass v. Kass*, 696 N.E.2d 174, 175 (N.Y. 1998); *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992); *J.B. v. M.B.*, 783 A.2d 707, 708 (N.J. 2001).

162. Though some courts have made this assumption for the sake of argument, it is not always clear that no legal obligation would exist if a child was created over the objection of one of the genetic progenitors.

individual has an interest in controlling the use of her own genes.¹⁶³

Even if it were possible to relieve a genetic parent of all legal burdens attendant to parenthood, there might still be a harm, even if only psychic, to the person forced to procreate without her consent: harm occasioned by the loss of control over one's procreative choices and harm in the form of the emotional burden of knowing or imagining that a child exists in the world to whom one is bonded through a genetic tie.¹⁶⁴ Courts have frequently found in favor of those who object to procreating in circumstances of non-consent involving embryos. This suggests that individuals have a protected legal interest in deciding whether to share their genetic material with a child.¹⁶⁵ If this is the case when a person seeks to avoid genetic parentage, then it should also be the case when a person seeks to become a genetic parent, and only a genetic parent. Even in the embryo disposition cases decided by a small number of courts around the country, those courts have tended to make clear that embryos might be released to a potential parent if that person has no other means of becoming a parent, including through adoption.¹⁶⁶

That there is an interest in propagating one's genes does not mean that it is on par with the interest in procreating and parenting. Imagine a person who seeks

163. I. Glenn Cohen has argued that a right not to be a genetic parent, as distinct from a legal parent, may not in fact be protected by the Constitution and that such a right could be waived even if it does exist. *See generally* I. Glenn Cohen, *The Constitution and the Right Not to Procreate*, 60 STAN. L. REV. 1135 (2008).

164. *See id.*; *see also* A.Z. vs. B.Z., 725 N.E. 2d 1051, 1059 (Mass. 2000) ("In this case, we are asked to decide whether the law of the Commonwealth may compel an individual to become a parent over his or her contemporaneous objection. The husband signed this consent form in 1991. Enforcing the form against him would require him to become a parent over his present objection to such an undertaking. We decline to do so."); J.B. v. M.B., 783 A.2d at 718 ("Enforcement of a contract that would allow the implantation of preembryos at some future date in a case where one party has reconsidered his or her earlier acquiescence raises similar issues [about enforcing private contracts to enter into or terminate familial relationships]. If implantation is successful, that party will have been forced to become a biological parent against his or her will."). In these earlier cases, it could be argued that courts felt some constraints based on uncertainty about whether a person substantially forced into parenthood by the use of her genetic material against her will would be legally compelled to parent. Given the business in sperm and egg selling that currently exists, it seems like a court, if it so chose, could fairly easily determine that a person forced into genetic parenthood in an embryo dispute case would not have legal obligations to the child born of such an arrangement, but the claim that genetic link without consent violates a right to avoid procreation would still stand.

165. *See, e.g.*, J.B. v. M.B., 783 A.2d at 717 ("Her fundamental right not to procreate is irrevocably extinguished if a surrogate mother bears J.B.'s child. We will not force J.B. to become a biological parent against her will."); Davis v. Davis, 842 S.W.2d at 604 ("Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question."). It should be noted, though, that the logic that allows an individual to avoid parenthood by keeping someone from using embryos formed with one's gametes does not extend to a man interested in avoiding parenthood by forcing an already pregnant woman to have an abortion.

166. *See supra* note 165.

pregnancy for the experience of procreation, but with no intent or desire to commit to caring for the child who will be born. This author is not positing a woman who becomes pregnant by a stranger after a one-night stand. Nor should you imagine the stranger who, when informed of the pregnancy, runs away as far and as fast as possible. Rather, imagine a rare breed of human being who makes a determination to get pregnant or get someone else pregnant with the specific intent of seeing that pregnancy to its end and putting the child up for adoption. For the sake of this argument, let us assume that the child will in fact be adopted into a home full of love where she will be cherished and live a long, happy, and healthy life so that there is no harm in the sense of a child left to live a life of suffering. We can even assume that the child will not know that she was adopted and therefore will have no difficulties related to a sense of having been abandoned by her biological parents.¹⁶⁷ This very narrow scenario forces us to ponder whether the person who created a pregnancy under these circumstances had an interest in doing so that is worthy of respect and perhaps constitutional protection.

A woman might have a genuine interest in experiencing pregnancy separate from and excluding an interest in being a parent. Some women who act as surrogate mothers articulate this interest and explain that they have easy pregnancies or love the experience of being pregnant.¹⁶⁸ Further, they have children of their own and desire to help others experience the joys and tribulations of parenting.¹⁶⁹ For these women, the procreative interest involved in acting as a surrogate is all about the experience of pregnancy and not at all about a desire to parent the child who will be born and given to others to be raised. Given that pregnancy is a unique life experience that cannot be simulated, it is difficult to imagine a compelling reason not to allow a woman to pursue an arrangement in which she can experience pregnancy without assuming the responsibility of parenting if we have no reason to think that a child born of such an arrangement will suffer harm. An intended parent can thereby become a

167. One might argue that there is harm to the child in not knowing that she is adopted, which denies to her knowledge about her genetic origins. This might be so in a theoretical sense, but for purposes of the argument here this deeper layer of harm is irrelevant to the question of what interest a person might have in procreating without parenting.

168. See TEMAN, *supra* note 60, at 22.

169. As one surrogate wrote of her experience bearing a child for a gay male couple:

Motivations and altruisms aside, let me be completely selfish for a moment. Becoming a surrogate provided a way for me to experience a planned pregnancy at a time in my life when I could enjoy the experience. There would be no lifelong commitment to raising another child, and it was one of the rare chances so few people receive to do something over. . . . It was a spiritual experience to be able to help create a life for two people who so desired a child, and I got to play the nurturing role, singing and talking to the little one growing inside me. . . . On top of all of this, I was compensated, and after it all, my life went back to being my life.

Beth Jones, *Mutual Exploitation, A Response, in Pregnant Man?: A Conversation*, 22 YALE J.L. & FEMINISM 256, 257-58 (2010).

parent, and a child can be brought into a worthwhile existence.

It is more challenging to make a persuasive argument that a man may also have an interest in procreation without parenting. The lack of a physical experience of procreation akin to a woman's pregnancy removes the argument that the act of carrying a child might in itself be one to which a man might aspire. But, perhaps, he may have an interest in watching a pregnancy progress, watching a pregnant belly expand, placing his hand upon a woman's stomach and feeling a kick, or watching a fetus progress on an ultrasound screen throughout the months of a pregnancy. All of these things can be significant life experiences even if they are not followed by parenting. For instance, imagine a man who donates sperm to a lesbian couple because he believes that they will be good parents, but does not desire parenting rights or obligations for himself. He might avail himself of the experience of watching the pregnancy progress secure in the knowledge that his life need not change once the baby is born. The people described here, the woman who delights in pregnancy but does not desire to parent the child she bears or the man who enjoys the vicarious experience of watching a pregnancy progress, are people who possess a genuine interest in the process of procreation that is decoupled from a desire to parent.

Individuals willing to sell or donate their gametes or embryos to assist others who desire to procreate and parent harbor another category of procreative interest separate from parenting. These people might claim an interest in monetary gain, which gives pause to those uncomfortable with the intertwining of commerce with the creation of children. This reaction is worthy of consideration. It is not entirely clear why the exchange of money should have any impact on the nature of the right to procreate as distinct from a right to parent or engage in sexual activity. If a right to marry does not hinge upon one's reasons for doing so, then why should the right to procreate be any different? An individual could legally and without constitutional barrier seek a spouse who is wealthy in order to launch himself into a higher economic echelon, and this desire to seek wealth would not diminish the fundamental nature of his right to marry. He could, in fact, explicitly marry in exchange for money, and, so long as the marriage was not fraudulent in a way that runs afoul of legitimate marriage regulation (e.g., entering into a sham marriage in order to secure legal immigration status), the commercial nature of the marriage transaction might violate the *spirit* of marriage, but it would not violate the law.

The same could be said of those who procreate for profit rather than for the potential joy of the procreative experience or parenting. The act of selling rather than donating gametes need not diminish the seller, the buyer, or the item being sold. Goods can be precious, even when they are bartered in a market.¹⁷⁰ Respect

170. As Debra Satz explains: "[T]he idea of respect alone does not entail the conclusion that reproductive labor should not be treated as a commodity . . . [W]e sometimes sell things that we also respect." DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE: THE

for an item does not evaporate simply by placing a price on it. As such, it is unclear that money, standing alone, should be an impediment to respecting a constitutional right to procreate in exchange for payment.

Many similar concerns that arise in the context of commerce and reproduction may also be present in transactions that involve no money at all. An offer of \$50,000 for a woman to sell her eggs might be coercive, but a man who is urged by his parents to give sperm to his brother's wife (his sister-in-law) so that the married couple might have a child with a genetic link to the husband may also feel coerced by the tug of familial responsibility or loyalty. As such, the system created in this article draws a distinction not between commercial versus non-commercial transactions, but between using ART to make babies the user will parent and those which involve use for the benefit others. In this version of a regulated world, even altruistic acts could be subject to some forms of regulatory control. The goal of the two-tiered system is to recognize the need to protect those who labor on behalf of others, either in the form of selling gametes or reproductive capacity.

Those who sell gametes or reproductive labor may also have a desire to experience a sense of purpose or power that comes from providing something precious to one who needs or wants it. They can be viewed as seeking the kind of karmic wellness that comes from donating blood or an organ, but doing so with much better remuneration. Again, while this interest may not feel as lofty as a dual interest in procreating and parenting, it is not entirely without legitimacy. In fact, as a society, we count on people finding sufficient worth in giving pieces of themselves to others in order to sustain our organ donation system.¹⁷¹ We expect that this level of personal giving will provide psychic reward so that people will do it even when money is not involved. We should not be so unwilling to believe that there are other ways in which this interest in feeling good or doing a good thing motivates people.

That there might be an interest at play here does not mean that the law must treat these situations as identical to those involving people who desire both to procreate and parent. It is possible to draw a principled distinction between those who procreate for personal edification with intent to parent, and those who procreate for profit—monetary or otherwise. In the latter category, the right at stake might be subject to an intermediate level of constitutional scrutiny to

MORAL LIMITS OF MARKETS 120 (2010). *But see* MICHAEL SANDEL, WHAT MONEY CAN'T BUY 110-13 (2012) (raising concerns about how markets for certain goods coerce and corrupt).

171. The United Network for Organ Sharing (UNOS) is a non-profit that has a government contract to implement the U.S. Organ Procurement and Transplantation Network (OPTN), which currently manages a waiting list of over 100,000 people waiting for donated organs. This network, as acknowledged by UNOS, "depends on the generosity of the American public" because the law does not allow for the sale of human organs. *Awareness & Promotion*, UNOS, <http://www.unos.org/donation/index.php?topic=awareness> (last visited Nov. 7, 2014).

acknowledge that interfering with procreative decision making, even without a desire to parent, infringes upon an important individual interest. In this context, states may place legal obligations on those who broker baby-making deals (e.g., those who sell sperm and eggs or those who recruit and manage surrogate mothers) because selling the building blocks for conception or making one's body available for the use of others would not garner the same level of protection from state interference as one would get if seeking access to the tools of reproduction without a profit motive. Ultimately, the point is that there are legitimate interests at play in these transactions that do not end in parenting, and those interests cannot be wholly ignored or assumed unworthy of constitutional respect.

An acknowledgement of Tier II rights will almost certainly impact women disproportionately for a variety of reasons, including the fact that women are often the primary patients in a fertility setting because they are the ones who must become pregnant. Also, some of the most controversial reproductive practices (surrogacy and egg selling) are directly tied to women. Tier II has the benefit of acknowledging a right and giving it constitutional heft while also allowing for legislative interference in the interest of protecting those who work in this field by selling their reproductive capacity. The issue here is about providing space for the state to regulate a labor market in which there is significant potential for exploitation and harm. This might mean regulating the actions of fertility brokers (i.e., those who facilitate surrogacy contracts or the sale of eggs) while acknowledging that there are women who are served well by the existence of this market.

The Tier II interest in procreating for profit is potentially strengthened by its often necessary connection with Tier I procreation. For some who seek to procreate and parent, a substitute womb, sperm, or eggs from a source other than an intended parent might be a pre-requisite of the procreative process. In these cases, Tier II becomes important not because of the interest of the person seeking to sell building blocks of conception, but because the interest of the person seeking to parent requires the presence of willing sellers of reproductive capacity. These connections might warrant special consideration of Tier II without necessarily elevating the interest to the level of Tier I.

C. State Interests in Procreation

An evaluation of the constitutionality of legislation that burdened Tier I or Tier II rights would require a court to consider state interests in procreation. At a basic and perhaps uncontroversial level, the state has an interest in assuring that competent medical providers offer appropriate care to patients and that those patients have means to redress harm caused by inadequacies in care. The needs of the state are served by having citizens who are healthy and who can contribute

positively to their communities, and access to good medical care is necessary to realize this interest.¹⁷² The state also has an interest in protecting vulnerable people from exploitation and harm, which is another reason why some oversight of medical care, including reproductive healthcare, is appropriate.

Justification for a state interest in procreation also flows from the fact that procreation is a private act with public consequences—some big, some small. Procreation is necessary for our continued existence as a society and a species. Even those who are concerned about the consequences of an overpopulated planet must concede that if one wants human beings to continue to exist on the planet, some people need to procreate. This does not mean that procreation is an unqualified good, but it does mean that the choice to participate in keeping the planet populated deserves some respect and, at times, protection and encouragement.¹⁷³

The state also faces financial consequences when people procreate. This occurs in part because the state extends services when new people are born, including benefit programs for those in need. Further, when procreative acts create health risks for pregnant women or babies, the state can bear the costs of those choices. One of the risks associated with ART is the birth of high order multiples, which can happen with the use of fertility drugs or when a physician transfers several embryos to a woman's uterus during IVF.¹⁷⁴ Carrying high order multiples can injure and even kill the pregnant woman and the fetuses that she carries.¹⁷⁵ These pregnancies often result in premature births, which can have distinctly negative consequences for the children.¹⁷⁶ Even twin pregnancies increase pregnancy risks for women and fetuses.¹⁷⁷ The cost of obstetrical care for high-risk pregnancies, involving multiples or not, can be substantial, and people do not always have the financial resources to cover the costs of the care.¹⁷⁸ This is also true of the cost of neo-natal intensive care unit (NICU)

172. See *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (“Under our precedents it is clear the State has a significant role to play in regulating the medical profession.”).

173. The question of choice here is important, as choice is always exercised within constraints. Thus, a woman who has no access to contraception or abortion might not be choosing pregnancy in a way that supports a claim that she is an autonomous actor pursuing her own interests and desires. This goes to the point of needing to recognize how autonomy interacts with an individual's lived experience.

174. AM. SOC'Y FOR REPROD. MED., *MULTIPLE PREGNANCY AND BIRTH: TWINS, TRIPLETS AND HIGH ORDER MULTIPLES* 5 (2012), available at http://reproductivefacts.org/BOOKLET_Multiple_Pregnancy_and_Birth/.

175. *Id.* at 6-8.

176. *Id.* at 6.

177. *Id.* at 6-8.

178. For instance, Nadya Suleman, who gave birth to a set of octuplets after an in vitro procedure, was clearly financially incapable of caring for eight pre-term babies along with the six other children whom she was already raising as she has intermittently received state welfare benefits since their birth. Samantha Schaefer, *'Octomom' Nadya Suleman Hit with Additional Welfare Fraud Charge*, L.A. TIMES (Feb. 5, 2014), <http://articles.latimes.com/2014/feb/05/local/la-me-ln-octomom-welfare-fraud-20140205>.

services for babies born with compromised health as a result of the circumstances of their engineered birth.¹⁷⁹ These costs can easily reach high into six figures.¹⁸⁰ Thus, where the state bears an exorbitant financial burden as a consequence of an individual procreative decision, it may wish to be involved in how that decision gets made.¹⁸¹

More controversially, the state may also act in the interest of future children when it seeks to regulate ART. I. Glenn Cohen has thoroughly and eloquently critiqued the best interests of the future children rationale as a basis of lawmaking,¹⁸² but the law has at various points taken account of the interests of those who do not yet exist at all—not even in embryonic form—or who are in-utero.¹⁸³ A state interest in future children might also center on the health of a

179. See Shari Roan, *Multiple Births, Multiple Risks*, L.A. TIMES (June 25, 2007), <http://articles.latimes.com/2007/jun/25/health/la-he-ivf-multiples25-2007jun25> (noting that the cost of multiple births can easily top \$100,000). One author delineates the monetary costs of multiple births as follows:

Antenatal, delivery and postnatal care costs: hospital obstetrical care, including ultrasound scans, hospital visits for ultrasound, inpatient stay, delivery and postnatal care and stay for mother is: twins \$5,000 each, triplets \$10,000 each, quads \$17,000 each (estimates assuming no complications). One set of premature twins costs the health care system approximately \$130,000 from birth to discharge. Multiple-birth babies are more likely to be admitted to Neonatal Intensive Care Units (NICU) after birth. The more babies born in the set, . . . the lower the birth weight of each child and the increase in admittance to NICU's [sic].

Christa D. Reed, *The Costs of Raising Twins*, TWINS MAG., available at <http://www.twinsmagazine.com/blog/costs-raising-twins-april-national-multiple-birth-awareness-month> (last visited Nov. 7, 2014).

180. Reed, *supra* note 179.

181. Other possible interests are of a more amorphous quality including concerns about protecting the “natural” quality of procreation. As Jackson notes: “[H]uman intervention in the process of procreation provokes much greater repugnance and outrage than similarly unnatural attempts to reduce pain, or cure disease. Moreover, this uneasiness tends to be confined to interventions only in the very earliest stages of human reproduction: technical interference in pregnancy and childbirth through, for example, fetal monitoring, prenatal testing or surgical delivery, is seldom condemned on the grounds of its *unnaturalness*.” JACKSON, *supra* note 11, at 171. Some, especially in the context of prenatal or pre-implantation testing, intimate that there is a state interest in avoiding pre-birth discrimination based on gender or disability. See, e.g., Adrienne Asch & Erik Parens, *The Disability Rights Critique of Prenatal Genetic Testing: Reflections and Recommendations*, 29 HASTINGS CTR. REP., Sept.-Oct. 1999, at S1 (noting the danger of discrimination that pre-natal genetic testing presents); Inmaculada de Melo-Martín, *Sex Selection and the Procreative Liberty Framework*, 23 KENNEDY INST. ETHICS J. 1 (2013) (rejecting the idea that procreative liberty should protect sex selection for non-medical reasons).

182. See generally I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423 (2012) (arguing against the use of the best interest of the resulting children rationale for regulating reproduction).

183. For instance, in the context of forced sterilization cases involving people living with developmental disabilities, courts take account of the interests of future children as one part of a multi-pronged assessment of the appropriateness of removing the procreative capacity of a developmentally disabled person through sterilization. *In re Grady*, 426 A.2d 467 (N.J. 1980) (involving the issue of involuntary sterilization for a developmentally disabled adult); *Conservatorship of Valerie N.*, 707 P.2d 760 (Cal. 1985) (involving an attempt to sterilize a developmentally disabled adult woman without her consent).

fetus, the health of a future child, and the conditions in which a future child might live.

IV. CREATING A REGULATORY REGIME

“Our reproductive capacity or incapacity indubitably has a profound impact upon the course of our lives, and decisions about whether or not to reproduce are among the most momentous choices that we will ever make.”¹⁸⁴

Using RJ as a framing device, this Part considers how the tiered right to procreate would work in the context of legislative attempts to regulate so-called reproductive excess. This section responds to those critiques of ART that have come from scholars explicitly or implicitly raising RJ-related issues, and examines how to respect concerns about harm and exploitation while assuring adequate respect for the fundamental right at issue. Precisely because of the issues raised earlier in this article about the importance of the right at stake and the potential to replicate reproductive hierarchies seen in coital reproduction, it is critical to consider negative regulation of access to ART with a discerning eye. This Part situates Tiers I and II within an existing and imperfect system of reproductive regulation.

A. Why Regulate?

The fertility industry in the United States has not been the subject of substantial regulatory fervor.¹⁸⁵ Many state legislatures and the federal government have steered clear of regulating assisted reproduction in significant ways beyond the general regulation of medical care. However, there has been a consistent and persistent drumbeat for greater regulatory interference in the world of ART coming from a variety of sources including academics, clergy, and commentators in mainstream media.¹⁸⁶

With few exceptions, scholars do not ground their arguments for broader regulation of ART in data of widespread unethical or harmful practices by ART providers. Rather, they are often steeped in philosophical or moral objections to underlying practices, i.e., the destruction of embryos as part of IVF, or the disconnect between physical intimacy and the creation of a child.¹⁸⁷ Other

184. JACKSON, *supra* note 11, at 7.

185. *See, e.g.*, NAOMI CAHN, *TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION* (2009) (arguing for expanded regulation of the fertility market in the United States). But not everyone agrees that the existing system of regulation is laissez-faire. *See e.g.*, AM. SOC'Y FOR REPROD. MED., *OVERSIGHT OF ASSISTED REPRODUCTIVE TECHNOLOGY* (2010) (arguing that the fertility industry is, in fact, heavily regulated as part of the medical profession).

186. *See, e.g.*, Alexander N. Hecht, *Wild Wild West: Inadequate Regulation of Assisted Reproductive Technology*, 1 HOUS. J. HEALTH L. & POL'Y 227 (2001).

187. *See, e.g.*, SANDEL, *supra* note 170.

concerns about ART flow from anecdotes that describe extreme cases such as the birth of octuplets after IVF or surrogacy arrangements gone awry.¹⁸⁸ The basis of such calls for greater regulation flows from a variety of concerns about everything from the manufacture of babies,¹⁸⁹ to discrimination against people living with disabilities,¹⁹⁰ to the health risks of multiple gestations,¹⁹¹ to identity problems for children born from gametes sold anonymously,¹⁹² to the commodification of women's bodies¹⁹³ and the commercialization of reproduction,¹⁹⁴ and the destruction of "natural" families.¹⁹⁵

When it comes to regulating in the face of a range of concerns, some commentators simply call for increased data collection—something that is sorely lacking in the fertility industry.¹⁹⁶ Others, however, want more specific limitations including upper limits on the age of women who want to use ART to get pregnant,¹⁹⁷ enjoining individuals from creating so-called savior siblings,¹⁹⁸ and setting standards for how many embryos can be transferred to a woman's uterus during a given cycle of IVF.¹⁹⁹ Other ideas include requiring adoption-like

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188. See, e.g., Kimberly D. Krawiec, *Why We Should Ignore the "Octomom,"* 104 NW. U. L. REV. COLLOQUY 120 (2009) (arguing against legislation creating limits on embryo transfers inspired by concern about the Octomom example).
189. See COMM. ON ETHICS, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION NO. 553: MULTIFETAL PREGNANCY REDUCTION (2013), available at <http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Ethics/Multifetal-Pregnancy-Reduction>.
190. See Kimberly M. Mutcherson, *Disabling Dreams of Parenthood: The Fertility Industry, Anti-Discrimination, and Parents with Disabilities*, 27 LAW & INEQ. 311, 347 (2009).
191. See Urska Velikonja, *The Costs of Multiple Gestation Pregnancies in Assisted Reproduction*, 32 HARV. J.L. & GENDER, 463, 504 (2009) (arguing for increased regulation of the fertility industry in the United States based on the European model to reduce the number of multifetal pregnancies).
192. See Lucy Frith, *Gamete Donation and Anonymity: The Ethical and Legal Debate*, 16 HUMAN REPROD. 818 (2001) (describing a child's right to know as one of the interests being used to justify ending policies of donor anonymity).
193. See SPAR, *supra* note 21, at 82-83; THE BABY MACHINE: COMMERCIALISATION OF MOTHERHOOD (Jocelyne A. Scutt ed., 1988).
194. See REPRODUCTION & RESPONSIBILITY, *supra* note 71, at 6; JANICE G. RAYMOND, WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM 57 (1993).
195. See Leon Kass, *Making Babies—The New Biology and the "Old" Morality*, 26 PUB. INT. 18, 49 (1972).
196. See REPRODUCTION & RESPONSIBILITY, *supra* note 71, at 208-14.
197. See Ethics Comm. of the Am. Soc'y for Reprod. Med., *Oocyte or Embryo Donation to Women of Advanced Age: A Committee Opinion*, 100 FERTILITY & STERILITY 337 (2013) ("[P]roviding donor oocytes or embryos to any woman over 55 years of age . . . should be discouraged.").
198. B.M. Dickens, *Preimplantation Genetic Diagnosis and 'Savior Siblings,'* 88 INT'L J. GYNECOLOGY & OBSTETRICS 91, 94 (2005) (describing cases of children born after embryos were selected and screened to ensure matching donors for sick siblings).
199. The Human Fertilisation and Embryology Authority (HFEA), which closely regulates the fertility industry in the United Kingdom, requires licensed clinics to have a plan in place for reducing multiple births. *Multiple Births*, HUMAN FERTILISATION & EMBRYOLOGY AUTH., <http://www.hfea.gov.uk/401.html#guidanceSection3909> (last visited Nov. 7, 2014). Further,

home studies for people who hire surrogates²⁰⁰ and court approval of all surrogacy contracts.²⁰¹ States might determine what levels of compensation, if any, are appropriate for those who are selling gametes or renting their reproductive capacity as surrogates, or a state could ban these practices altogether or forbid payment for surrogacy.²⁰² Other suggestions include eliminating anonymity in the market for sperm²⁰³ and creating mandatory donor registries.²⁰⁴ One might also imagine a state asserting control over whether would-be parents could discard embryos based on characteristics such as sex, as some legislators have attempted to do in the context of abortion.²⁰⁵

There is nothing fanciful about any of these possible forms of regulation given that many of them appear in legal regimes around the globe. This article's goal is not to argue for or against any particular regulatory recommendation. Instead the point is to understand the intentional and unintentional consequences of such proposed changes that negatively impact various populations who access ART, especially those whose family-building choices are already the most

there are standards for how many eggs or embryos can be transferred during a cycle. Specifically, providers "should not transfer more than three eggs or two embryos in any treatment cycle if: a) the woman is to receive treatment using her own eggs, or embryos created using her own eggs (fresh or cryopreserved), and b) the woman is aged under 40 at the time of transfer." *Id.* Further, "[t]he centre should not transfer more than four eggs or three embryos in any treatment cycle if: a) the woman is to receive treatment using her own eggs, or embryos created using her own eggs (fresh or cryopreserved), and b) the woman is aged 40 or over at the time of transfer." *Id.* Finally, "If a woman is to receive treatment using donated eggs or embryos, or embryos created with donated eggs, the centre should not transfer more than three eggs or two embryos in a treatment cycle. This is regardless of the procedure used and the woman's age at the time of transfer." *Id.*

200. New Hampshire has such a law. N.H. REV. STAT. ANN. §§ 168-B:1–B:21 (West 2007).

201. *Id.*

202. Several countries ban the sale of gametes, including France, Greece, and the United Kingdom, though some countries do allow donors to be reimbursed for their expenses. Human Fertilisation and Embryology Act of 1990 (as amended) (U.K.) (donors may be reimbursed for the expenses associated with donation, but they may not be compensated otherwise); Am. Soc'y for Reprod. Med., IFFS Surveillance 2007, 87 FERTILITY & STERILITY S28 (Supp. 2007) (Greece and France do not permit payment for sperm, though Greece does allow payment of the donor's expenses). Many countries ban surrogacy altogether or compensated surrogacy. See generally, Mina Chang, *Womb for Rent*, HARV. INT'L REV., Spring 2009, at 11, 11-12 (noting that many countries, including the U.K. and Australia, have banned surrogacy). In the United States, Arizona and the District of Columbia ban the practice. See ARIZ. REV. STAT. § 25-218 (2007); D.C. CODE §§ 16-401, 16-402 (2007).

203. See Naomi Cahn & Wendy Kramer, *Sperm Donors Should Not be Anonymous*, N.Y. TIMES (Sept. 13, 2011), <http://www.nytimes.com/roomfordebate/2011/09/13/making-laws-about-making-babies/sperm-donors-should-not-be-anonymous>; NAOMI CAHN, THE NEW KINSHIP: CONSTRUCTING DONOR CONCEIVED FAMILIES 116 (2013).

204. Neroli Sawyer, *Who's Keeping Count? The Need for Regulation is a Relative Matter*, 92 FERTILITY & STERILITY 1811 (2009) (arguing for a mandatory federal donor registry as recommended by Naomi Cahn).

205. BRIAN CITRO ET AL., REPLACING MYTHS WITH FACTS: SEX-SELECTIVE ABORTION IN THE UNITED STATES 1 (2014) ("Laws banning sex-selective abortion are proliferating in the United States.").

scrutinized and circumscribed.²⁰⁶

Arguably, any of the regulatory choices detailed in the previous paragraph could be described as serving legitimate, important, and perhaps compelling interests of the state. They could be said to serve one of two broader goals: protecting individuals from making procreative decisions that the state deems not to be in the interest of that individual or the interest of a future child, or protecting the interests of the public—including populations who are incapable of protecting themselves. Given existing calls for regulation and future calls that will surely come, this article now turns to considering how to incorporate the justice ideals described earlier into a functioning legal regime that responds to the fundamental nature of the right to procreate with assisted reproduction and the state interests in reproduction.

B. Principles for Moving Forward

Any regulatory regime related to procreation must acknowledge two core truths. First, the right to procreate is different in kind and character from a host of other constitutional rights—including other fundamental rights—because it is “*constitutional* in the physical sense, implicating the individual’s rights to physical integrity and to retention of the biological capabilities with which he or she was born into this world.”²⁰⁷ Thus, the nature of the right at stake creates a high bar for attempts at state control or interference.

The second fundamental principle can, but need not, conflict with the first. This principle is that the right to procreate cannot be understood or properly protected without taking serious account of the fact that it is the only right that when exercised leads to the creation of another human being. The legal and moral responsibilities accompanying the choice to make another person are daunting. The seriousness of the enterprise, both making babies and caring for them once they enter the world, is not ignored within this analysis of regulatory expansion. However, the analysis also will not ignore some of the key features of non-coital reproduction that support a limited field of regulation.

A system of regulation should be based on a belief in procreative and familial pluralism. Lisa Ikemoto has argued that the entrenchment of reproductive technology as treatment for infertility meant that assisted reproduction became a tool for “reinscrib[ing] a particular model of family”—in this case married, opposite-sex units for parenting. Placing the use of ART into a “traditional setting, and thus ‘naturalizing’ it”²⁰⁸ is not an inevitable way of understanding the technology or its relationship to family because these technologies “create enormous potential for disrupting existing ideas about what

206. See Mutcherson, *supra* note 18, at 200-04.

207. Conservatorship of Valerie N., 707 P.2d 760, 786 (Cal. 1985).

208. Lisa C. Ikemoto, *The In/Fertile, the Too Fertile, and the Dysfertile*, 47 HASTINGS L.J. 1007, 1021 (1996).

it means to be a parent and what constitutes a family.”²⁰⁹

Embracing procreative pluralism involves rejecting the distinction between “natural” and “unnatural” that marks some bodies and some couplings as fundamentally nonprocreative. In order to realize the transformative potential of assisted reproduction it is critical to understand the family forms that can be produced with reproductive technology not as alternatives to a norm, but as legitimate unto themselves.²¹⁰ That these units can be articulated as copying an existing family form does not mean that they must be understood as cheap facsimiles.

For instance, as Ikemoto acknowledges, lesbians having children can be viewed as a response to the pressure of the mother imperative as a tool of patriarchy, but the act is also a rejection of the rules of motherhood. As she explains: “Lesbians who use the technologies lay claim to identity parts denied them in the dominant discourse—womanhood and motherhood—by manipulating the splintering effect of the technologies. The result, lesbian motherhood, may be both transgressive and assimilated.”²¹¹ Just as the right to procreate can be understood as both/and, so too can the ways in which people choose to procreate.

A system of regulation should not fetishize choice, and justice does not demand that the state give individuals unfettered choice in how they seek to procreate. There are serious issues related to the market in fertility services that might warrant legal restrictions. For instance, that a same-sex male couple desires a child does not mean that any woman should be forced or coerced into acting as a surrogate on their behalf to satisfy a Tier I right to procreate. The woman’s rights over her body trump the couple’s right to procreate. Similarly, if those who are buying ova from young women are failing to inform those women of the health risks involved in harvesting eggs, then regulation of this Tier II right, short of withholding it altogether, might be both warranted and necessary. An RJ lens helps to foreground those issues without denying how complicated the questions are and how categories of privilege can expand and contract in the context of ART (i.e., wealthy same-sex couples might have power in some ways, but lack power in others).

A system of regulation must take account of the balance between buyers and sellers in the market for making babies. On this subject, RJ seems to support the distinction between Tier I and Tier II because it is fundamentally about exercising control over one’s reproductive life and family life, which has implications for economic well-being, but is not centered on economics. In other words, protecting the ability to safely be a seller in the market for reproductive

209. NELSON, *supra* note 2, at 335.

210. These families built by technology may involve more than two parents, same-sex parents, single parents, older parents, and more variations.

211. Ikemoto, *supra* note 208, at 1057 (citations omitted).

labor and products might require creating some limitation on access to the market. Regulation of this sort might then impact Tier I rights related to family building, but that would be acceptable as a matter of justice.

Finally, a system of regulation should avoid replicating existing reproductive hierarchies or creating new ones that are based on unjustified types of discrimination. This principle may appear to be in conflict with the two-tiered system articulated in the previous section and certainly it will be important to ensure that this system does not itself create an unfair hierarchy of interest. The tiered system is different than other kinds of reproductive hierarchies that this article and RJ reject because it does not focus on invidious categories, such as race or sexual orientation, as a basis of drawing distinctions between and among people who have a right to procreate.

The tiered system recommended here is not concerned with a person's characteristics (e.g., income or marital status) but instead seeks to provide a comparable level of constitutional protection to all of those who seek the experience of procreating and parenting without regard to historically discriminatory beliefs about who "deserves" to procreate and who does not. This system of separating procreators is not about economic or racial superiority, but instead centers on procreation as a form of expressing human interests in connection and continuation. Separating from discriminatory reproductive hierarchies is of the utmost importance because one of the consistent critiques of the liberal autonomy view of assisted reproduction is that it reinscribes the supremacy of whiteness and of white men in particular.²¹²

To truly embrace the lessons of RJ, a regulatory regime must, at minimum, be cognizant of two interests that are too often given short shrift in liberal accounts of a robust right to assisted reproduction. First, in order to achieve equality of access, the government likely needs to affirmatively create opportunities for financial assistance to those seeking access to assisted reproduction, which could be done in part through public and private insurance programs. If we are to give procreative pluralism its due, it is insufficient to limit ourselves to dismantling external barriers when it is obvious that providing resources is the only thing that opens up certain options to certain people.²¹³

212. Joan C. Callahan and Dorothy Roberts explain that "[t]he moral centerpiece of feminist social justice approaches to reproduction-assisting technologies is that these technologies privilege some (namely, well-off white men) over others, and that they are, therefore harmful in virtue of this contribution to a system of social subordination." Joan C. Callahan & Dorothy Roberts, *A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory*, 84 KY. L.J. 1197, 1212 (1996). The authors also note, "The disproportionate use of these technologies by white people, despite higher infertility rates among people of color, suggests as well the probability of racial bias in fertility and genetic counselling [sic]." *Id.* at 1217.

213. Emily Jackson explains that it is not enough to "remov[e] external constraints from an individual's capacity to follow preferences that are *already* fully formed and clearly articulated. Instead there may be times when the positive provision of resources and services may be necessary in order to assist people both to work out their own priorities and to realise

Second, it is imperative to recognize that the market in reproductive labor can exploit so that policymaking on Tier II rights should protect these laborers as other laborers are protected in their workplaces.

There are, of course, more ways in which RJ has implications for the fundamental right to assisted reproduction and future work can parse through attempts to regulate as they come to fruition. This article's purpose is to describe the conditions under which a regime of procreative pluralism can be created and begin to imagine how it can respect and protect a spectrum of individuals who participate in technologically enhanced procreative processes.

CONCLUSION

Make thee another self for love of me,
That beauty still may live in thine or thee.²¹⁴

Using RJ to frame the conversation about a fundamental right to assisted reproduction is perhaps a more complicated conversation than one can have by focusing on autonomy or equality alone. This is appropriate given that creating life is, and should be, an endeavor that inspires complex thoughts. For the majority of people in this country, reproduction is a matter of finding a willing opposite-sex partner and having sexual intercourse without using birth control. By contrast, there are thousands of people in the United States for whom access to ART is not a luxury, but a necessity, if they want to have children, especially if they want those children to share their genes. For these people, treating ART as a convenient place to play out frustrations about a changing world or irresponsible coital reproduction has serious consequences. It is right to respect the procreative act inherent in ART by ensuring that our discussions of a right to procreate do not exclude procreation with assistance.

But procreative pluralism is not a rallying cry for rights and equality without any constraints. This is not a concept that elevates choice at all costs or that misunderstands the complicated reality of socially constructed choices. But as people debate various proposals for limiting access to ART altogether or controlling the way that individuals use ART, the intimacy of that regulation frequently goes unexamined. The regime posited by this article respects the intimate act of procreation, whether in a bedroom or a physician's office, and asks that the law protect procreation however it happens. That regime, though, also demands a balancing of the rights and interests of the actors who come to assisted reproduction with different goals and desired outcomes.

Given the global history of discriminatory governmental interference in procreation, we should not contemplate future state regulation of assisted

[sic] them." JACKSON, *supra* note 11, at 7-8.

214. WILLIAM SHAKESPEARE, SONNET X (1609) (The Procreation Sonnets).

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reproduction without remembering sobering lessons about how governments have abused disfavored populations through overt and subtle methods of reproductive control. From sterilization abuse of the disabled and women of color, to criminal court punishments limiting or forbidding procreation, to limiting access to government support programs based on reproductive choices, this country is no stranger to procreation as a site of subjugation. We must be wary lest the state's decision to exercise control over the few who use assisted reproduction become a harbinger of greater control over the reproductive decisions of the many.