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Products of the Will: Robertson's *Children of Choice*

Gilbert Meilaender*

Perhaps no author in the field of bioethics has written more widely or influentially on assisted reproduction than John Robertson, and his *Children of Choice*¹ might almost be described as a *Summa*. Although he sometimes claims to be discussing reproductive freedom as a moral and legal matter, I find very little that qualifies as moral argument. Nevertheless, Robertson's argument deserves our attention precisely because it accurately represents a widely shared and influential viewpoint in our society. I will explore the structure of Robertson's approach and reflect upon some of the deeper issues that he acknowledges, but (with a rapidity that often astonishes) passes by

I

Robertson addresses a number of different issues — abortion, forced contraception, in vitro fertilization and collaborative reproduction, the status of the human embryo, quality control of offspring, restrictions on pregnant women to prevent harm to children, and nonreproductive uses of our reproductive powers (e.g., producing embryos for research, conceiving a child to serve as an organ donor) — but throughout his discussion the fundamental structure of argument remains essentially the same. He begins with the claim that (given the legal status of abortion in our society) there is a right *not* to reproduce. He then argues that it should follow that there is also a right to reproduce if one wishes. Although this would be, in the first instance, a right to reproduce coitally, Robertson argues that it must logically be extended to include noncoital reproduction as well as the power to control characteristics of the offspring one produces.

This right to reproduce is basic but not absolute. Hence, it could be limited if the state had compelling interests that required such limitation. For

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1. JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* (1994).

Robertson, however, the only sort of interest that might warrant limiting the right of reproductive liberty would be clear evidence that harm would result from its exercise. Most of the objections to one or another manner of exercising the right seem to him to express "symbolic" concerns rather than identify actual harms. Those concerns, he suggests, are matters about which citizens in a pluralistic society may reasonably differ and, therefore, offer no substantial ground for limiting the right of reproductive liberty. Even though relatively few limitations upon the exercise of this right are, in his view, justified, Robertson does describe it as a negative rather than a positive right. The state is not obligated to make possible our exercise of the right; it simply cannot stop us from exercising the right if we wish. With that bare bones outline of the argument before us, we need to consider at least three of its important features: the meaning and scope of reproductive liberty, the importance of the liberty, and its character as a negative rather than a positive right.

The Meaning and Scope of Reproductive Liberty

Robertson's goal is "to show the importance of procreative liberty"² Although Robertson often uses this language, I will generally refer to "reproductive liberty" because, as will become evident, I do not think he discusses a phenomenon that can accurately be termed "procreation." The first task, however, is to clarify the nature of the liberty

Robertson's initial and simplest description of reproductive liberty is that it is "the freedom to decide whether or not to have offspring."³ Elsewhere, he speaks of a "decision to have or not have children,"⁴ and of "an individual or couple's choice to use technology to achieve reproductive goals."⁵ A slightly broader formulation describes this liberty as "the freedom to have and rear offspring."⁶

Robertson clearly describes reproductive liberty as "first and foremost an individual interest."⁷ That he often refers to the right of "couples" to exercise their reproductive liberty does not, I think, indicate anything other than a deferential nod toward bourgeois morality. When he considers the

2. *Id.* at 3-4.

3. *Id.* at 4.

4. *Id.* at 5.

5. *Id.* at 18.

6. *Id.* at 119.

7. *Id.* at 22.

question of collaborative reproduction (involving donors and surrogates) in chapter six, he raises at the very outset a hard question that has the capacity to undermine his individualistic description of reproductive liberty. Given that such collaborative undertakings involve

the decomposition of the usually unified aspects of reproduction into separate genetic, gestational, and social strands, [a]re couples [and even this is too narrow a term here because the users of these techniques need not be a "couple" in any ordinary sense] who use these techniques "procreating" in a significant way, even though one of them may lack a genetic or biological connection to offspring? Is a collaborator meaningfully procreating if he or she is merely providing gametes or gestation without any rearing role?⁸

A reader will search the rest of this chapter in vain for any attempt to address that question. Instead, Robertson launches into a discussion of whether either the collaborators or the offspring are "harmed" by such reproduction.⁹ Because such harm, apart from some merely "symbolic" concerns, seems unlikely to him, he finds relatively little reason for limits on collaborative forms of reproduction.¹⁰ I suspect he thinks he has taken up the question he raised: whether the parties to such an undertaking could meaningfully be said to be procreating. But, in fact, he has not come even within hailing distance of the question. To do so would require him to wrestle with some of those symbolic concerns he so regularly sets aside.

The exercise of reproductive liberty requires no biological tie to the offspring produced. Recognizing the possibility of various collaborative arrangements in which people acquire a child to rear but have no biological connection to that child, Robertson suggests that, while this "is not reproduction in the strict sense," it still is part of reproductive freedom "because of the importance of parenting to persons who cannot themselves reproduce."¹¹ To be even more precise, he should have written: "Because of the importance of parenting to persons who cannot *or will not* reproduce themselves." Not only is noncoital, collaborative reproduction a part of reproductive liberty, so also are many measures one might take to control or shape the characteristics of the children one begets or intends to rear. Robertson asserts that reproductive liberty is of great personal significance

8. *Id.* at 120.

9. *See id.* at 120-22.

10. *Id.* at 122.

11. *Id.* at 143.

and that "[i]f a person thought that she would realize those benefits only from a child with particular characteristics, then she should be free to select offspring to have those preferred traits."¹²

It turns out, in fact, that the connection of parent and child protected by the right of reproductive liberty is almost entirely a product of the will. Because collaborative reproduction is a part of this liberty, it cannot necessarily require an intention to rear the child who is the product of one's gametes. And, on the other hand, it cannot require any biological connection at all with the child whom one gestates and/or rears. Unpacking this liberty in detail leads Robertson to hypothesize that we will be led to re-evaluate our understanding of the family (though this depends, of course, upon the unargued assumption that those who use such techniques are, in fact, doing the same thing as those who procreate in the traditional manner). "Such a reevaluation might show that preconception rearing intentions should count as much as or more than biological connection. If so, then arrangements in which several persons collaborate to produce a child for person(s) to rear who have no biologic connection with the child should also be presumptively protected."¹³ This in turn suggests to him that a broadened understanding of the liberty involved may one day "lead to a widespread market in paid conception, pregnancies, and adoptions" — a possibility he views with equanimity.¹⁴ What should be clear here is the triumph of will in Robertson's understanding of reproductive liberty. Whatever some people do, using the current panoply of techniques, to produce a child that one or more of them will rear seems presumptively protected by the right of reproductive liberty as Robertson understands it. His description of reproductive liberty expands and contracts at various points in the discussion, but it will, I think, be hard for a reader to suppose that the fundamental description is not that with which he begins, a description that requires no biological tie: "An individual or couple's choice to use technology to achieve reproductive goals."¹⁵

To be sure, some acts related to reproduction do not fall within the scope of the liberty. Thus, for example, Robertson holds that creating embryos for research, while it ought to be permitted and protected for other reasons, cannot be defended by appeal to reproductive liberty.¹⁶ But having

12. *Id.* at 152-53.

13. *Id.* at 143.

14. *Id.*

15. *Id.* at 18.

16. *Id.* at 200-02.

a child so that it can be a tissue donor is an exercise of this liberty because it does, after all, involve the production of a child.¹⁷ Only at "extreme measures such as cloning or nontherapeutic enhancement" does Robertson tend in the direction of prohibition.¹⁸ These measures "may violate widely shared notions of what makes procreation important."¹⁹ But a reader who has made it this far is likely to have difficulty explaining why Robertson himself attempts to "posit a core view of the goals and values of reproduction" that will rule out those extreme measures.²⁰ According to this view

[P]rocreative liberty would protect only actions designed to enable a couple to have normal, healthy offspring whom they intend to rear. Actions that aim to produce offspring that are more than normal (enhancement), less than normal (Bladerunner), or replicas of other human genomes (cloning) would not fall within procreative liberty because they deviate too far from the experiences that make reproduction a valued experience.²¹

I, at least, am unable to reconcile this statement with Robertson's more general views. Certainly his view presents no reason to restrict the exercise of the liberty to a "couple." More generally, if people might be reluctant to exercise their reproductive liberty without the freedom to enhance the characteristics of their offspring, Robertson's standard mode of argument suggests that freedom to enhance would also become a part of the liberty. If a child who is molded to be in some ways less than normal would not, but for that act, have been born at all, Robertson's standard analysis again suggests that the child has suffered no harm.²² And if people wish for whatever reason to rear a child who is the replica of an already existing person, nothing in Robertson's depiction of reproductive liberty should lead us to object. His appeal here to actions that "deviate too far from the experiences that make reproduction a valued experience" is a last-ditch attempt to find limits to a freedom that no longer presupposes any natural substratum and fails to pour meaning back into a concept that has become entirely the impoverished creature of human will.

17 *See id.* at 197

18. *Id.* at 153-54.

19. *Id.* at 154.

20.. *Id.* at 167

21. *Id.*

22. For a similar argument, cf. PAUL LAURITZEN, PURSUING PARENTHOOD: ETHICAL ISSUES IN ASSISTED REPRODUCTION 42 (1993).

The Importance of Reproductive Liberty

Why should we think that this liberty is so important? When Robertson addresses that question, he tends to repeat a few formulations that serve to ease us past the deeper humanistic issues that lie buried in such a question. Most generally, he suggests that certain "reproductive experiences are central to personal conceptions of meaning and identity" and provide "a crucial self-defining experience."²³ Or, again, the achievement of reproductive goals is "a central aspect of people's freedom to define themselves through reproduction."²⁴

Interestingly, however, Robertson does not view all reproductive experiences that might be termed self-defining as part of reproductive liberty itself. Thus, for example:

[W]hether the father may be present during childbirth, or whether childbirth may occur at home rather than in a hospital may be important for the parties involved, but they do not implicate the freedom to reproduce (unless one could show that the place or mode of birth would determine whether birth occurs at all).²⁵

There is, of course, something quite sensible about such a claim, but its good sense stands in tension with the expansiveness and narcissism of reproductive experience as Robertson describes it. What is peripheral to one person's self-defining experience may be quite central to another's, and I cannot find a thread in Robertson's argument strong enough to bear the weight of these distinctions. Once we begin to appeal to the importance of certain private experiences for personal conceptions of meaning and dignity it will not be easy to find our way back into worlds of shared meaning. Robertson intends, however, his second chapter to show that "procreative liberty deserves presumptive respect because of its central importance to individual meaning, dignity, and identity"²⁶

When we turn to that chapter, we are told that "transmission of one's genes through reproduction is an animal or species urge closely linked to the sex drive."²⁷ Moreover, connection to future generations may give us "solace in the face of death," may be the "expression of a couple's love or

23. ROBERTSON, *supra* note 1, at 4.

24. *Id.* at 18.

25. *Id.* at 23.

26. *Id.* at 16.

27. *Id.* at 24.

unity," and may have "religious significance."²⁸ This is, I think, as close as Robertson comes to helping us understand the human importance of reproductive experience. Consider the possibility of a married couple seeking donor insemination because of the husband's infertility. The resulting child cannot be said without considerable argument to express that couple's unity, nor, of course, does the birth of a child involve transmission of the husband's genes. To suppose that the sperm donor is himself fulfilling that fundamental urge to transmit one's genes must entail that we think of the donor as personally present in the child — in which case donor anonymity becomes morally suspect. Thus, many of the considerations Robertson mentions here as reasons for the importance of reproductive experience are not involved in a common form of assisted reproduction. We are left with the solace that a possibly very attenuated link to future generations may offer us in the face of death, though we are not told exactly why giving rise to those who will replace us — and who must therefore remind us of our mortality — will provide such solace.

Moreover, Robertson sometimes interprets even these considerations in ways that drain them of much of their ordinary significance. For example, if one has already produced offspring, the "marginal value" of additional offspring may be diminished.²⁹ Or, again, in claiming that people unfit to be parents need not be thought of as losing their right to reproductive liberty, Robertson notes that they might reproduce without rearing: "Offspring could be protected by having others rear them without interfering with parental reproduction."³⁰ True as this is — and necessary as it unfortunately is in many cases — it suggests that we have not progressed much in plumbing the human meaning of procreation.

For the most part, then, we are left with generalities about "the centrality of reproduction to personal identity, meaning, and dignity"³¹ and told that centrally involved in the dignity of persons is their "wish to replicate themselves."³² Robertson never asks in this connection whether human dignity might best be displayed in the way we deal with what is unwanted and unexpected in life. He does not rigorously address the question whether those who wish to experience only biological parenthood, only rearing, or only gestating are *doing* the same thing as those who hold

28. *Id.*

29. *Id.* at 31.

30. *Id.*

31. *Id.* at 30.

32. *Id.* at 32.

these aspects of parenthood together and whether, therefore, the importance we ascribe to the experience of parenthood is rightly conferred upon those who deliberately separate its constituent parts and seek to experience only some of them. Nor does he ask whether bearing and rearing children is better thought of as a task or as a return we make for the gift of life than as an experience sought for purposes of self-definition — or whether we would ascribe to it the importance we do if we thought of it chiefly as an exercise in self-definition. In short, the reader repeatedly is assured that reproductive experience is of immense human importance, but the argument itself threatens to drain from the experience most of what has made it seem important.

A Negative Right

In addition to being first and foremost an *individual* interest, reproductive liberty is also a negative rather than a positive right.³³ Although others may not interfere with one's exercise of the right, they are under no obligation to provide the services or resources that would make such exercise possible. Nevertheless, although the state is not obligated to make the exercise of the right financially possible, under Robertson's analysis, it must do a good bit to foster such exercise.

For example, the right must include permission to exercise "quality control" over one's offspring, for apart from "some guarantee or protection against the risk of handicapped children," people might choose not to reproduce.³⁴ Also, "selection decisions are essential to procreative liberty because of the importance of expected outcome to whether a couple will start or continue a pregnancy "³⁵ Evidently, then, the state could not discourage such quality control without infringing upon the right to reproductive liberty. More puzzling still is a statement Robertson makes in his discussion of Norplant: "If women are to be guaranteed control over their fertility through contraception, long-acting contraceptives such as Norplant should be made available to all women who desire it."³⁶ Perhaps Robertson intends only to make a policy recommendation and not to claim that such access to Norplant must be construed as part of the right of

33. *Id.* at 23.

34. *Id.* at 33.

35. *Id.* at 152.

36. *Id.* at 70-71.

reproductive liberty. The language he uses, however, suggests that he is discussing something that is part of the decision whether or not to have offspring and, hence, part of the protected liberty. And this, in turn, sounds far more like a positive than a negative right.

Similarly, preconception agreements that are a part of some collaborative reproductions should, he argues, be regarded as binding because people who cannot rely on such agreements will lack "the assurance they need to go forward with the collaborative enterprise."³⁷ We are told that agreements to pay surrogates are "probably necessary if infertile couples are to obtain surrogacy services."³⁸ Once again, it seems that any restrictions designed to discourage the reduction of procreation to contractual terms are interpreted as infringements of the right. Nonetheless, Robertson writes that the state is not required to "subsidize or otherwise encourage the use of all reproductive techniques" and that states may even "refuse to enact laws that facilitate collaborative reproduction."³⁹ Considerably more clarity is needed about what it means to characterize reproductive liberty as a negative rather than a positive right. I suspect that the source of much of the unclarity is a general blurring of the moral and the legal throughout the argument. Perhaps Robertson, while recognizing that states may not presently be required under law to encourage assisted reproduction and that, indeed, they may even discourage it, nevertheless wishes to propose that such encouragement be brought within the scope of reproductive liberty. That proposal, however, might transform a negative right into a positive right.

II

Thus far, I have focused chiefly on Robertson's discussion of the desire to reproduce. The desire not to reproduce, however, is more foundational in his argument. This is so because his argument is almost exclusively a legal (rather than moral) one and because the wish not to reproduce is more firmly grounded in our present understanding of constitutional law. It is, therefore, worth paying some heed to Robertson's discussion of abortion in chapter three.⁴⁰

37. *Id.* at 126.

38. *Id.* at 140.

39. *Id.* at 234.

40. *See id.* at 45-68.

The chapter is devoted largely to a discussion of what Robertson terms "a modified pro-choice position that is likely to dominate ethical, legal, and popular thinking about abortion for the foreseeable future."⁴¹ Here, as elsewhere in the book, a reader may not always be sure whether Robertson is describing or affirming, but, in general, he seems to look favorably upon this modified prochoice position. From that perspective, "abortion at early stages of pregnancy is generally viewed in most circumstances to be an ethically and legally acceptable act, but an act that should be discouraged or avoided whenever possible."⁴² If, however, Robertson does in fact support this position, he has a peculiar understanding of what it would mean to discourage an act. He recommends, for example, that in order to overcome distributive inequities in access to abortion, our public policy should "fund or provide contraceptive and abortion services."⁴³ Moreover, the acceptability of waiting periods longer than twenty-four hours for an abortion would depend on whether "such a period of reflection actually aids an informed decision or is merely obstructionist"⁴⁴ — a peculiarly negative way of describing a policy that might reasonably be designed to discourage abortion.

Arguments in defense of abortion generally take one of two forms.⁴⁵ "Personhood" arguments justify abortion up to that point (if any) in pregnancy at which the fetus is thought to have become a person with rights.⁴⁶ "Bodily support" arguments rely on the claim that, even if the fetus has rights, a pregnant woman cannot be obligated to provide it with the support of her body.⁴⁷ The second of these arguments is principally a right not to have to carry a fetus — which is not the same as the right to a dead fetus. Only by the accidents of medical technology will its exercise in the early stages of pregnancy necessarily result in a dead fetus. The second argument, therefore, is more difficult to relate to Robertson's right of reproductive liberty, which is described as involving a decision to have or not have children. Obviously, even if one is not compelled to carry a

41. *Id.* at 45.

42. *Id.* at 46.

43. *Id.* at 48.

44. *Id.* at 62.

45. See Gilbert Meilaender, *Abortion: The Right to an Argument*, HASTINGS CENTER REP., Nov./Dec. 1989, at 13.

46. See *id.* at 14-15.

47. See *id.* at 15-16.

fetus to term or rear the child who is born, one may still have a child if abortion is not understood necessarily to result in a dead fetus.⁴⁸ Hence, one might expect the personhood argument to carry more weight with Robertson. And in fact, he argues that abortion is about "escaping those burdens," not just of carrying or caring for a child, but of having one's offspring alive against one's will.⁴⁹

He faces the difficulty, however, as he clearly recognizes, that the Supreme Court's reasoning has depended less on the personhood than on the bodily support argument. By making viability a crucial, if not fully determinative, line, the *Roe v. Wade*⁵⁰ decision ascribed legal (and perhaps moral) significance to the point at which the fetus can survive outside the womb without the mother's bodily support.⁵¹ And, as Robertson also notes, if the fetus is considered to have personal status, the woman's "morally protectable interest [would consist] in becoming free of bodily burdens and not in avoiding reproduction altogether."⁵² Given his understanding of reproductive liberty, it is not surprising that Robertson attempts to move the argument in a different direction.

The importance of viability, he suggests, is not that it marks the point at which the fetus can live without the mother's bodily support. Rather, the fetus becomes sentient "and thus has interests in its own right" around the time of viability.⁵³ This does not mean that the fetus is yet a person with rights because personhood requires "the ability to reason or make choices."⁵⁴ Once the fetus is sentient, however, we may have some moral duties toward it as we do toward animals.⁵⁵ For the moment, then, as long as viability roughly coincides with the appearance of sentience, it will be a morally significant line (as it is in *Roe v. Wade*). But Robertson sees and states the crucial point clearly: "If technology pushes viability back to earlier presentient stages, it will cease to have this

48. And, as Robertson notes, "[e]ven if the child is relinquished for adoption, there will be powerful feelings of attachment, responsibility, and guilt that will, in many cases, last a lifetime." ROBERTSON, *supra* note 1, at 49.

49. *Id.*

50. 410 U.S. 113 (1973).

51. *Roe v. Wade*, 410 U.S. 113, 163-64 (1973); ROBERTSON, *supra* note 1, at 53.

52. ROBERTSON, *supra* note 1, at 51.

53. *Id.* at 53.

54. *Id.* at 51.

55. *Id.* at 53.

moral significance, because survivability will no longer correlate with sentience."⁵⁶

To rest too much weight on the bodily support argument would endanger the entire structure of Robertson's case for reproductive liberty, for if the day comes, as it well may, when fetuses can be kept alive outside the womb even before they are sentient, the reasoning of *Roe v Wade* would no longer undergird a right to abortion. Thus, Robertson needs the broader right not to have children — the right to a dead fetus — and that in turn will require some version of a personhood argument to suggest that we do no injustice when we abort the fetus. Here again, of course, one is never certain whether Robertson is pressing a moral argument or predicting (or attempting to shape) the future course of constitutional interpretation. While he seems generally to suggest that he is doing the latter, I think it is the former — a largely undefended argument about the meaning and moral importance of personhood — that is driving the argument.⁵⁷

Robertson claims, for instance, that a blanket condemnation of all abortion after conception "overlooks the very different biologic stages of embryonic and fetal development."⁵⁸ But his claim is underdeveloped in several ways. Once we have made the personhood — and not the bodily support — argument central, it will readily occur to us that an individual human life experiences a variety of developmental stages both before and after birth (a moment that has moral significance according to the bodily support, but not the personhood, argument). We may therefore be uncertain why Robertson states that "a person's keen interest in avoiding the social burdens of reproduction does not justify infanticide."⁵⁹ Indeed, he provides no argument to support that claim.⁶⁰ We may further note that the process of development within a human life generally follows a trajectory that includes, at the end, decline — sometimes decline into a condition in which one lacks the ability to reason or make choices, sometimes into nonsentience. We will have to consider the full implications of Robertson's understanding of personhood before we can decide whether it represents the way of wisdom.

56. *Id.*

57. See LAURITZEN, *supra* note 22, at 56-63.

58. ROBERTSON, *supra* note 1, at 48.

59. *Id.* at 50.

60. See *id.*

In short, although Robertson writes of "the extremes and inconsistencies of the anti-choice program,"⁶¹ his own pro-abortion stance is extreme in its reduction of human personal dignity to cognitive and volitional capacities and inconsistent in its failure to follow through on his preference for the personhood argument. He detects in proliferas a "latent agenda" that views abortion as a denigration of the importance of sex and marriage and "an attack on or devaluation of their life-style."⁶² One would be more impressed with his capacity to discern such agendas, though, were he to note that the interest of many men in their sexual freedom leads them to espouse prochoice views, or were he to consider whether some prochoicers might themselves feel threatened by a moral ideal that gives compelling testimony to human interdependence and the strength of character required to deal with the unexpected and unwanted in life. To explore such questions, not just to detect latent agendas, is the true task of moral reasoning.

III

At the very outset of his discussion, Robertson declares that there is "something profoundly frightening" about the forms of technological advance and kinds of choices that he will be discussing.⁶³ And at the end of the book he writes of our "ambivalence" — both individual and societal — toward these techniques.⁶⁴ But I suspect that a reader of the intervening pages would probably not discern much ambivalence or worry in Robertson's voice. It therefore is a little difficult to take to heart professions of ambivalence unless we bring other voices into play. Robertson offers a relatively straightforward but very thin understanding of human life. Individuals are largely isolated wills, brought together in association when they choose to cooperate in pursuit of their interests. Such an intense, but narrow focus might remind us of C.S. Lewis's contrast between the depiction of Adam and of Satan in Milton's *Paradise Lost*:

Adam, though locally confined to a small park on a small planet, has interests that embrace 'all the choir of heaven and all the furniture of

61. *Id.* at 66.

62. *Id.* at 67

63. *Id.* at 3.

64. *Id.* at 234.

earth.' Satan has been in the Heaven of Heavens and in the abyss of Hell, and surveyed all that lies between them, and in that whole immensity has found only one thing that interests Satan. [His] monomaniac concern with himself and his supposed rights and wrongs is a necessity of the Satanic predicament. He has wished to 'be himself,' and to be in himself and for himself, and his wish has been granted.⁶⁵

A singleminded focus on the self's willful pursuit of its projects in the world has the effect of obscuring our vision of other important realities. To attend to these other considerations we turn now to develop a vision of the individual as more situated and embedded — and to consider whether we may not thereby see more deeply into the meaning of human procreation.

Marriage as a Basic Form of Human Life

Robertson recognizes, as I noted earlier, that those who decompose marriage into its constituent parts, who separate its relational and procreative dimensions, may not be "doing" the same thing as those who beget and rear children within the bond of marriage. Despite recognizing the legitimacy of such a question, however, he never really addresses it. It is therefore worthwhile to seek to understand why one might believe that the union of biological, gestational, and rearing parenthood within a marriage should be important for human life.

Certainly, we can separate the personal and the biological, the relational and the procreative, dimensions of marriage and recombine them in a variety of ways. That we can do so testifies to the marvelous range of human freedom. If such freedom is the sole truth about human nature, if we are simply beings who freely create ourselves, there will be no limit to such self-definition and self-creation other than the limit of harm to others, which Robertson regularly invokes. In recent years, human dominion over the natural world has often been seen as problematic. But in our schizophrenic culture, we can deplore environmental abuse as an unwarranted exercise of human freedom while forging ahead in turning procreation into reproduction. Rather than seeing the person as present in the body, and the person's freedom as necessarily dependent upon respect for the natural world, we suppose that the personal and the biological are entirely separate realms and that we need not honor the body as the locus of personal presence.

Clearly, there is given in human nature a connection between procreation and the differentiation of the sexes. "To this given connection in our

65. C.S. LEWIS, A PREFACE TO PARADISE LOST 102 (1942).

nature it is possible to respond in only two ways. We may welcome it, or we may resent it."⁶⁶ We may resent it and use our freedom to remake it in the countless different ways that Robertson discusses — and in more ways still to be imagined. We may, that is, find human meaning in the body's procreative powers only when we choose that it should be there and only in the manner that we choose. But we may also honor the body as the presence of the person and ask ourselves what the good might be of holding together procreation and the bond of personal love between a man and woman.

Understanding procreation as appropriate only within the bond of mutual love of husband and wife will, first, be good for the loving relationship itself.⁶⁷ No doubt the motives of those who beget children coitally within marriage are often mixed, and they may have much to learn about the meaning of their action. But if they are willing to shape their intentions in accord with the nature of the act itself, in learning what procreation means they may be freed from self-absorption. Rather than being an exercise in self-definition or self-replication, procreation, as the fruition of coitus, should teach us that the act of love is not simply a personal project undertaken for our own fulfillment. That the embrace of husband and wife may prove fruitful and may sustain human life can provide their love a spaciousness it needs. Even when the relation of a man and a woman does not or cannot give rise to offspring, they can understand their embrace not simply as their personal project in the world, but as their participation in a form of life that carries its own inner meaning and has its *telos* established in nature. Such an understanding is necessary if the sexual relation of man and woman is to be more than "simply a profound form of play"⁶⁸ That our culture desperately needs to reclaim such a vision before the relation of men and women is debased still further seems, to me at least, evident.

Understanding procreation as appropriate only within the bond of mutual love of male and female will, second, be good for procreation itself.⁶⁹ Even when a man and a woman deeply desire a child, even when their act of love is moved by that desire and hope, the child can never be "the primary object of attention in that embrace."⁷⁰ Indeed, unless one's beloved is the object of one's attention and desire, the man, at least, may even be

66. OLIVER O'DONOVAN, *BEGOTTEN OR MADE?* 16 (1984). The discussion that follows draws upon O'Donovan's discussion. *See id.* at 16-17

67. *See id.*

68. *Id.* at 17

69. *See id.*

70. *Id.*

unable to fulfill his designated role. In the act of love, the partners must set aside their projects in order to give themselves to each other, and the (perhaps hoped for) child becomes the natural fruition of their shared love, not a chosen project. The child, therefore, is always a gift and, even, a mystery — one like them who springs from their embrace, not an inferior being whom they have made and whose destiny they should now determine. That our culture desperately needs to reclaim such a vision before our care for children is debased still further seems, to me at least, evident.

Clearly, we remain free to sever the procreative and relational dimensions of marriage at will, to find no personal significance in their natural unity unless we choose that it should be there. In our freedom, we can thus soar far above our finite condition, forgetting that there may be more ways to violate our humanity than by limiting that freedom. Certainly, we ought not suppose that an affirmation of reproductive liberty comes unencumbered with any metaphysical baggage. For, as Paul Ramsey once noted, when we dismember procreation into its several parts and combine them in new and different ways, we simply enact a new myth of creation in which human beings are created with two separate faculties — one manifesting the deepening of the unity of the partners through sexual relations, the other giving rise to children through "a cool, deliberate act of man's rational will."⁷¹ Thus, a symbolic vision of human nature is present both in the position I have outlined and in Robertson's defense of reproductive liberty. Neither can be offered free of metaphysical implications. We should not therefore assume that those who "procreate" and those who — having severed procreation into its parts — "reproduce" are *doing* the same thing. But if we can learn again to think of marriage as a basic form of life within which procreation ought to take place, we will necessarily challenge Robertson's argument at any number of important points. We will characterize procreation not simply as a right, but as the internal fruition of the act of love — a task undertaken to sustain human life. We will view all forms of collaborative reproduction as dehumanizing, as a violation of a basic form of human life. And we will doubt whether "quality control" of our offspring can express a commitment to human equality that envisions the child not as a product we have made, but as one like us in dignity

71. PAUL RAMSEY, *FABRICATED MAN: THE ETHICS OF GENETIC CONTROL* 37 (1970).

Making and Doing

This last point — the child as one who is begotten, not made — deserves more extended development. The contrast between doing and making is at least as old as Aristotle's characterization of *praxis* and *poesis*.⁷² This distinction, however, has had no impact on Robertson's discussion. When, for example, he discusses the permissibility of noncoital techniques for reproduction, he notes that some people have moral objections.⁷³ "However, often the harms feared are deontological in character. In some cases they stem from a religious or moral conception of the unity of sex and reproduction or the definition of family."⁷⁴ One is tempted to respond: "Well, yes. What sort of objections do we think we might encounter when contemplating the possibility of moral concerns?" But the point is that, for Robertson, making rather than doing, what we accomplish rather than what we do, always wins the argument. "[W]ithout a clear showing of substantial harm to the tangible interests of others, speculation or mere moral objections alone should not override the moral right of infertile couples to use those techniques to form families."⁷⁵ Why then, one might ask, did he bother even to mention moral objections? "Given the primacy of procreative liberty," he writes, "the use of these techniques should be accorded the same high protection granted to coital reproduction."⁷⁶ The point, however — at least if Robertson takes himself to be engaging in moral argument — is that the primacy of procreative liberty is not "given." He assumes and asserts this primacy, but largely without moral argument. And in so doing, he narrows tremendously the range of considerations that may shape our thinking about the meaning of the presence of children in human life. We need to open our minds to other features of human action in order to see how we might come to think of a child as our equal — and not simply as our product or project.

In passing quickly by any objections thought to be "deontological" in character, Robertson declines to think about what it means to "do" something and refuses to contemplate the difference between what we do and what we accomplish in our doing. A richer understanding of the ways

72. See ARISTOTLE, VI NICOMACHEAN ETHICS *2-5.

73. ROBERTSON, *supra* note 1, at 34.

74. *Id.*

75. *Id.* at 35.

76. *Id.*

of evaluating human behavior will make clear just how much he omits. In *The Responsible Self*, H. Richard Niebuhr delineated three different modes of moral reasoning and evaluation.⁷⁷ I draw on his categories to suggest how much is missing in Robertson's treatment of moral considerations.

First, we may describe human beings as makers or fashioners.⁷⁸ We act because we have goals and want to realize goods that we value. We are in the world as people who have projects, which we seek to realize through action. Like artisans or craftsmen, we are at work on a product, attempting to fashion it into the desired shape. From this perspective, we necessarily pay attention chiefly to what we accomplish, to the results of our action. Seeking to enhance human life as much as we are able, we cannot help but count the cost — weigh costs and benefits — when pursuing our projects and shaping our products. When we think in this way, our attention focused on the goal we seek to realize, we quite naturally suppose that an "ought to do" follows from an "ought to be." If it ought to be the case that we experience the sense of worth and dignity that comes from producing children, then we ought to do whatever makes possible this experience — unless, of course, the resulting harm to others is too great. That this first method of moral evaluation is important we cannot doubt because we indeed exist as goal-oriented, productive beings. Nonetheless, more can be said about human action.

Second in Niebuhr's typology is the fact that we come to know ourselves as human agents only within a community of others in whom we recognize a being and dignity like our own.⁷⁹ As Thomas Ogletree notes:

The sociality of the self refers to the fact that our very possibility of being human subjects comes to us through our relationships with significant others. I need the concern and positive regard of others in order to actualize my own personhood. This need occasions the disclosure of the value others hold for me. Yet I discover a new fact in these need-fulfilling relationships: these "others" are in a position to lay claims upon me.⁸⁰

Put less abstractly, in recognizing my own dignity I recognize the dignity of others like me. In recognizing that I can sometimes be wronged by others

77 H. RICHARD NIEBUHR, *THE RESPONSIBLE SELF: AN ESSAY IN CHRISTIAN MORAL PHILOSOPHY* 47-68 (1963). My use of Niebuhr's categories here has been shaped and influenced by Thomas W. Ogletree, *Values, Obligations, and Virtues: Approaches to Bio-Medical Ethics*, 4 J. RELIGIOUS ETHICS 105 (1976).

78. See NIEBUHR, *supra* note 77, at 49-51.

79. See *id.* at 51-54.

80. Ogletree, *supra* note 77, at 114.

even without being harmed by them, and that they likewise may be wronged by me even without being harmed, I come to see that our humanity is expressed in what we do, not just in what we make or accomplish. We may have obligations to do or refrain from doing that are not grounded in harms to others. Hence, on this model, Niebuhr pictures human beings not as makers or fashioners, but as fellow citizens — sharing a common life governed by rules that shape action in ways appropriate to their equal dignity. Recognizing, therefore, the complexity of human action, that there is more to be said about it than just that it is goal-oriented, we may also learn to contemplate the possibility that some things should not be done even if they would achieve results that might be, on the whole, desirable. This is not simply a "deontological" concern; it is integral to any serious consideration of human action.

Finally, if human action is goal-oriented and intersubjective, it is also responsive to all that presses upon us and claims our attention.⁸¹ In Niebuhr's terms, we seek to act not only in ways that realize what is good or reflect what is right, but also in ways that are "fitting" — that fittingly respond to all that is acting upon us and shaping us.⁸²

Just as a good driver must, in addition to knowing where he is going and being familiar with the rules of the road, respond in countless ways to what is going on around him, so also the discerning moral agent must understand his action as limited and responsive.⁸³ If we restrict moral considerations to goals and values, we see human beings only as makers or engineers. We lose an understanding of community in which our action is limited by the equal dignity of our fellow citizens, and we lose the sense that we are not, finally, beings characterized only by self-modifying freedom. We are also responders: to nature, to others like ourselves, and to what transcends both nature and humanity.

However important "making" may be, it does not exhaust the categories by which we should think about and evaluate human action. Moreover, there may be occasions when it is an inappropriate category, when it cannot capture the human significance of what we do. Procreation is such an occasion, for only the child who is "begotten, not made" can be one equal to us in dignity, one who is not finally a product at our disposal.⁸⁴ We must

81. See NIEBUHR, *supra* note 77, at 56.

82. See *id.* at 60-61.

83. *Id.* at 108-09.

84. O'Donovan's point in choosing a crucial phrase from the Nicene Creed ("begotten, not made") as the title of his book was precisely to engage us in exploring the meaning of the

think of the body as the locus of personal presence in order to discern the equal worth of the child who springs from the embrace of our bodies. There are countless ways to "have" a child. Not all of them amount to doing the same thing. Not all of them will teach us to discern the equal humanity of the child as one who is not our product, but, rather, the natural development of shared love, like us in dignity

The formation of a family is most truly human when it springs from what Gabriel Marcel called "an experience of plenitude."⁸⁵ To conceive, bear, give birth to, and rear a child ought to be an affirmation and a recognition: affirmation of the good of life that we ourselves were given; recognition that this life bears its own creative power to which we should be faithful. In this sense, Marcel could claim that "the truest fidelity is creative."⁸⁶ That something rather than nothing exists is a mystery lying buried in the heart of God, whose creative power and plenitude of being are the ground of our life. That a new human being should come into existence is not ultimately our doing. Within this life we can exercise a modest degree of control, but if we seek to do more, we fundamentally alter the nature of what we are doing — and of the beings to whom we give rise. Therefore, forming a family ought not be an act of planning and control by which we replicate ourselves or gain access to a pleasurable experience of our own worth. It ought to be an act of faith and hope, what Marcel termed "the exercise of a fundamental generosity"⁸⁷

Symbols

Summing up his argument, Robertson writes at one point: "The invocation of procreative liberty as a dominant value is not intended to demolish opposition or end discussion. Procreative choices that clearly harm the tangible interests of others are subject to regulation or even prohibition."⁸⁸ Yet, as we have seen, Robertson's discussion is in fact deaf to the wide range of considerations included in moral reflection. He tends to set aside all of these considerations as merely "deontological" concerns, thereby setting aside much that is central to our humanity. But the "magical"

dignity of the person.

85. GABRIEL MARCEL, *The Mystery of the Family*, in *HOMO VIATOR: INTRODUCTION TO A METAPHYSIC OF HOPE* 68, 88 (Emma Craufurd trans., 1962).

86. *Id.* at 90.

87. *Id.* at 87.

88. ROBERTSON, *supra* note 1, at 221.

word in Robertson's book, the word that truly does end discussion, is "symbolic." Summing up again near the end of the book, he writes: "As illustrated repeatedly throughout this book, many 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."⁸⁹ This claim, however, has not been "illustrated," much less demonstrated; it has only been asserted.

But it has been asserted repeatedly. In outlining the course his argument will take, Robertson notes that the interest in reproductive liberty, though not absolute, will often trump "competing concerns that are too speculative or symbolic to justify intrusion on procreative choice."⁹⁰ He describes the view that it is wrong to separate reproduction from the marital bond as "symbolic," a matter over which reasonable people may differ.⁹¹ Indeed, "concerns about the decomposition of parenthood through the use of donors and surrogates, about the temporal alteration of conception, gestation and birth, about the alienation or commercialization of gestational capacity, and about selection and control of offspring characteristics" do not involve "substantial harm to tangible interests of others," but affect only our "notions of right behavior."⁹² Discussing abortion, he asserts that "moral objections or symbolic commitments alone, over which individuals in a pluralistic society usually make their own choice" cannot override the right not to bear offspring.⁹³ The unwillingness of some people to view as binding a preconception agreement between collaborators in reproduction is "based on paternalistic attitudes toward women or on a symbolic view of maternal gestation."⁹⁴ Objections to a market for the sale of gestational services express a "symbolic concern" about which "reasonable people have differing moral perceptions."⁹⁵ Many objections to nonreproductive uses of our reproductive capacity involve "largely symbolic moral claims on behalf of embryos, fetuses, offspring, and women."⁹⁶ Abortion of an existing pregnancy for transplant purposes might be reasonable because one might well think that "the additional symbolic devaluation of human life through

89. *Id.* at 222.

90. *Id.* at 17

91. *See id.* at 41.

92. *Id.*

93. *Id.* at 50.

94. *Id.* at 132.

95. *Id.* at 141.

96. *Id.* at 198.

deliberate creation and destruction of prenatal life is negligible."⁹⁷ Clearly, the word "symbolic" functions as a mantra throughout the discussion, its very invocation seeming to settle disputes.

But, as Paul Tillich might have put it, we should never say "only a symbol." One of the important characteristics of a symbol is that "it opens up levels of reality which otherwise are closed for us."⁹⁸ Furthermore, symbols do not express thoughts that we (privately) have; they give rise to thought.⁹⁹ We cannot think in nonsymbolic ways. Indeed, even the most simple and least mythic human attempts at speech will be freighted with symbolic expression.¹⁰⁰ We may make our language less interesting; we cannot make it nonsymbolic. We can only be tone deaf to the symbols, as Robertson is, for example, when he reads Judith Jarvis Thomson's defense of abortion. In her hypothetical cases, the fetus is symbolically construed as a parasite (in the unconscious violinist analogy) and as a mushroom (in the peopleseed analogy), but this seems quite straightforward to Robertson.¹⁰¹ According to Robertson, "Thomson shows that in many cases, such as rape and sexual intercourse with contraception, a persuasive moral claim that the fetus has the right to use the body of another cannot be made."¹⁰² But Thomson's is not straightforward language about rights and interests. Embedded in her language are (misleading) symbols of the human. To miss them is to misunderstand the argument.

Because symbols give rise to thought and expression, we overlook them or dismiss them at the peril of our humanity. If we think of them as "mere" symbols, we cut ourselves off from much that is most important in the life of human beings who are, after all, the symbol-making animals. Worrying precisely about such possibilities, C.S. Lewis once described the person who attempts to see through the symbolic nature of our language rather than seeing with it:

Quite truly, therefore, he claims to have seen all the facts. There is nothing else there; except the meaning. He is therefore, as regards the matter in hand, in the position of an animal. You will have noticed that most dogs cannot understand *pointing*. You point to a bit of food on the

97 *Id.* at 214.

98. PAUL TILlich, DYNAMICS OF FAITH 42 (1957).

99. PAUL RICOEUR, THE SYMBOLISM OF EVIL 348 (Emerson Buchanan trans., 1967).

100. *Id.* at 9.

101. *But cf.* Gilbert Meilaender, *The Fetus as Parasite and Mushroom: Judith Jarvis Thomson's Defense of Abortion*, LINACRE Q., May 1979, at 126.

102. ROBERTSON, *supra* note 1, at 51.

floor: the dog, instead of looking at the floor, sniffs at your finger. A finger is a finger to him, and that is all. His world is all fact and no meaning.¹⁰³

I have suggested above that the transformation of procreation into reproduction involves new ways of thinking about human life — which, of course, is not surprising because symbols give rise to thought. Perhaps most dangerous is the possibility that we will find it more difficult to think of the child as one who is equal in dignity to those who make it. It is true, of course, that for some time to come our inherited ways of thinking may encourage us to think of children as equal to those who produce them. But, as Oliver O'Donovan notes:

[I]f we do not live and act in accordance with such conceptions, and if society welcomes more and more institutions and practices which implicitly deny them, then they will soon appear to be merely sentimental [that is, "merely symbolic"], the tatters and shreds which remind us of how we used once to clothe the world with intelligibility¹⁰⁴

When we think of human beings chiefly as "will," as beings characterized by their interests, we see something true, but we miss much else. We miss ways in which, subjecting the body to their will, they may endanger their humanity, threaten their equal dignity, and degrade their status as the symbol-making animal. Learning to think of human beings as will and freedom alone has been the long and steady project of modernity. At least since Kant, ethics has often turned to the human will as the sole source of value. The understanding of reproduction that Robertson depicts and defends is, from this perspective, not at all surprising; it is faithful to that very narrow understanding of the human. If it does not surprise us, however, there may be cause for worry. We should consider more than legal arguments when we read Robertson's *Summa*. We should also contemplate the image of our humanity symbolically portrayed in his pages.

103. C.S. LEWIS, *Transposition*, in *THE WEIGHT OF GLORY AND OTHER ADDRESSES* 16, 28 (1949).

104. O'DONOVAN, *supra* note 66, at 86.

