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Regulating Choice: A Constitutional Law Response to Professor John A. Robertson's *Children of Choice*

Ann MacLean Massie*

I. Introduction

To begin, I would like to add my applause to others' for Professor John A. Robertson's splendid new book, *Children of Choice: Freedom and the New Reproductive Technologies*.¹ Professor Robertson sets forth a comprehensive and coherent theory for the formation of social policy respecting the use of artificial insemination, *in vitro* fertilization (IVF), and surrogacy contracts as means for achieving parenthood. Along the way, he

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1. See JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES back jacket cover (1994) (quoting five prominent ethicists in philosophy, law, and medicine who praise Robertson's book and note its importance).

applies the same framework of values to an examination of collateral issues raised by the new reproductive technologies — the development and use of Norplant and RU486, embryo research, cryopreservation and discard, and techniques and uses of genetic screening and manipulation. The whole is a prodigious accomplishment, presenting a cohesive and unified philosophy that will enlighten policymakers and enliven the public debate on technological advances that are already changing dramatically the landscape of reproductive possibilities open to infertile couples who are so diligently, and often desperately, seeking assistance in order to have their own biologically related children.² This Symposium promises to be only one sample of the wide-ranging response that *Children of Choice* is certain to receive.

Professor Robertson's central thesis is the primacy of "procreative liberty — the freedom to decide whether or not to have offspring and to control the use of one's reproductive capacity"³ Noting that "this value is widely acknowledged when reproduction occurs *au naturel*,"⁴ the author states that "it should be equally honored when reproduction requires technological assistance."⁵ In Robertson's view, "procreative liberty deserves presumptive respect because of its central importance to individual meaning, dignity, and identity";⁶ hence, his succinctly stated proposition: "I propose that procreative liberty be given presumptive priority in all conflicts,

2. Although the actual incidence of infertility has not significantly increased in recent years, except in the group of married couples with wives 20 to 24 years old, the number of office visits to private physicians for treatments for infertility has risen from about 600,000 in 1968 to about 1.6 million in 1984, with a particularly sharp increase between 1980 and 1983. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INFERTILITY: MEDICAL AND SOCIAL CHOICES 55 (1988) [hereinafter OTA, INFERTILITY]. This increase is due in part to both the increasing number of physicians providing infertility services and the new reproductive technologies used to treat infertility. See *id.* at 56. A survey by the Office of Technology Assessment (OTA) estimated that "172,000 women underwent artificial insemination in 1986-87, at an average cost of \$953, resulting in 35,000 births from artificial insemination by husband (AIH), and 30,000 births from artificial insemination by donor (AID)." OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, ARTIFICIAL INSEMINATION: PRACTICE IN THE UNITED STATES 3 (1988) [hereinafter OTA, ARTIFICIAL INSEMINATION]. The OTA also estimated that nearly 600 babies had been born through surrogacy arrangements by 1988. OTA, INFERTILITY, *supra*, at 267 *Time* estimated that over 2000 births resulted from surrogacy arrangements between 1987 and 1990. *And Baby Makes Four*, TIME, Aug. 27, 1990, at 53; see also ROBERTSON, *supra* note 1, at 98 (citing recent statistical increases in usage of reproductive technologies).

3. ROBERTSON, *supra* note 1, at 16.

4. *Id.* at 4.

5. *Id.*

6. *Id.* at 16.

with the burden on opponents of any particular technique to show that harmful effects from its use justify limiting procreative choice."⁷

Given this hypothesis, "[a] central question in this enterprise is to determine whether effects on embryos, families, women, and other participants rise to the level of severity necessary to justify infringing a basic right."⁸ Professor Robertson concedes that "what counts as the 'substantial harm' that justifies interference with procreative choice may often be contested,"⁹ but he devotes substantial portions of the book to arguments that almost no conceivable counterinterest actually sustains the burden of proving the sufficiency of its importance. In Robertson's words, "it is difficult to show that the alleged harms of noncoital reproduction are sufficient to justify overriding procreative liberty"¹⁰

The evaluation of any alleged harm rests initially, in Robertson's view, on a distinction "between harms to individuals and harms to personal conceptions of morality, right order, or offense."¹¹ Professor Robertson dismisses the latter concerns in almost every instance, for in a pluralistic society, "[a] majoritarian view of 'right' reproduction or 'right' valuation of prenatal life, family, or the role of women should not suffice to restrict actions based on differing individual views of such preeminently personal issues."¹² Thus, the "presumptive priority" of procreative liberty "will give persons directly involved the final say about use of a particular technology, unless tangible harm to the interests of others can be shown."¹³

One might think, as do a number of commentators, that the well-being of the children resulting from assisted conception would constitute precisely the sort of weighty counterinterest that could justify restrictions on the procreative liberty of adult would-be parents whenever there were grounds to think that the use of reproductive technologies might threaten or

7 *Id.*

8. *Id.* at 17

9. *Id.* at 24.

10. *Id.* at 40.

11. *Id.* at 41.

12. *Id.* Robertson does, however, concede that "[a]t a certain point, a practice such as cloning, enhancement, or intentional diminishment of offspring may be so far removed from even pluralistic notions of reproductive meaning that they leave the realm of protected reproductive choice." *Id.*, see also *id.* at 149-72 (addressing these extreme situations). But see John A. Robertson, *The Question of Human Cloning*, HASTINGS CENTER REP., Mar.-Apr. 1994, at 6, 9-14 (defending cloning on grounds similar to arguments generally used in *Children of Choice*).

13. ROBERTSON, *supra* note 1, at 41-42.

jeopardize the welfare of resulting offspring.¹⁴ Professor Robertson readily admits that impact on offspring is an important consideration,¹⁵ but he

14. See, e.g., ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 229 (1993) ("If we really care about children, we should question why there is so much talk of the adult's right to procreate, right to control his or her body, and right to parent, but so little talk of the child's right to anything."); OTA, INFERTILITY, *supra* note 2, at 226-28; *id.* at 234 ("Whether or not future children can be seen as having rights, society has an obligation to protect them in reasonable ways from foreseeable harms, and States and the Federal Government have some constitutional authority to do so."); George J. Annas, *Regulating the New Reproductive Technologies*, in REPRODUCTIVE LAWS FOR THE 1990'S 411, 418 (Sherrill Cohen & Nadine Taub eds., 1989) [hereinafter Annas, *Regulating*] (arguing that government may have large role in regulating new reproductive technologies — "not only protecting interests of the adults in quality services and informed consent, but also taking reasonable steps to protect the interests of future children that are 'created' by these methods"); Philip G. Peters, Jr., *Protecting the Unconceived: Nonexistence, Avoidability, and Reproductive Technology*, 31 ARIZ. L. REV 487, 548 (1989) ("[I]njuries which are likely to deny a child a reasonable opportunity for minimal health and happiness may harm the child, even if that life is not worse than death. If so, intervention to prevent the implementation of technologies likely to cause these injuries finds support in the interests of the would-be children."); Maura A. Ryan, *The Argument for Unlimited Procreative Liberty: A Feminist Critique*, HASTINGS CENTER REP., July-Aug. 1990, at 6, 8 (arguing that unlimited procreative liberty protects parental desires and affords too little protection to offspring's "essential autonomy," which is necessary for development of full personhood). For examples of arguments against constitutional protection of surrogacy arrangements specifically, see MARTHA FIELD, SURROGATE MOTHERHOOD 69-74 (expanded ed. 1990); CHRISTINE OVERALL, ETHICS AND HUMAN REPRODUCTION: A FEMINIST ANALYSIS 185-90 (1987); George J. Annas, *Fairy Tales Surrogate Mothers Tell*, 16 LAW, MED. & HEALTH CARE 27, 29-30 (1988); A.M. Capron & M.J. Radin, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, 16 LAW, MED. & HEALTH CARE 34, 38-41 (1988); Angela R. Holder, *Surrogate Motherhood and the Best Interests of Children*, 16 LAW, MED. & HEALTH CARE 51, 53-54 (1988); Ann M. Massie, *Restricting Surrogacy to Married Couples: A Constitutional Problem?*, 18 HASTINGS CONST. L.Q. 487, 506-15 (1991); Shari O'Brien, *Commercial Conceptions: A Breeding Ground for Surrogacy*, 65 N.C. L. REV 127, 143-47 (1986); Margaret J. Radin, *Market-Inalienability*, 100 HARV L. REV 1849, 1932-36 (1987); Barbara L. Keller, Comment, *Surrogate Motherhood Contracts in Louisiana: To Ban or to Regulate?*, 49 LA. L. REV 143, 186-89 (1988). See also UNIF STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT prefatory note, 9B U.L.A. 153-54 (Supp. 1994) [hereinafter UNIF CONCEPTION ACT] (explaining that purpose of Act is to serve best interests of children created by assisted conception).

15. See ROBERTSON, *supra* note 1, at 13 (recognizing welfare of offspring as one of six ethical considerations that must be taken into account in connection with use of reproductive technologies); *id.* at 75-76 (discussing impact on offspring of irresponsible reproduction); *id.* at 121-22 (discussing potential psychological harms to children of collaborative reproduction — i.e., those born as result of donor or surrogacy arrangements); *id.* at 217 ("The important question is not what brought about conception and delivery, but what happens to these children afterwards."); see also John A. Robertson, *Embryos, Families, and Procreative*

invariably trumps its potential to restrict adult procreative interests by noting that, with respect to any given child born with the use of assisted conception, its only choice would be either existence under the limitations imposed by the parental behavior or total nonexistence.¹⁶ Citing "wrongful life" cases to support his views,¹⁷ Robertson is unable to conjure up conditions under which it would have been better for the child not to have been born at all. For example, a child born with the help of IVF to a mother who tests positive for the human immunodeficiency virus (HIV) may well turn out to be HIV-positive itself and therefore destined to end a short life with an agonizing death.¹⁸ Even if the child escapes this fate, its mother will likely

Liberty: The Legal Structure of the New Reproduction, 59 S. CAL. L. REV. 939, 1034 (1986) [hereinafter Robertson, *Embryos*] (noting legitimacy of reasonable regulation of noncoital technology, which enhances autonomy and protects welfare of offspring); John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 434 (1983) [hereinafter Robertson, *Procreative Liberty*] ("The state's concern with the well-being of offspring may also justify regulation.").

16. See ROBERTSON, *supra* note 1, at 117 (discussing unmarried persons, persons who have tested positive for human immunodeficiency virus (HIV), and couples and individuals who are unstable or unfit to be parents); *id.* at 253 n.40 (discussing older mothers). Indeed, Robertson allows the presumptive primacy of procreative liberty to override interests of the created children with respect to virtually all reproductive technologies that implicate procreative liberty interests. See *id.* at 111 (posthumous reproduction); *id.* at 153 (positive selection of offspring traits); *id.* at 162 (germline intervention); *id.* at 169 (cloning).

17. See *id.* at 247 n.18 (citing *Smith v. Cote*, 513 A.2d 341 (N.H. 1986); *Becker v. Schwartz*, 386 N.E.2d 807 (N.Y. 1978); *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984)); see also *id.* at 75-76 (noting that children born with genetic handicaps or HIV and children born into illegitimacy, poverty, or abusive situations might experience life as net benefit even though it would involve some degree of suffering); *id.* at 85 & n.43 (noting that Tay-Sachs disease might present strongest case for wrongful life claim); Robertson, *Embryos*, *supra* note 15, at 988-89 (explaining that wrongful life claims cannot prevail in instances of noncoital reproduction because there is no way for individual claimant to exist except in condition about which he complains).

18. The estimated rate of perinatal transmission of HIV varies in the medical literature from 13% to 60%. See Clara Gabiano et al., *Mother-to-Child Transmission of Human Immunodeficiency Virus Type 1. Risk of Infection and Correlates of Transmission*, 90 PEDIATRICS 369, 369 (1992). A 1992 study indicates a mother-to-offspring transmission rate of 23.9%. See *id.* at 370-71. That study notes that when a first-born child was infected, 40% of second-born children were also infected, as compared with only 8.3% of second-born children infected when the first-born was uninfected. See *id.* at 372. In a 1989 study, the rate of perinatal HIV infection was found to be approximately 30%. See Stephane Blanche et al., *A Prospective Study of Infants Born to Women Seropositive for Human Immunodeficiency Virus Type 1*, 320 NEW ENG. J. MED. 1643, 1646 (1989). According to that study, about 20% of the HIV-infected infants will die by the age of 18 months. See *id.* at 1643. In some cases, infants infected with HIV may later become seronegative, but continue to suffer from severe

be alive for only a short period of the child's life, and we cannot be sure of the presence of another loving adult to bring up the child. Nonetheless, Robertson maintains that IVF services in this situation "would not harm children who have no other way to be born, and thus may ethically be provided if [an IVF] program is so inclined."¹⁹

Of course, Robertson is speaking here of private clinics, which, he notes, commonly screen out HIV-positive applicants.²⁰ But what happens if the clinic is a state actor, as so many of them are?²¹ If Professor Robertson's theory of the primacy of procreative liberty were to be not simply an ethical framework setting the stage for public debate, but rather were to become an established principle of constitutional law — if, in other words, procreative liberty (defined to include the right to use reproductive technologies to achieve biological parenthood) were to be construed as a constitutionally protected "fundamental right," subject to restriction only in the service of a "compelling state interest," and then only by "narrowly tailored means"²² — then, according to Professor Robertson's analysis, a publicly supported IVF clinic would have no choice but to serve the HIV-positive applicant. Her fundamental right "to bear or beget a child"²³ would

immune deficiency. *See id.* at 1646. In at least one case, an infant who became seronegative, though completely symptom-free, carried the HIV genome. *See id.* The children who become perinatally infected with HIV have a very poor prognosis, and, although asymptomatic at birth, most develop symptoms before age one. *See* Gwendolyn B. Scott et al., *Survival in Children with Perinatally Acquired Human Immunodeficiency Virus Type 1 Infection*, 321 *NEW ENG. J. MED.* 1791, 1791, 1795 (1989). The median survival age for these children is 77 months. *See id.* at 1793.

19. ROBERTSON, *supra* note 1, at 117

20. *See id.*

21. Out of the 169 U.S. facilities that offered IVF or gamete intrafallopian transfer as of March 1988, the OTA listed at least 39 facilities that appeared to be related to state-run institutions. *See* OTA, *INFERTILITY*, *supra* note 2, at 311-20.

22. This is the traditional language of "strict scrutiny," or independent judicial review, that describes the criteria for measuring the validity of restrictions upon constitutionally protected rights. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.3, at 575 (4th ed. 1991) (discussing strict scrutiny test); *id.* §§ 14.26-.30(a) (discussing right of privacy); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 11-1 to -4 (2d ed. 1988) (discussing constitutional protections for certain "preferred rights"); *id.* §§ 15-9 to -11 (discussing right of privacy); *id.* §§ 16-6 to -7 (discussing strict scrutiny in equal protection/fundamental rights context).

23. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (invalidating restrictions on access to contraceptive devices by single persons). Dictum in Justice Brennan's majority opinion in *Eisenstadt* states: "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

override any interest that the state might assert in restricting her access to IVF because the resulting child — whether HIV-positive or not, whether its mother would live very long or not, and whether there were another available loving adult to raise the child or not — would be better off to have been born than not to have been born. This is precisely the approach that Professor Robertson advocates *as a matter of constitutional law*

Before I probe this notion, let me offer some other examples of issues that might seem ripe for public debate, but that would be virtually foreclosed to discussion if Professor Robertson's views of constitutional analysis prevailed. Throughout *Children of Choice*, Robertson writes from the basic assumption that reproductive technologies would be used by infertile individuals or, more specifically, infertile couples. Elsewhere, however, he has stated more explicitly that the effect of his interpretation of the substantive liberty interest protected by the Constitution would be to prohibit government regulation of the reasons for resort to assisted reproduction,²⁴ just as the government is barred from regulating the reasons for a woman's choice to have an abortion.²⁵ Thus, mere convenience — a woman's desire

fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* This characterization has become the banner reference describing the concept of procreative liberty. See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 640 (1974) (invalidating school boards' mandatory unpaid maternity leave policies); see also *TRIBE*, *supra* note 22, § 15-10, (citing cases); cf. *ROBERTSON*, *supra* note 1, at 36-37 (referring to *Eisenstadt* language as "[t]he most ringing endorsement of this right").

24. See Robertson, *Procreative Liberty*, *supra* note 15, at 430 ("The right of married persons to use noncoital and collaborative means of conception to overcome infertility must extend to any purpose, including selecting the gender or genetic characteristics of the child or transferring the burden of gestation to another. Restricting the right of noncoital or collaborative reproduction to one purpose, such as relief of infertility, contradicts the meaning of a right of autonomy in procreation and also raises insuperable problems of definition and monitoring.").

25. See *Roe v. Wade*, 410 U.S. 113, 163 (1973) (establishing that for previability abortions, "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State"); *ROBERTSON*, *supra* note 1, at 46 ("No limits on the reasons for abortion can be imposed prior to viability, nor can third parties be given veto power over the woman's choice."); *id.* at 63 ("*Roe-Casey* does prohibit any inquiry into motives or reasons for abortion, and thus probably protects conceptions and abortions designed to produce embryos or fetal tissue for research or transplant, and even abortion on gender grounds."); *id.* at 159 ("[U]nder *Roe v. Wade* the reason or indication for the abortion is irrelevant — abortions may occur for strong or weak reasons, for major or for trivial genetic defects."); *id.* at 213 ("Under *Roe v. Wade*, there is no limit on the reasons or motivations for previability abortion — the pregnant woman is the sole judge of the need.").

to remain slim, to avoid the physical burdens of pregnancy and childbirth, or to pursue an uninterrupted career — would support a decision to hire a gestational surrogate, for example. By contrast, the Uniform Status of Children of Assisted Conception Act, in its proposal for legalized surrogacy contracts, requires the precondition of functional infertility — that is, a finding that the intended mother is unable to bear a child or unable to do so without unreasonable risk to the child or to herself.²⁶ The Uniform Act also requires that the intended parents in a surrogacy arrangement be "a man and woman, married to each other."²⁷ In *Children of Choice* and other writings, Professor Robertson acknowledges that the procreative liberty that he advances inheres primarily in the marital relationship,²⁸ however, he advocates a constitutional reading that would protect access to reproductive technologies by single persons and by gay or lesbian couples, as well as by married or cohabiting heterosexual couples.²⁹

Again, consider the controversial situation of a postmenopausal woman who desires the implantation of a fertilized egg into her womb so that she may become pregnant, deliver the baby, and, most likely, rear the child.³⁰

26. See UNIF CONCEPTION ACT, *supra* note 14, § 6(b)(2), 9B U.L.A. 159 (Supp. 1994).

27. *Id.* § 1(3), 9B U.L.A. 155 (Supp. 1994).

28. See ROBERTSON, *supra* note 1, at 35-40; Robertson, *Embryos*, *supra* note 15, at 956-62; Robertson, *Procreative Liberty*, *supra* note 15, at 415-18, 427-32, 459.

29. See ROBERTSON, *supra* note 1, at 128 (unmarried women who are either single or cohabitating with male or female partners); Robertson, *Embryos*, *supra* note 15, at 962-64, 1003 (unmarried persons); *id.* at 1031 (lesbian and single women); Robertson, *Procreative Liberty*, *supra* note 15, at 418, 433, 459-60 (unmarried persons).

30. On July 18, 1994, a 62-year-old Italian woman, Rosanna Della Corte, gave birth to a boy whom she named after her dead teenage son. See *Italian Woman Gives Birth at 62*, WASH. POST, July 19, 1994, at A14. Dr. Severino Antinori arranged Della Corte's pregnancy through IVF with a donor's egg and sperm from Della Corte's husband. See *id.* She is the oldest known woman ever to have given birth. See *id.* Dr. Antinori was also responsible for the pregnancy of a 59-year-old British woman who gave birth to twins in December 1993. See Bill Hewitt et al., *Turning Back the Clock*, PEOPLE WKLY., Jan. 24, 1994, at 37, 37. Antinori has helped 54 women over the age of 50 become pregnant and give birth. See *id.* However, he considers age 63 or age 64 to be "the outer limit" for this technique. *Id.* at 41. Another Italian fertility specialist, Professor Carlo Flamigni, helped Liliana Cantadori, a 61-year-old woman, become pregnant and give birth to a healthy baby boy. See *id.* at 39. Cantadori lied to Flamigni about her age by telling him that she was only 47. See *id.* Rumors in the Italian press say that she may be trying to get pregnant again. See *id.* The United States has also had its share of postmenopausal pregnancies and births. Elke Archangel, a 52-year-old postmenopausal woman, bore twins in March 1993 as a result of IVF with a 34-year-old donor's egg. See Denise Fortino, *Never Say Never*, GOOD HOUSEKEEPING, June 1994, at 70,

In January 1994, a bill passed the French Senate that would prohibit the use of reproductive options in such cases,³¹ and reproductive clinics in this country commonly use age as a screening device.³² Robertson's constitutional analysis would invalidate governmental regulation on this issue and bar a publicly funded clinic from using age as a criterion, although presumably individualized assessment of any woman's health to ensure her reasonable welfare during pregnancy and childbirth would be permissible prior to the provision of assisted reproductive services.

73-74 [hereinafter Fortino, *Never*]. The process was conducted by Dr. Mark Sauer of the University of Southern California (USC) IVF program in Los Angeles. *See id.* at 74. One of the twins has Down's Syndrome. *See id.* Since 1990, 13 out of 29 women over the age of 50 have given birth through the IVF program at USC. *See* Denise Fortino, *Menopause and Motherhood*, GOOD HOUSEKEEPING, June 1994, at 74, 74. Seven of them are grandparents as well as new parents; five are first-time mothers. *See id.* Dr. Sauer predicts that the improvements taking place in the IVF field will increase the success rate in women over age 50 from the current 30% to about 50%. *See id.*, *see also* FIELD, *supra* note 14, at 36-37 (discussing surrogate in South Africa, Pat Anthony, who gave birth to her own triplet grandchildren by gestating ova supplied by her daughter and fertilized by sperm of her daughter's husband).

31. *See* Alexander M. Capron, *Grandma? No, I'm the Mother!*, 24 HASTINGS CENTER REP., Mar.-Apr. 1994, at 24, 25. In January 1994, France considered introducing a new package of bills that entail some of the world's toughest restrictions on access to artificial reproductive techniques. *See* Scott Kraft, *France May Limit Artificial Pregnancies*, L.A. TIMES, Jan. 6, 1994, at A7. If approved, the bills "would allow 'medically assisted procreation' only to remedy sterility or to avoid the transmission of disease to the child. It could not be used for women without partners, homosexuals or women past menopause." *Id.* The laws would also provide barriers to artificial insemination and embryo implantation in cases in which the couple intending to rear the child thereby created would have no biological connection to the child. *See id.*

32. A 1987 survey of 1,473 private physicians who perform artificial insemination revealed that 9% of the physicians had rejected applicants over 40 years old, 26% were likely to reject such applicants, and 62% were not likely to reject such applicants. *See* OTA, ARTIFICIAL INSEMINATION, *supra* note 2, at 29; *see also* LORI B. ANDREWS, NEW CONCEPTIONS: A CONSUMER'S GUIDE TO THE NEWEST INFERTILITY TREATMENTS, INCLUDING *IN VITRO* FERTILIZATION, ARTIFICIAL INSEMINATION, AND SURROGATE MOTHERHOOD 123 (1984) (noting that American clinics offering IVF in 1984 set age limit of 35 to 39 years for woman of couple); BARTHOLET, *supra* note 14, at 192 (noting her discovery that only three out of about 20 IVF clinics in her personal search were willing to accept woman over 40 years old); Capron, *supra* note 31, at 25 (citing, as example, Dr. Mark V Sauer, obstetrics and gynecology professor at University of Southern California, who pioneered use of egg donation for postmenopausal pregnancies in this country, but has chosen 55 as cutoff age); Fortino, *Never*, *supra* note 30, at 73 (citing, as example, Genetic and IVF Institute in Fairfax, Virginia, which will not accept couples over age 41).

All of these instances of persons desiring access to reproductive technologies — HIV-positive women, single persons, gay or lesbian couples, individuals or couples who do not need the service for reasons of infertility, and women well above natural childbearing age — present situations in which reasonable persons might well differ on issues of whether such access ought to be permitted and in which many might consider society's stake in the outcomes to be high. Specifically, it might well be argued that a due regard for the welfare of the resulting children would militate in favor of particular kinds of regulations, or at least in favor of proceeding cautiously during the next few years as we make our way through the thorny social considerations raised by advancing reproductive technologies.

Yet Professor Robertson's analysis would, as a matter of constitutional law, decide for us that in each of the situations posed the would-be parent's procreative liberty overrides competing considerations and prevents any regulations other than those designed purely to ensure safe medical practices. The effect of his constitutional interpretation is to foreclose debate and remove the issues from the public forum, for, in this view, the "rights" of adults preclude the possibility of regulation that public consensus might deem desirable. The conversation is over before it has had a chance to begin.³³

A primary objection to Professor Robertson's global approach is that it ignores both the manner in which constitutional interpretation comes about and the underlying reasons for the way in which the Supreme Court approaches constitutional questions. It is axiomatic that the Supreme Court will address a question of constitutional interpretation only in the context of a case or controversy, and then only when the case cannot be decided on any other basis. The Court refuses to anticipate future (though related) constitutional questions; instead, it insists upon deciding any constitutional issue upon the narrowest possible grounds.³⁴ At least part of the reason for the Court's adherence to this set of principles is its belief that wise and workable constitutional doctrine can develop only through an evolutionary, case-by-case process in which issues are sharply focused and "pressed before

33. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 14 (1991) (arguing that assertion of rights fails to take account of social responsibility by cutting off discussion that would potentially aid in "the process of self-correcting learning"). As Glendon so aptly observes, "[I]n its simple American form, the language of rights is the language of no compromise. The winner takes all and the loser has to get out of town. The conversation is over." *Id.* at 9.

34. See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) (summarizing rules that Supreme Court has developed "for its own governance in the cases confessedly within its jurisdiction").

the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting and demanding interests."³⁵

The body of doctrine that emerges from a line of case law can certainly serve a predictive purpose for evaluating the validity of some instances of proposed future action. Obviously, it can also serve as a useful springboard for framing social policy perspectives. However, the process of extrapolating from a body of Supreme Court cases a full-blown theory of broad-based social policy, applying that theory to a number of issues whose very form is changing shape almost daily with the development of increasingly sophisticated technology, and then insisting that all behavior within the theoretical umbrella must be the subject of heightened constitutional protection seems to me to be dubious at best. As the Supreme Court's jurisprudential approach suggests, current attempts to resolve questions that are not yet fully defined, or whose implications we cannot yet entirely appreciate, run the danger of leading to socially undesirable consequences if our current resolution does not retain the flexibility to adapt to each new situation as it comes up. Setting an entire realm of social policy into constitutional concrete poses this danger.

I submit, therefore, that Professor Robertson's definition of "procreative liberty" paints with too broad a brush insofar as constitutional interpretation is concerned. By foreclosing discussion and the possibility of social control over issues important to the future of us all, he reaches results that are unnecessary for the protection of constitutional values and undesirable from the standpoint of public policy. His glib recitation of the rubric that, from the perspective of any individual, it is invariably better to have been born than not to have been born makes too short a shrift of a concern central to the reproductive technologies debate — namely, what we should do to ensure the physical, mental, and psychological well-being of the children whom we are deliberately bringing into existence.

Please do not misunderstand me. As a mother who would have been devastated by infertility, I have only the strongest sympathies for those who desperately desire to become parents and whose fondest wish is for children with a genetic tie to at least one of the rearing parents. I am not even saying that, as a matter of social policy, I would vote with those who would restrict access to assisted reproduction by single persons, gay or lesbian couples, or,

35. *United States v. Fruehauf*, 365 U.S. 146, 157 (1961); *see also* *TRIBE*, *supra* note 22, §§ 3-9 to -10 (discussing ban on advisory opinions and doctrine of ripeness).

for that matter, any of the parties that I mentioned earlier in my chronicle of controversial situations.

What I am saying, quite simply, is that the development of new reproductive technologies raises issues too numerous and complex for us to deal with — or even to foresee — all at one time. In the final chapter of *Children of Choice*, Professor Robertson addresses "critiques of procreative liberty," several of which are represented in this Symposium.³⁶ In characterizing those who might disagree with him, he states that some "may simply be more cautious."³⁷ I would place myself in that camp. However, there is no room for caution, or for addressing the issues piecemeal in the public forum, if Professor Robertson is correct that "procreative liberty," *as he defines it*, is a fundamental right protected by standards of strict scrutiny under the United States Constitution. It is to that contention that I now turn.

II. *The Constitutional Argument*

A. *Robertson's Thesis*

Much of the discussion in *Children of Choice* of the primacy of procreative liberty as an overriding value is couched in terms of social policy arguments, not necessarily constitutional ones. From a purely social policy perspective, I do not disagree with Professor Robertson that the procreative interests of would-be parents is *a* primary value, worthy of a great deal of respect and accommodation as we consider the increasing sophistication and usage of reproductive technologies. Indeed, his "lens of procreative liberty,"³⁸ as he characterizes it, does provide us with "a useful framework"³⁹ for evaluating both current issues and future developments in this rapidly evolving area. As a matter of social policy, my disagreement with Professor Robertson is more one of emphasis than of kind. I would endow the procreative interests of would-be parents with a less thoroughgoing primacy and would place more weight on the interests of the children resulting from the use of these technologies.

36. See ROBERTSON, *supra* note 1, at 220-35 (answering critiques that his rights-based approach to procreative liberty is overly individualistic, ignores social responsibility and community needs, fails to account for economic and class effects, and risks exploiting and oppressing women).

37. *Id.* at 222.

38. *Id.* at 220.

39. *Id.* at 222.

Where I differ from Professor Robertson is with his insistence that procreative liberty as a constitutionally protected fundamental right should be broadly construed in a manner that protects from all but minimal regulation virtually any means of achieving biological parenthood for virtually any would-be parent. Although the constitutional argument *per se* is not as prominent in *Children of Choice* as in some of Professor Robertson's other writings,⁴⁰ he does advance it in Chapter 2,⁴¹ and his basic phraseology throughout the book mirrors the constitutional parlance of fundamental rights language.⁴²

His examination of both Supreme Court holdings and dicta in a number of cases leads Professor Robertson to the conclusion that "[i]n the United States laws restricting coital reproduction by a married couple would have to withstand the strict scrutiny applied to interference with fundamental constitutional rights."⁴³ From there, he invokes equal protection reasoning and notes that the desire of infertile couples "to have a family — to beget, bear, and rear offspring — is as strong as in fertile couples."⁴⁴ This proposition then follows:

[I]f bearing, begetting, or parenting children is protected as part of personal privacy or liberty, those experiences should be protected whether they are achieved coitally or noncoitally. In either case they satisfy the basic biologic, social, and psychological drive to have a biologically

40. See Robertson, *Embryos*, *supra* note 15, at 954-67; Robertson, *Procreative Liberty*, *supra* note 15, at 414-20, 427-36.

41. ROBERTSON, *supra* note 1, at 22-42. For especially relevant sections, see *id.* at 28-29, 35-40.

42. There is very little difference between a declaration that any restriction upon procreative liberty (broadly defined to include the use of assisted reproduction) must be subjected to strict scrutiny and can be upheld only if it is narrowly tailored to support a compelling state interest, see *supra* note 22 and accompanying text, and Professor Robertson's statement that "procreative liberty [should] be given presumptive priority in all conflicts, with the burden on opponents of any particular technique to show that harmful effects from its use justify limiting procreative choice," ROBERTSON, *supra* note 1, at 16. *Cf. id.* at 40-41 ("If procreative liberty is taken seriously, a strong presumption in favor of using technologies that centrally implicate reproductive interests should be recognized. Although procreative rights are not absolute, those who would limit procreative choice should have the burden of establishing substantial harm. This is the standard used in ethical and legal analyses of restrictions on traditional reproductive decisions. Because the same procreative goals are involved, the same standard of scrutiny should be used for assessing moral or governmental restrictions on novel reproductive techniques.").

43. ROBERTSON, *supra* note 1, at 36.

44. *Id.* at 39.

related family. Although full genetic reproduction might not exist in each case, the interest of the couple in rearing children who are biologically related to one or both rearing partners is so close to the coital model that it should be treated equivalently. Noncoital reproduction should thus be constitutionally protected to the same extent as coital reproduction, with the state having the burden of showing severe harm if the practice is unrestricted.⁴⁵

B. *The Current Constitutional Status of Procreative Liberty*

1 *Supreme Court Decisions*

To assess Professor Robertson's arguments, it is first necessary to determine as precisely as possible what interests the Supreme Court has held to be subject to heightened protection under the Constitution. Identifying the core values at stake in defined liberty interests should then lead to logical conclusions about the potential scope of procreative liberty as an element of the right of privacy.

Professor Robertson and other commentators have accurately noted that the Supreme Court's clearest jurisprudence in this area concerns the right *not* to procreate — i.e., not to bear unwanted children.⁴⁶ In 1965, *Griswold v. Connecticut*⁴⁷ first identified a right of access to contraceptive devices as part of a "right of privacy"⁴⁸ inherent in the marital relation-

45. *Id.* For the viewpoint that collaborative reproductive techniques (i.e., AID, surrogacy, or IVF with a donor embryo) are more similar to adoption than to coital reproduction, see BARTHOLET, *supra* note 14, at 218-29.

46. See, e.g., OTA, INFERTILITY, *supra* note 2, at 219-20; ROBERTSON, *supra* note 1, at 28-29, 45-48; Annas, *Regulating*, *supra* note 14, at 416; Massie, *supra* note 14, at 502-04; O'Brien, *supra* note 14, at 139-40; Robertson, *Embryos*, *supra* note 15, at 955 n.50; Robertson, *Procreative Liberty*, *supra* note 15, at 405 n.3, 415-16; Ryan, *supra* note 14, at 7; Keller, *supra* note 14, at 172-73.

47. 381 U.S. 479 (1965).

48. See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."). In his opinion for the Court, Justice Douglas found the privacy right in "penumbras, formed by emanations" from specific guarantees in the Bill of Rights, including the First Amendment's freedom of association, the Fourth Amendment's protection of the home from unreasonable searches and seizures, and the Fifth Amendment's self-incrimination clause, as well as the Ninth Amendment's provision concerning the retention of unenumerated rights by the people. *Id.* at 484.

ship.⁴⁹ *Eisenstadt v. Baird*⁵⁰ extended the same right of privacy to single persons in 1972.⁵¹ In 1977, *Carey v. Population Services International*⁵² held that minors could not be barred from purchasing contraceptives.⁵³ Meanwhile, the 1973 decision of *Roe v. Wade*⁵⁴ found that the right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy,"⁵⁵ at least during the first trimester.⁵⁶ Mature minors possess the same right;⁵⁷ other minors may obtain an abortion with parental consent or through a judicial proceeding.⁵⁸ *Planned Parenthood v. Casey*⁵⁹ recently reaffirmed a woman's previability abortion right,⁶⁰ although the Court softened its prior trimester framework to an undue burden standard for evaluating government regulation.⁶¹

It is clear that the government must respect an individual's right to prevent procreation by the use of contraception or by previability abortion, but what is the picture when we look to the positive side of procreative liberty — the right to procreate? As long ago as 1942, in *Skinner v*

49. *See id.* at 485-86.

50. 405 U.S. 438 (1972). Justice Brennan characterized the right of privacy expansively: "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 person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

51. *See id.*

52. 431 U.S. 678 (1977).

53. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693 (1977) (opinion of Brennan, J.).

54. 410 U.S. 113 (1973).

55. *Roe v. Wade*, 410 U.S. 113, 153 (1973). Justice Blackmun's opinion for the Court grounded the privacy right in the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action." *Id.*

56. *See id.* at 163.

57. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) (invalidating statute giving parent veto power over minor's abortion decision).

58. *See Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (holding that state may require parental notification or consent, but only if it establishes judicial bypass procedure, which must permit mature minor to make decision herself or — if she is not mature — must allow court to decide whether abortion is in her best interest). *See generally* *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (involving judicial bypass procedure); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990) (same).

59. 112 S. Ct. 2791 (1992).

60. *See Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2816 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

61. *See id.* at 2818-20.

Oklahoma,⁶² the Court in dictum referred to procreation as "one of the basic civil rights of man"⁶³ and noted that "marriage and procreation are fundamental to the very existence and survival of the race."⁶⁴ *Skinner*, however, was an equal protection case concerning the state's power to render someone permanently sterile, and its reference was to natural procreative *capacity*, not to procreative acts.⁶⁵

Since *Skinner*, in construing the liberty interest protected by the Due Process Clause of the Fourteenth Amendment, the Court has delineated, in Justice Powell's words, "[a] host of cases [that] have consistently acknowledged a 'private realm of family life which the state cannot enter.'"⁶⁶ This realm includes personal decisions "relating to marriage, procreation, contraception, family relationships, and child rearing and education."⁶⁷ Accordingly, the Court has struck down policies restricting an individual's choice of whom⁶⁸ and when to marry,⁶⁹ zoning regulations burdening rights of blood relatives to live together in a single household,⁷⁰ and laws deemed to interfere with parental rights to raise and educate children as one sees fit.⁷¹ Although no case attempts to define a positive right to procreate as such, recognition of such a right is certainly implicit

62. 316 U.S. 535 (1942).

63. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

64. *Id.*

65. *See id.* at 536-37

66. *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (opinion of Powell, J.) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). Justice Powell actually traces the lineage of these cases to two decisions preceding *Skinner*. *See Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that parents have right to educate their children in private schools); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (holding that state law prohibiting foreign language instruction violates Fourteenth Amendment).

67. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) (citations omitted).

68. *See Loving v. Virginia*, 388 U.S. 1, 11-12 (1967) (invalidating Virginia's antimiscegenation statute).

69. *See Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (invalidating statute requiring court's approval of marriage of resident having minor children who are not in his custody and whom he is under legal duty to support).

70. *See Moore*, 431 U.S. at 499-500 (opinion of Powell, J.) (invalidating single-family residential ordinance that defined "family" so narrowly as to prevent grandmother from living in same house with her son and two grandsons who were cousins, not brothers).

71. *See Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that parents have right to educate their children in private schools); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (holding that state law prohibiting foreign language instruction violates Fourteenth Amendment).

in *Cleveland Board of Education v LaFleur*,⁷² in which the requirements of two school boards for extensive maternity leave were held to constitute impermissible burdens on a protected area of "freedom of personal choice in matters affecting marriage and family life."⁷³ In his opinion for the court, Justice Stewart specifically linked the pregnancy choice of the teachers with Justice Brennan's characterization in *Eisenstadt v Baird* of the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁷⁴ Justice Stewart's reference was arguably significant for the fact that he cited contraception cases (dealing with the right *not* to procreate) to imply support for an expansive *positive* constitutional concept of procreative liberty

Yet we must also keep in mind some sharp cutoff points that the Court has earmarked in its delineation of the constitutionally protected right of privacy. In *Bowers v Hardwick*,⁷⁵ the Court refused to characterize homosexual behavior as an aspect of the freedom of intimate association.⁷⁶ Instead, the Court upheld a state prohibition against homosexual sodomy on the grounds that the practice had long constituted a criminal offense and hence did not fit within the "fundamental liberties . . . deeply rooted in this Nation's history and tradition."⁷⁷

Again, in *Michael H. v Gerald D.*,⁷⁸ the Court upheld a statutory presumption of a child's legitimacy, irrebuttable by all but the marital couple, and, in so doing, brushed aside a natural father's claim of rights both to prove his paternity and to maintain a relationship with his daughter under circumstances in which the mother had been married and living with her husband at the time of the birth.⁷⁹ Claims of parental rights by natural fathers of illegitimate children are given constitutional respect when those fathers have participated in the child's maintenance and care.⁸⁰ In *Michael*

72. 414 U.S. 632 (1974).

73. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639 (1974).

74. *Id.* at 640 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

75. 478 U.S. 186 (1986).

76. *See Bowers v Hardwick*, 478 U.S. 186, 191-92 (1986).

77. *Id.* at 192 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.)).

78. 491 U.S. 110 (1989).

79. *See Michael H. v. Gerald D.*, 491 U.S. 110, 119-30 (1989) (opinion of Scalia, J.).

80. *See, e.g., Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding that denial to

H., however, the Court found that the state policy favoring (1) the child's interests in a status of legitimacy and (2) the preservation of the integrity of the family unit overrode any interests that either the natural father or the child herself might otherwise assert.⁸¹

Given the parameters of the Supreme Court's right of privacy decisions, how are we to interpret the scope of the enunciated "right to decide whether to bear or beget a child"?⁸² I suggest that the answer to this question lies in an examination of the underlying *values* at stake in the decided cases. The second question is how broadly *should* that right extend as questions involving the new reproductive technologies make their way into our legal system? Although full exploration of that question is beyond the scope of this Article, I submit that formulating the answer calls for social policy considerations that give weight and value to concerns beyond simply, or even primarily, the procreative liberty interests of the affected adults.

2. Values Underlying the Decisions

Professor Robertson's reading of the privacy cases leads him to conclude that coital reproduction within marriage is a fundamental right subject to the highest degree of constitutional protection.⁸³ Because the underlying motivations and desires are the same, he argues that noncoital

unmarried father of parental fitness hearing afforded other parents whose custody is challenged by state violates Equal Protection Clause); *see also* *Lehr v Robertson*, 463 U.S. 248, 267-68 (1983) (holding that Equal Protection Clause does not require state to afford mothers and fathers similar legal rights with respect to their children when father has failed to attempt to establish relationship with child); *Caban v Mohammed*, 441 U.S. 380, 392-93 (1979) (holding that New York statute prohibiting adoption of child without natural mother's consent, but allowing adoption of child without natural father's consent unless father can prove adoption not to be in child's best interests, violates Equal Protection Clause when natural father has established substantial relationship with child).

81. *See Michael H.*, 491 U.S. at 119-20 (opinion of Scalia, J.); *see also id.* at 125 (citing common-law presumption of legitimacy of any child born during marriage and stating that "[t]he primary policy rationale underlying the common law's severe restrictions on rebuttal of the presumption appears to have been an aversion to declaring children illegitimate

A secondary policy concern was the interest in promoting the 'peace and tranquillity of States and families'").

82. *Eisenstadt v Baird*, 405 U.S. 438, 453 (1972); *see also supra* notes 50-51, 74 and accompanying text.

83. *See* ROBERTSON, *supra* note 1, at 36; *see also supra* note 43 and accompanying text.

reproduction should receive the same degree of constitutional deference.⁸⁴ Are these conclusions justified? I submit that the first one is, but the second one is not. The distinction becomes apparent upon an examination of the values underlying the cases involving procreative choice.

Professor Robertson argues that the primary value at stake here is the "central importance [of procreative liberty] to individual meaning, dignity, and identity"⁸⁵ for both fertile and infertile couples. In other words, what matters is the shared wish of both fertile and infertile couples "to replicate themselves, transmit genes, gestate, and rear children biologically related to them."⁸⁶ The desire is the same, the motivations are the same, and the goal is the same. Therefore, he reasons, infertile couples should have the same protected right to noncoital reproduction that fertile couples have to coital reproduction.⁸⁷ This syllogism has an appealing ring to it and, as a social policy proposition, deserves respect if not wholesale accommodation. In the realm of constitutional law, however, there are many instances in which there is a sharp distinction between the degree of protection specifically provided to a belief or motivation and the degree of protection provided to the conduct arising from that belief or motivation.

3. *The Belief/Conduct Distinction*

Professor Robertson is surely correct in identifying self-fulfillment as a major concern of the privacy cases and a key rationale underlying the protection given to procreative choice.⁸⁸ Citing those decisions, the *Casey* Court declared:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.⁸⁹

84. See ROBERTSON, *supra* note 1, at 39; see also *supra* note 45 and accompanying text.

85. ROBERTSON, *supra* note 1, at 16.

86. *Id.* at 32.

87. See *id.* at 39.

88. See *id.* at 24-25.

89. *Planned Parenthood v Casey*, 112 S. Ct. 2791, 2807 (1992).

The primacy of beliefs to any person's self-definition, and the centrality of freedom of self-definition to the concept of liberty generally, cannot be gainsaid. Nor can it be denied that liberty must entail, at the very least, the right to make certain choices about how to live one's life in a manner that will give meaning and value to the existence of the person making the choices. In other words, liberty must involve not only freedom of belief, but also a meaningful opportunity to act upon the beliefs central to self-definition.

Nonetheless, it is also true that our system of constitutional government, for all its emphasis upon individual liberties as particularly recognized in the Bill of Rights, has always insisted upon the importance of the distinction between beliefs, on the one hand, and conduct stemming from those beliefs, on the other. Beliefs often possess, for the believer, the quality of the absolute; certainly, from the standpoint of government, they possess the quality of the unregulable. The government may attempt to influence beliefs, but it ultimately lacks the power either to instill or to expunge them from the minds of those who hold them. Conduct, on the other hand, is the stuff with which regulation is concerned. Given that beliefs are both central to self-definition and essentially ungovernable, while conduct is both the natural outgrowth of beliefs and the arena of regulation, the important question becomes: To what extent must government accommodate conduct in order to respect belief and to preserve the right of self-definition, as it simultaneously acts in the best interests of all by promulgating regulations that seem desirable to a majority?

I know of no thoroughgoing answer to this question — at least, not in the developed jurisprudence of constitutional case law — but particularized answers abound, especially in the area of First Amendment interpretation. The Religion Clauses present a striking example of constitutional protection for belief: Government is specifically prohibited from establishing any religion, but it is also required to respect "the free exercise thereof."⁹⁰ "Exercise" is in fact an active word and might seem to connote a component of protected conduct, as well as belief. Yet time and again, the Supreme Court has stated that although the Free Exercise Clause protects belief absolutely, religiously motivated conduct "remains subject to regulation for the protection of society"⁹¹ Thus, child labor

90. U.S. CONST. amend. I. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" *Id.*

91. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940); *see also* *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963) (stating that, although "[t]he door of the Free Exercise Clause

laws,⁹² universal immunization requirements,⁹³ and antipolygamy laws⁹⁴ have all been upheld against religious objections to compliance. In each case, the Court favored larger social values perceived to be at stake — for example, in the polygamy cases, common notions of morality and an ordered society, and in the immunization cases, concerns related to both the general public health and the individual welfare of the children most directly affected. Furthermore, challenged regulations have not necessarily been held to a "strict scrutiny" standard of review; at least, criminal laws of general applicability need not accommodate religiously based conduct and need not rest upon a compelling state interest.⁹⁵ Although the Religious Freedom

stands tightly closed against any governmental regulation of religious *beliefs* as such," resulting conduct may be circumscribed when it poses "some substantial threat to public safety, peace or order"); *Braunfeld v Brown*, 366 U.S. 599, 603-04 (1961) ("[L]egislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion."); *Reynolds v. United States*, 98 U.S. 145, 166 (1878) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

92. See *Prince v Massachusetts*, 321 U.S. 158, 167 (1944) ("[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and this includes, to some extent, matters of conscience and religious conviction.").

93. See generally *Cude v. State*, 377 S.W.2d 816 (Ark. 1964); *Mosier v. Barren County Bd. of Health*, 215 S.W.2d 967 (Ky. 1948); *Sadlock v Board of Educ.*, 58 A.2d 218 (N.J. 1948); *Board of Educ. v. Maas*, 152 A.2d 394 (N.J. Super. Ct. App. Div. 1959), *aff'd*, 158 A.2d 330 (N.J.), *cert. denied*, 363 U.S. 843 (1960); *City of New Braunfels v. Waldschmidt*, 207 S.W. 303 (Tex. 1918). These cases all cited *Jacobson v Massachusetts*, 197 U.S. 11 (1905), as authority for defending compulsory immunization requirements against religious objections. The *Jacobson* Court specifically stated, "According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." *Id.* at 25. Further, the Court stated, "Whatever may be thought of [the mandatory vaccination] statute, it cannot be affirmed to be, beyond question, in palpable conflict with the Constitution." *Id.* at 31, *accord Prince*, 321 U.S. at 166-67 ("[One] cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.").

94. See *Reynolds*, 98 U.S. at 165-66 (arguing that marriage, as foundation of society, creates social obligations and duties that must be subject to governmental regulation lest social order be destroyed).

95. See *Employment Div. v. Smith*, 494 U.S. 872, 888 (1990) ("[P]recisely because we value and protect religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.").

Restoration Act of 1993⁹⁶ attempts to impose such a requirement, its constitutional validity remains to be tested. In any event, the positive protection afforded by the Free Exercise Clause arguably justifies stronger protections for conduct stemming from religious beliefs than for conduct that has other motivational roots.⁹⁷

Again, consider the freedom of expression. Pure expression — the simple statement of a thought, belief, idea, or factual piece of knowledge — is surely the closest thing to the holding of that thought, belief, idea, or knowledge, and hence deserves a degree of protection almost as absolute, as reflected in the strong requirement that government remain viewpoint neutral in its regulatory policies.⁹⁸ Even so, simple statements can be constrained or punished based upon their content in the service of

96. Pub. L. No. 103-141, 107 Stat. 1488 (1993).

97. See, e.g., *Employment Div.*, 494 U.S. at 891-907 (O'Connor, J., concurring in judgment) (taking strong issue with Court's rationale on ground that Free Exercise Clause provides positive protection for areas of religiously motivated behavior); *id.* at 907-21 (Blackmun, J., dissenting) (dissenting on similar grounds). Several commentators have made this argument. See generally Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV 993 (1990); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV 1 (arguing generally that Free Exercise Clause requires some accommodations for religiously motivated conduct and permits others that legislatures might decide to grant); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV 555 (1991); Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV 743 (1992) (arguing against legislative accommodations for religiously motivated conduct, but also maintaining that Free Exercise Clause requires some accommodations); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV 1; Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV 685 (1992) (arguing generally that Free Exercise Clause requires some accommodations for religiously motivated conduct and permits others that legislatures might decide to grant).

98. See, e.g., *Texas v Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 60-61 (1983) (Brennan, J., dissenting) (noting that case law "provide[s] some support for the notion that the government is permitted to exclude certain subjects from discussion in nonpublic forums," but "[o]nce the government permits discussion of certain subject matter, it may not impose restrictions that discriminate among viewpoints on those subjects whether a nonpublic forum is involved or not"); *City of Madison Joint Sch. Dist. No. 8 v Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175-76 (1976) ("[T]he participation in public discussion of public business cannot be confined to one category of interested individuals. To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees.").

a compelling state interest, such as the national security at stake in antiespionage statutes⁹⁹ or the public order preserved by prohibitions against incitement to riot.¹⁰⁰

Beyond these quite specific and rare circumstances of potentially permissible content regulation, however, speech is actually subject to a relatively high degree of circumscription in the guise of reasonable time, place, and manner regulations.¹⁰¹ Any speaker is entitled to express her beliefs, thoughts, ideas, or knowledge, but certainly not anywhere, at any time, or in any manner of her choosing. Although time, place, and manner regulations trigger a heightened standard of review, their validity does not require a compelling state interest, and the government's burden is not difficult to sustain, so long as the rules are applied evenhandedly.¹⁰² Even

99. See, e.g., *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (stating, in dictum, that prior restraint on speech might be permissible in "exceptional cases" and citing as examples "actual obstruction to [a government's] recruiting service or the publication of the sailing dates of transports or the number and location of troops" during wartime, obscenity laws, and "incitements to acts of violence and the overthrow by force of orderly government"); see also *New York Times Co. v. United States*, 403 U.S. 713, 723 (1971) (Douglas, J., concurring) (invalidating injunctions prohibiting publication by two newspapers of so-called "Pentagon Papers" on ground, *inter alia*, that *Near* test was not met). Some Justices in *New York Times*, however, pointed to the possibility of appropriate criminal laws supporting postpublication penal action. See *id.* at 730 (Stewart, J., concurring); *id.* at 733-40 (White, J., concurring); cf. *Snapp v. United States*, 444 U.S. 507, 509 n.3, 515-16 (1980) (per curiam) (noting that Central Intelligence Agency may act to protect substantial government interests in national security secrets by imposing restrictions on employee activities and holding that when employee breached agreement to submit manuscript for prepublication review, judgment imposing constructive trust on book's profits was appropriate).

100. See *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (invalidating Ohio's criminal syndicalism statute and holding that statute prohibiting advocacy of illegal conduct is valid only if prohibited conduct is "directed to inciting or producing imminent lawless action" and is "likely to produce such action"). The *Brandenburg* test was reaffirmed in *Hess v. Indiana*, 414 U.S. 105 (1973) (per curiam), in which the Court held that the test was not met as applied to an alleged incitement to riot during a street protest. See *id.* at 108-09; see also *TRIBE*, *supra* note 22, § 12-9.

101. See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984) ("[R]easonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression but are nevertheless valid.").

102. See, e.g., *id.* at 293 ("Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions. We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."). The requirement of a "significant governmental interest" (rather

the quintessential public forums need not remain constantly available: Public parks are commonly closed from dusk to dawn to protect the public safety, the need for streets to serve vehicular traffic justifies permit requirements,¹⁰³ and the authorities can insist that public sidewalks remain sufficiently clear for pedestrian use.¹⁰⁴ The use of sound enhancement devices is clearly subject to reasonable regulation in the service of the public peace.¹⁰⁵ Notice that the more it is possible to characterize the subject matter of the regulation as "conduct" — even "expressive conduct" — rather than as "pure speech," the more likely it is that a regulation will be upheld;¹⁰⁶ hence, the Court's close attention to the appropriate characterization of such activities as draft card burning,¹⁰⁷ the wearing of

than "compelling") is the language of an intermediate standard of judicial review. *See also* *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) ("Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so."); *id.* at 798-99 n.6 ("While time, place, or manner regulations must be 'narrowly tailored' in order to survive First Amendment challenge, we have never applied strict scrutiny in this context.").

103. *See, e.g.,* *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969) (invalidating ordinance requiring permit for parade or demonstration on overbreadth grounds, but noting permissibility of properly drawn statute); *Cox v. New Hampshire*, 312 U.S. 569, 575-76 (1941) (upholding license requirement for parade or procession on public street after state supreme court narrowly construed statute to limit discretion of licensing authority to appropriate time, place, and manner considerations).

104. *See, e.g.,* *Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 2516, 2526 (1994) ("The State has a strong interest in promoting the free flow of traffic on public streets and sidewalks").

105. *See generally* *Ward*, 491 U.S. 781; *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *Kovacs v. Cooper*, 336 U.S. 77 (1949).

106. *See, e.g.,* *Texas v. Johnson*, 491 U.S. 397, 406 (1989) ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word."); *Shuttlesworth*, 394 U.S. at 152 ("[T]he First and Fourteenth Amendments [do not] afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech." (quoting *Cox v. Louisiana*, 379 U.S. 536, 555 (1965)) (second brackets added by Court)).

107. *See* *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (upholding congressional prohibition of draft card burning in face of claim that activity was undertaken as form of political protest and noting that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms").

black armbands,¹⁰⁸ and flag burning.¹⁰⁹

The privacy cases themselves also leave broad scope for the regulation of conduct. Although the cases most directly related to procreative liberty speak in terms of the "right to decide whether to bear or beget a child"¹¹⁰ (a mental process), the holdings fall far short of protecting all possible behaviors related to that choice. Instead, the cases defining constitutionally protected *conduct* invariably implicate not only the value of self-fulfillment or self-definition, but one or more other values as well. Generally, these values are characterizable either as respect for an individual's bodily integrity or as social concerns related to the privacy of marital intimacy and the integrity of the family unit.

Bodily integrity is one of the chief values particularly identified for protection in the contraception and abortion cases. Both *Eisenstadt* and *Carey* struck down contraception restrictions partly on the basis that the state had no right to punish concededly illicit sexual conduct by imposing on the miscreant the physical burdens of pregnancy and the birth of an unwanted child.¹¹¹ *Roe v. Wade* and other abortion cases expressed similar concerns.¹¹² These decisions comport with others in which the Court has

108. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505-06 (1979) (holding that wearing of black armbands by school students could not be prohibited or punished because activity was "akin to 'pure speech'" and neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate").

109. See *United States v. Eichman*, 496 U.S. 310, 317-18 (1990) (holding Flag Protection Act of 1989 unconstitutional as content-based regulation of expressive conduct). The *Eichman* Court specifically based its holding upon *Texas v. Johnson*, in which the Court determined that, unlike the statute in *O'Brien*, a Texas anti-flag-burning law was "related to the suppression of free expression" and therefore was outside the more lenient *O'Brien* test. See *Johnson*, 491 U.S. at 407.

110. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

111. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694-95 (1977) (citing *Eisenstadt*, 405 U.S. at 448, and referring generally to cases supporting abortion rights of minor women as protective of bodily integrity). See generally *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (supporting abortion rights of minor women as protective of bodily integrity).

112. See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973) (detailing aspects of "[t]he detriment that the State would impose upon the pregnant woman by denying this choice altogether"); see also *TRIBE*, *supra* note 22, § 15-10, at 1340 (stating that "it is difficult to imagine a clearer sense of bodily intrusion" than requiring woman to carry child to term); cf. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (1992) ("Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role").

protected persons against unwanted surgery or other procedures invasive of bodily integrity¹¹³ Taken as a whole, this body of law would surely severely restrict or prohibit altogether such practices as state-mandated sterilization, contraception, or abortion — freedom from which constitutes another aspect of procreative liberty¹¹⁴ — as well as protect access to those procedures performed consensually

Values related to protecting the intimacy of the marriage relationship and the integrity of the family unit form another central concern of the privacy cases. They are the entire focus of *Griswold v Connecticut*¹¹⁵ and of decisions already cited relating to the "private realm of family life."¹¹⁶ Interestingly, the value of marital integrity provides a key rationale for the major restriction on parenting rights in *Michael H. v Gerald D*¹¹⁷ In that case, the Court permitted California to protect an ongoing marriage against the assault represented by the natural father's assertion of paternal rights to a child born during the marriage.¹¹⁸

113. See, e.g., *Winston v. Lee*, 470 U.S. 753, 766 (1985) (holding that surgical intrusion into defendant's body to retrieve bullet fired by victim was unreasonable under Fourth Amendment when medical risks were disputable); *Rochin v. California*, 342 U.S. 165, 172-73 (1952) (holding that use of morphine capsules as evidence against defendant violated Due Process Clause when capsules were obtained by force and against defendant's will through stomach pump).

114. See ROBERTSON, *supra* note 1, at 36-38; see also *id.* at 69-93 (concluding that forced use of Norplant to curb irresponsible reproduction violates procreative liberty and bodily integrity and may only be justified in case of severe mental retardation). *Buck v. Bell*, 274 U.S. 200 (1927), upheld the validity of a Virginia statute that authorized forced sterilization of people with hereditary forms of mental illness when such sterilization was deemed to be in the best interests of the mentally defective person and society. See *id.* at 207 Although *Buck* has never been overruled, it is generally conceded that in light of the dictum in *Skinner v. Oklahoma*, 316 U.S. 535 (1942); see *supra* notes 62-65 and accompanying text, and the other right to privacy cases, see *supra* notes 47-81 and accompanying text, the *Buck* decision would be unlikely to be upheld today. See, e.g., NOWAK & ROTUNDA, *supra* note 22, § 14.27, at 759 ("[I]t is doubtful that the Supreme Court would follow *Buck v. Bell* today. If the justices can find no compelling interest to justify the prohibition of abortions, any state interest in sterilization should be held insufficient to impair this fundamental right."); TRIBE, *supra* note 22, § 15-10, at 1340 ("[I]t is hard to square the basic philosophy of *Skinner v. Oklahoma* with the proposition that the state may usurp the individual's procreative choices in an irreversible way — whether by sterilization or by compulsory breeding." (footnote omitted)).

115. 381 U.S. 479 (1965); see *supra* notes 47-49 and accompanying text.

116. *Moore v. City of E. Cleveland*, 431 U.S. 494, 499 (1977) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)); see *supra* notes 66-74 and accompanying text.

117. 491 U.S. 110 (1989); see *supra* notes 78-81 and accompanying text.

118. See *Michael H. v. Gerald D.*, 491 U.S. 110, 129-30 (1989) (opinion of Scalia, J.).

The marriage relationship, with its concomitant intimacy, thus lies at the heart of the constitutionally protected right of privacy. Within the context of marriage, consensual behavior that might normally be expected to result in procreation — in other words, coital reproduction — certainly comes within the ambit of this protection.

Notice, however, that with respect to other so-called "procreative liberty" decisions, this syllogism does not apply. The Court has made very clear, for example, that outside the context of the marriage relationship, protection of the right of access to contraception does not mean protection of the right to engage in the behavior that makes contraception necessary or desirable,¹¹⁹ particularly in the case of minors.¹²⁰ Thus, laws against fornication and adultery and those prohibiting sexual activities with or on the part of minors are perfectly valid. Similarly, the abortion cases, although protecting the rights of a woman to bodily integrity against the burden of an unwanted pregnancy, have specifically refused to hold that "one has an unlimited right to do with one's body as one pleases."¹²¹

119. See *Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972) (stating that state can constitutionally regulate extramarital and premarital sexual relations); *id.* at 449 (noting that legislature has "a full measure of discretion in fashioning means to prevent fornication"); *Griswold v. Connecticut*, 381 U.S. 479, 498 (1965) (Goldberg, J., concurring) ("The State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication."); *id.* at 505 (White, J., concurring) ("[T]he statute is said to serve the State's policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, concededly a permissible and legitimate legislative goal."); *Poe v. Ullman*, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting) ("The laws regarding marriage forbidding adultery, fornication and homosexual practices confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis."); *id.* at 552-53 ("The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced. So much has been explicitly recognized in acknowledging the State's rightful concern for its people's moral welfare.").

120. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 707 (1977) (Powell, J., concurring) ("[T]he relevant question in any case where state laws impinge on the freedom of action of young people in sexual matters is whether the restriction rationally serves valid state interests."); *id.* at 713 (Stevens, J., concurring) ("I would describe as 'frivolous' appellees' argument that a minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the State."); *id.* at 719 (Rehnquist, J., dissenting) (arguing that Court's action amounted to denial of state's power to deter sexual conduct among unmarried minors and declaring it "departure from a wise and heretofore settled course of adjudication to the contrary").

121. *Roe v. Wade*, 410 U.S. 113, 154 (1973).

The clear message is that not all procreative behavior is subject to the heightened protection of the constitutional right of privacy. The next question is whether the special privacy right that inheres in the marriage relationship nonetheless encompasses all consensual procreative behavior, including use of the means of assisted reproduction.

I submit that the answer is no. Unlike coital reproduction, assisted reproduction does not directly implicate the values — bodily integrity, marital intimacy, or integrity of the family unit — that are central to the privacy cases. Heightened protection is not triggered simply by the fact that any particular conduct represents a search for meaning in life or because the persons involved are seeking self-fulfillment central to their self-definition. When invoked, those values have proven to be an insufficient basis for a claim to constitutional protection of the resulting behavior. In *Bowers v Hardwick*, Justice Blackmun's dissent vehemently called upon these values to protect, as part of the right of intimate association, the conduct prohibited by Georgia's antisodomy statute.¹²² The majority, however, disagreed and noted that "[t]he law is constantly based on notions of morality."¹²³

4. Conclusions

The foregoing examination of the values that underlie existing privacy cases, and of the criteria pertinent to the regulation of other constitutionally protected rights involving beliefs central to the individual, leads to several conclusions germane to the current discussion. First, it is clear that within the context of marriage, both the consensual behavior and the choices involved in the natural process of "bearing or begetting" children receive full constitutional protection. Second, absent its compelling interest in a viable fetus, the government may not intervene in the reproductive choices of individuals (married or single) in a manner that intrudes upon their bodily integrity. Finally, the cases suggest that the state may constitutionally regulate reproductive behavior outside the particular context of marital intimacy. Apparently, it may ground that regulation in values that the legislature deems sufficiently significant, including common concepts of morality.

Whether as a question of constitutional interpretation or as a point of public policy, one could easily disagree with the outcome in *Bowers v Hardwick*, and indeed with the notion of regulating any intimate behavior

122. See *Bowers v Hardwick*, 478 U.S. 186, 204-06 (1986) (Blackmun, J., dissenting).

123. *Id.* at 196.

between two consenting adults when there is no danger of direct harm to any third person. That disagreement finds a strong foundation in the values invoked by Justice Blackmun in his *Bowers* dissent and by Professor Robertson in his defense of procreative liberty—namely, the right to seek one's self-fulfillment through choices that will give meaning and value to one's life.¹²⁴ However, as important as these values are and as central as they may be to a satisfying definition of liberty, the conduct to which they lead must be subject to appropriate circumscription when the welfare of a third person might be endangered or undermined by the actor's unrestrained choice. A potential detrimental effect of an individual's behavior upon a third person is necessarily of concern from a public policy perspective; in constitutional parlance, it may often rise to the level of a state interest sufficiently significant to justify regulation designed to prevent the perceived harm.

Professor Robertson himself concedes that sufficient harm to a third party's interests is an appropriate limit on procreative liberty,¹²⁵ however, he repeatedly discounts the notion of harm to the third parties most directly affected by an individual's or a couple's use of reproductive technologies—namely, the resulting children.¹²⁶ I believe that Robertson underplays the

124. See *id.* at 204-06 (Blackmun, J., dissenting); ROBERTSON, *supra* note 1, at 24-25.

125. See ROBERTSON, *supra* note 1, at 17 ("A central question in this enterprise is to determine whether effects on embryos, families, women, and other participants rise to the level of severity necessary to justify infringing a basic right."); *id.* at 37 ("Restrictions on marital reproduction are theoretically possible only if the state can show great harm to others from the reproduction in question."); *id.* at 41-42 (noting that harm necessary to justify infringing one's procreative liberty by restricting access to reproductive technologies must be both tangible and substantial); *id.* at 58 ("At viability the fetus's advanced development lends itself to a more objective valuation of its interests, and the woman's interest in ending pregnancy can be limited."); *id.* at 72 ("[D]ecisions to reproduce should be viewed as presumptive rights that are subject to limitation only upon the showing of substantial harm to the interests of others."); *id.* at 178 ("Even if determinative of a decision to reproduce neither the core values that underlie procreative liberty nor any other protected liberty includes the right to make offspring less than healthy and normal, when a healthy birth is reasonably possible."); *id.* at 179 ("At a certain point one's right to use one's body as one wishes must take account of the interests of others whose needs those decisions directly impinge."); *id.* at 221 ("Procreative choices that clearly harm the tangible interests of others are subject to regulation or even prohibition."); *id.* at 224 ("If harmful effects are clearly established public concerns may take priority over private choice.").

126. See *id.* at 50 ("[A] high standard of justification should be met to warrant overriding the woman's presumptive right to end pregnancy."); *id.* at 153 ("The risk of harmful effects does not undercut the presumptive importance of [genetic trait] selection as part of reproductive choice, even if analysis of particular cases shows sufficient harm to justify

interests of the children deliberately created by assisted reproduction and in so doing neglects a primary value that must be given due weight in any responsible social policy concerning these "children of choice." Because my perception of the scope of constitutional protection for procreative choice is narrower than his, I would like to share a few thoughts on this issue from a public policy perspective.

III. The Welfare of Third Parties: The Interests of "Children of Choice"

Throughout *Children of Choice*, whenever Professor Robertson contemplates any potentially negative effects of adults' reproductive choices on the resulting children, he favors the adults' procreative liberty on the ground that, from the standpoint of the children, the only alternative is nonexistence, and it is always "better to have been born than not to have been born."¹²⁷ This rubric decides the issue for him: The adults have a fundamental right "to decide whether to bear or beget a child", the children have no fundamental right to nonexistence and undoubtedly would not choose it if they could.

It seems to me that this approach is conceptually flawed and morally inadequate. The concept stems from so-called "wrongful life" cases. In these cases, disabled children have sought recovery in damages from physicians or genetic counseling services on the ground that their parents were negligently misinformed about the likelihood of the children's severe disabilities — knowledge that would have caused the parents to decide to abort or never to conceive.¹²⁸ Although three jurisdictions have allowed

limiting the right to select." (emphasis added)); *id.* at 221 ("With this approach we have seen that there are few instances in which the feared harms of the new technology are compelling enough to justify restrictive legal intervention (though the need for responsible use remains)."); *id.* at 222 ("[M]any of the concerns and fears will, upon closer analysis, turn out to be speculative fears or symbolic perceptions that do not justify infringing core procreative interests.").

127 See *supra* notes 15-19 and accompanying text (describing "wrongful life" argument and citing cases).

128. See generally *Turpin v Sortint*, 643 P.2d 954 (Cal. 1982) (in bank); *Gami v Mullikin Medical Ctr.*, 22 Cal. Rptr. 2d 819 (Ct. App. 1993); *Curlender v. Bio-Science Lab.*, 165 Cal. Rptr. 477 (Ct. App. 1980); *Smith v Cote*, 513 A.2d 341 (N.H. 1986); *Procanik v Cillo*, 478 A.2d 755 (N.J. 1984); *Berman v Allan*, 404 A.2d 8 (N.J. 1979); *Gleitman v Cosgrove*, 227 A.2d 689 (N.J. 1967); *Becker v. Schwartz*, 386 N.E.2d 807 (N.Y. 1978); *Flanagan v. Williams*, 623 N.E.2d 185 (Ohio Ct. App. 1993); *Speck v Finegold*, 408 A.2d 496 (Pa. Super. Ct. 1979), *aff'd*, 439 A.2d 110 (Pa. 1981); *Nelson v Krusen*, 678 S.W.2d

child plaintiffs to recover the special expenses of their extraordinary care and training,¹²⁹ no court has awarded general damages for the alleged "injury" of life itself. The courts reason that life, even under the very limiting conditions in which it may be experienced by the severely disabled, is preferable to nonexistence — in other words, it is "better to have been born than not to have been born."¹³⁰ This conclusion is augmented by the mind-boggling nature of the task of assessing general damages. If the function of a tort award is to place the plaintiff in the position in which she would have been absent the injury, how can a jury compare the value of a state of nonexistence with the value of the child's impaired life?¹³¹ The fact that

918 (Tex. 1984); *Harbeson v Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983) (en banc).

129. So far, the state supreme courts in California, New Jersey, and Washington have permitted special damage recoveries in wrongful life suits. *See generally* *Turpin v Sortini*, 643 P.2d 954 (Cal. 1982) (in bank) (involving congenital deafness); *Gami v. Mullikin Medical Ctr.*, 22 Cal. Rptr. 2d 819 (Ct. App. 1993) (involving spina bifida and following *Turpin*); *Curlender v. Bio-Science Lab.*, 165 Cal. Rptr. 477 (Ct. App. 1980) (involving Tay-Sachs disease and anticipating *Turpin*); *Procanik v Cillo*, 478 A.2d 755 (N.J. 1984) (involving congenital rubella syndrome); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983) (en banc) (involving fetal hydantoin syndrome).

130. *See, e.g.*, *Turpin v Sortini*, 643 P.2d 954, 961 (Cal. 1982) (in bank) ("[S]ome courts have concluded that the plaintiff has suffered no legally cognizable injury on the ground that considerations of public policy dictate a conclusion that life — even with the most severe of impairments — is, as a matter of law, always preferable to nonlife."); *Berman v Allan*, 404 A.2d 8, 12 (N.J. 1979) ("One of the most deeply held beliefs in our society is that life — whether experienced with or without a major physical handicap — is more precious than non-life."); Timothy J. Dawe, Note, *Wrongful Life: Time for a "Day in Court"*, 51 OHIO ST. L.J. 473, 483 (1990) (discussing *Gleitman v Cosgrove*, 227 A.2d 689 (N.J. 1967), and noting that, "[i]n denying the parents' claim for wrongful birth, the court demonstrated an overwhelming preference for life over nonexistence, no matter what the conditions of that life.").

131. *See, e.g.*, *Turpin*, 643 P.2d at 961 ("Because nothing defendants could have done would have given plaintiff an unimpaired life, it appears inconsistent with basic tort principles to view the injury solely by reference to plaintiff's present condition without taking into consideration the fact that if defendants had not been negligent she would not have been born at all."); *Procanik v. Cillo*, 478 A.2d 755, 763 (N.J. 1984) ("The crux of the problem is that there is no rational way to measure non-existence or to compare non-existence with the pain and suffering of impaired existence."); *Gleitman*, 227 A.2d at 692 ("By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies."); *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978) ("[A wrongful life claim] demands a calculation of damages dependent on a comparison between the Hobson's choice of life in an impaired state and nonexistence. This comparison the law is not equipped to make."); *Nelson v Krusen*, 678 S.W.2d 918, 925 (Tex. 1984) ("[T]he cause of action unavoidably involves the relative benefits of an impaired life as opposed to no

damages must be mitigated by the value of any benefit conferred, when that benefit is life itself, adds to the complexity of the problem.¹³²

As a number of judges and commentators have suggested, however, the tenet in wrongful life cases that existence is always preferable to nonexistence is not offered as a factual conclusion about each individual; rather, it is a statement of public policy based upon respect for the sanctity of human life in general and offered to support a jurisprudential conclusion that "wrongful life" is simply not an injury cognizable in the law.¹³³ Professor

life at all. All courts, even the ones recognizing a cause of action for wrongful life, have admitted that this calculation is impossible."); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 496 (Wash. 1983) (en banc) ("[M]easuring the value of an impaired life as compared to nonexistence is a task that is beyond mortals.").

132. See, e.g., *Turpin*, 643 P.2d at 964 ("[I]t must be recognized that as an incident of defendant's negligence the plaintiff has in fact obtained a physical existence with the capacity both to receive and give love and pleasure as well as to experience pain and suffering. Because of the incalculable nature of both elements of this harm-benefit equation a reasoned, nonarbitrary award of general damage is simply not obtainable."); *Nelson v. Krusen*, 678 S.W.2d 918, 924 (Tex. 1984) ("[B]ecause in awarding damages the court must offset any special benefits to the plaintiff resulting from the negligence, such a cause of action involves a weighing of life against non-life, a calculation that cannot be rationally made." (citation omitted)); *Dawe*, *supra* note 130, at 479-80 ("In wrongful life claims, then, the child usually asserts as 'general' damages the pain and suffering he will endure during his lifetime as a result of the defect, but presumably less the benefits he will derive from his existence, if any. This 'net burden' is then measured not against the value of a 'normal' life, but against the nullity of nonexistence.").

133. See, e.g., *Curlender v. Bio-Science Lab.*, 165 Cal. Rptr. 477, 486 (Ct. App. 1980) ("Public policy, as perceived by most courts, has been utilized as the basis for denying recovery; in some fashion, a deeply held belief in the sanctity of life has compelled some courts to deny recovery to those among us who have been born with serious impairment."); *Procanik v. Cillo*, 478 A.2d 755, 760 (N.J. 1984) ("[P]olicy considerations have led [the Supreme Court of New Jersey] in the past to decline to recognize any cause of action in an infant for his wrongful life."); *Flanagan v. Williams*, 623 N.E.2d 185, 191 (Ohio Ct. App. 1993) ("The common and statutory law of Ohio places an intrinsic value on life. In the absence of guidance from the Supreme Court or the General Assembly, we are not prepared to say that life, even with severe disabilities, constitutes actionable injury."); *Nelson*, 678 S.W.2d at 924 ("At heart, the reluctance of these courts [to award damages for being alive] is based on the 'high value which the law has placed on human life, rather than its absence.'" (quoting *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978))); Alexander M. Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV 618, 650 (1979) ("In [denying damages for wrongful life], courts are not announcing purely rational conclusions derived from legal principles but are instead proclaiming their personal views on certain value-laden 'facts.'"); Peters, *supra* note 14, at 506-09 (discussing concern of courts that nonexistence comparison in wrongful life claims would weaken social respect for life); *Dawe*, *supra* note 130, at 493 ("[M]ost of the rationales used by courts to reject wrongful life claims have been variations or extensions of a basic 'sanctity of life' argument.").

Robertson, however, expresses the statement that "it is better to have been born than not to have been born" as an ultimate existential truth — a fact that must necessarily obtain with respect to each individual child who comes into the world, whether or not, for example, that child might be HIV-positive, otherwise severely diseased or disabled, or born to abusive parents.¹³⁴ This transposition of an argument from its public policy origins to a statement offered for its universal truth seems to me to be misplaced. One commentator has expressed it eloquently:

The sanctity-of-life argument is ambiguous. It may advance the view that every life, no matter how severely defective, no matter how filled with suffering, is necessarily a good to the individual who lives it. This seems simply false. Alternatively, it may express the view that every human life has, or should have, value *for us*; that is, every life is worthy of concern and respect.¹³⁵

Current social policy, which respects autonomous patient choice for end-of-life decision-making, reflects a humane awareness that there are conditions under which life may be intolerable to the individual living it.¹³⁶ Surely that can be just as true for infants as for those who have lived much longer.¹³⁷

134. See *supra* notes 15-19 and accompanying text.

135. Bonnie Steinbock, *The Logical Case for "Wrongful Life,"* HASTINGS CENTER REP., Apr. 1986, at 15, 17

136. See generally SOCIETY FOR THE RIGHT TO DIE, REFUSAL OF TREATMENT LEGISLATION (1991) (containing more than 70 statutes consisting of state legislation pertaining to several kinds of advance directives — wherein patients while competent can provide for decisions to refuse or withdraw life-sustaining medical treatment under certain conditions — including "living will" documents, in which patients detail conditions under which they wish to refuse or halt medical treatment, and durable powers of attorney and surrogate decision-making statutes, which enable individuals to select persons to make choices for them once they become incompetent); 1 SOCIETY FOR THE RIGHT TO DIE, RIGHT-TO-DIE COURT DECISIONS (1976-1986) (analyzing 26 significant court decisions in this area of law); 2 *id.* (1987-1989) (analyzing 23 significant court decisions in this area of law); 3 *id.* (1990-) (analyzing 13 significant court decisions in this area of law). Some surrogate decision-making statutes name individuals to make end-of-life choices for patients who have failed to commit their wishes to writing. See generally UNIF RIGHTS OF THE TERMINALLY ILL ACT, 9B U.L.A. 127 (Supp. 1994). The Patient Self-Determination Act, part of the Omnibus Budget Reconciliation Act of 1990, requires health care providers receiving federal funds to inform patients about their rights under state law and to document whether or not patients have health care directives. See 42 U.S.C. § 1395cc(f) (Supp. V 1993).

137 Several judges have noted the connection that exists between "right-to-die" policy and "wrongful life" cases. See, e.g., *Turpin v Sortini*, 643 P.2d 954, 962 (Cal. 1982) (in bank) ("[A]t least in some situations — public policy supports the right of each individual to make his or her own determination as to the relative value of life and death."); *Procanik v*

Even if one concedes that children who owe their existence to assisted reproduction are virtually certain to find their lives to be net benefits rather than net burdens, a social policy choice that is content to rest upon this minimum threshold as the appropriate criterion for acceptability strikes me as highly questionable. In the section of his book titled "Preventing Prenatal Harm to Offspring,"¹³⁸ Professor Robertson offers the proposition that pregnant women who have not decided to abort have a strong responsibility to engage in certain behaviors and to avoid others in order to ensure that their children will be born as healthy as possible.¹³⁹ He distinguishes the "unavoidable harm" implicated by the procreative choice to reproduce under circumstances in which the child is bound to be born handicapped in some manner from the "avoidable harm" that might result from a woman's prenatal actions.¹⁴⁰ Conduct during pregnancy (other than the abortion choice itself) is not part of procreative liberty, in his view;¹⁴¹ the harm principle dictates that a woman's rights of autonomy and bodily integrity may be circumscribed at the point at which her choices might impinge on the interests of another, "the child that the fetus will become."¹⁴² Indeed, Professor Robertson believes that these interests are

Cillo, 478 A.2d 755, 771 (N.J. 1984) (Handler, J., concurring in part and dissenting in part) ("[If we accept that] individuals may lawfully determine in a necessitous or exigent setting that nonlife may reasonably be preferred over life [as we do in 'right-to-die' cases,] then we ought to conclude that damages flow from the deprivation of this right and that the infant plaintiff should be reasonably compensated."); Nelson v. Krusen, 678 S.W.2d 918, 933 (Tex. 1984) (citing "right-to-die" cases to note that "[t]he judgment of a parent or guardian may be substituted for that of the child when the child is incompetent and unable to decide whether he prefers nonlife to an impaired existence"). Also consider the following scenario posed by Joel Feinberg:

Suppose that after the death of your body a deity appears to you and proposes to give you an option. You can be born again after death (reincarnated), but only as a Tay-Sachs baby with a painful life expectancy of four years to be followed by permanent extinction, or you can opt for permanent extinction to begin immediately. I should think you would have to be crazy to select the first option.

Joel Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, 4 SOC. PHIL. & POL'Y 145, 164 (1989).

138. ROBERTSON, *supra* note 1, 173-94.

139. *See id.* at 173.

140. *See id.* at 178.

141. *See id.*

142. *Id.* at 179.

sufficiently strong to justify regulation¹⁴³ and, in some instances, criminal sanctions¹⁴⁴ for behavior potentially deleterious to the future child, although "the better policy in most cases will be to rely on information, education, and access to treatment."¹⁴⁵

Robertson's contentions are highly controversial, to say the least, and discussion of them is clearly beyond the scope of this Article. What I wish to suggest here is that the same consideration — the *optimal* (not minimal) well-being of the future children — is the appropriate basis upon which to shape social policy with regard to the use of assisted reproduction.¹⁴⁶ This assertion is not novel. In the area of family law, generally, issues involving the welfare of children are invariably decided on the ground of serving the children's best interests, even when doing so means infringing upon the rights or interests of adults.¹⁴⁷

The resolution of issues raised by assisted reproduction need not, in fact, go so far. Determining the "best interests" of children whose existence we are planning is a speculative enterprise. We do not even know the nature or extent of potential harms that might uniquely affect children born of assisted reproduction. Commentators raise such considerations as the effect upon self-identity when one does not know who one or both genetic parents are,¹⁴⁸ the confusion of "too many parents" or the

143. See *id.* at 182 (contemplating possible exclusion of women from certain areas of workplace if sufficient connection with harm to fetuses can be demonstrated and regulation is narrowly drafted); *id.* at 186-90 (discussing potential "prenatal seizures," such as incarceration for substance abuse and possible court-mandated cesarian sections).

144. See *id.* at 182-86.

145. *Id.* at 180.

146. Cf. sources cited *supra* note 14.

147. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 9.4, at 359 (2d ed. 1988) (noting that child's welfare is "primary concern" in child abuse or neglect proceedings); *id.* § 19.1, at 788 (noting that child's best interest is governing principle in custody disputes); *id.* § 19.4, at 797 nn. 3-4 (citing statutes and case law adopting child's best interest as primary criterion for custody); *id.* § 19.6, at 825 (criticizing doctrine of constitutional "parental right" to child custody as coming "dangerously close to treating the child in some sense as the property of his parent"); *id.* § 20.5, at 891 (noting that, in context of termination-of-parental-rights proceedings, "[m]ost courts concede that the welfare of children is a compelling state interest"); *id.* § 20.6, at 905 (noting that some statutes allow parental rights to be terminated when necessary to serve child's best interests); *id.* § 20.7, at 909 (noting that best interest of child is "ultimate standard for both agencies and courts" in adoption proceedings).

148. See, e.g., ANDREWS, *supra* note 32, at 278-80; BARTHOLET, *supra* note 14, at 228-29; FIELD, *supra* note 14, at 54; OVERALL, *supra* note 14, at 111; R. SNOWDEN ET AL.,

psychological harm perhaps engendered by custody battles when surrogate mothers wish to maintain contact with the babies that they have delivered,¹⁴⁹ and the need for full and accurate family medical profiles.¹⁵⁰ A child born to a postmenopausal woman¹⁵¹ or a child born as a clone of someone else, especially when that child is named after a deceased sibling, may suffer from a heavy burden of preconceived expectations.¹⁵² Deliberate planning for nontraditional families, such as single-parent situations or households in which both parents are of the same gender, poses other issues. The possibilities raised by increasing sophistication in genetic engineering may present the most far-reaching and unpredictable problems likely to arise.

ARTIFICIAL REPRODUCTION: A SOCIAL INVESTIGATION 118-19, 171-72 (1983); Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 669 (1991); Ethics Committee of the American Fertility Society, *Ethical Considerations of the New Reproductive Technologies*, FERTILITY & STERILITY, Sept. 1986 (Supp. 1), at 1S, 60S; Ryan, *supra* note 14, at 10; Walter Wadlington, *Artificial Conception: The Challenge for Family Law*, 69 VA. L. REV. 465, 499-500 (1983); Keller, *supra* note 14, at 186.

149. See, e.g., FIELD, *supra* note 14, at 54-55; OTA, INFERTILITY, *supra* note 2, at 227; Martha A. Field, *Surrogacy Contracts — Gestational and Traditional: The Argument for Nonenforcement*, 31 WASHBURN L.J. 1, 12-13 (1992); Keller, *supra* note 14, at 187 *Compare In re Baby M*, 537 A.2d 1227, 1235-37 (N.J. 1988) (involving surrogate mother battling with intended parents for custody of child) with Holder, *supra* note 14, at 52 (describing case of handicapped newborns resulting from surrogacy contracts and battles in which both intended parents and surrogate mother deny custody). Both of these types of custody battles may potentially cause psychological damage to the child.

150. See, e.g., ANDREWS, *supra* note 32, at 279-80; OTA, INFERTILITY, *supra* note 2, at 227; SNOWDEN ET AL., *supra* note 148, at 176-77; Andrews & Douglass, *supra* note 148, at 660-62; Annas, *Regulating*, *supra* note 14, at 413; Wadlington, *supra* note 148, at 499-500.

151. See *supra* note 30 and accompanying text.

152. See Robertson, *supra* note 12, at 11-12 ("[T]here could be special problems faced by [a later born twin]. Its path through life might be difficult if the later born child is seen merely as a replica of the first and is expected to develop and show skills and traits of the first. This might be a special danger if the later born child is used as a replacement for an earlier born child who has died."); Jerry Adler et al., *Clone Hype*, NEWSWEEK, Nov. 8, 1993, at 60, 61-62 (presenting situations in which couple, deciding that they like characteristics of particular person, might decide to thaw clone of that person to be implanted in woman's uterus); Philip Elmer-Dewitt, *Cloning: Where Do We Draw the Line?*, TIME, Nov. 8, 1993, at 65, 68 ("[W]hat about the couple that sets aside, as a matter of course, a clone of each of their children? If one of them died, the child could be replaced with a genetic equivalent."); *id.* ("All parents know how hard it is to separate what they think a child ought to be from what he or she actually is. That difficulty would be compounded — for both the parent and the child — if an exact template for what the child could become in 10 or 20 years were before them in the form of an older sibling.").

IV Conclusion

Certainly, society as a whole, as well as the individuals involved in the use of assisted reproduction, has a stake in the welfare of the future citizens that we are deliberately creating — not only their physical health, but their psychological and emotional well-being. We already have some parallels upon which to base our judgments, such as the experiences of adopted children or children from divorced or "blended" families. Careful deliberation and due regard for potential pitfalls should enable us to anticipate and to plan carefully to provide resolutions of social policy that will accommodate not only the procreative desires of would-be parents, but also the optimum conditions of health and nurturance for their "children of choice."

