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Liberalism and the Limits of Procreative Liberty: A Response to My Critics

John A. Robertson*

*Children of Choice*¹ is an argument for the primacy of procreative liberty in determining public policy for new reproductive technologies. It argues that the strong commitment to procreative liberty that exists in law, morality, and social practice entails an equally strong commitment to liberty in the use of new reproductive technologies. It then traces the implications of such an approach for seven controversial reproductive technologies, including the use of noncoital means of conception.

The commentators in this Symposium take issue with giving procreative liberty center stage. They deny that reproductive choices involving assisted reproduction have or should have any special priority. In addition, they find that the use of these techniques causes a variety of harms that outweigh their claimed status as rights. As a result, the commentators would severely restrict or prohibit many uses of reproductive technology that I claim are an individual's or a couple's right.²

In my view, the commentators have not made a convincing case against the rights-based approach of *Children of Choice*. In some instances, they have simply misunderstood the argument. In others, they have failed to grasp the extent to which a rights-based approach is consistent with

* Thomas Watt Gregory Professor, School of Law, University of Texas at Austin. A.B. Dartmouth College, 1964; J.D. Harvard University, 1968. I am grateful to the four commentators for many interesting points that have stimulated me to think more deeply about the issues addressed in *Children of Choice*. I am also grateful to the Washington and Lee University School of Law and to the *Washington and Lee Law Review* for giving me the opportunity to confront these issues both in a public forum and in writing. I also wish to thank my colleague Richard Markovits for helpful comments on an earlier draft.

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

2. Or so it appears. The commentators are often vague as to the precise policy outcome that they support.

regulatory policies that would prevent the harms which they fear. Sometimes, the commentators are unwilling to acknowledge the implications of a previously granted premise, or they simply disagree about a normative or policy matter over which reasonable persons may differ.³

In their zeal to show the excesses of a rights-based approach to reproductive matters, the commentators also miss a large area of agreement. Although arguing for the primacy of procreative liberty, *Children of Choice* never claimed that such an approach is the sole relevant perspective on these techniques. *Children of Choice* explicitly recognized the insights that other perspectives might bring and thus left ample room for grappling with the questions of caring, trust, and mutual concern that arise with use of reproductive technologies. But these questions take center stage only after we have recognized the crucial role that rights play. Rights in reproduction are not everything, but we cannot do without them, even as we struggle with questions about their scope and best use.

In order to show why rights discourse is necessary but not sufficient to encompass reproductive technology, I address the arguments of the commentators under three headings. Each writer raises questions about the scope and derivation of a right of procreative liberty, about the harms that justify overriding that liberty, and about the extent to which the state should discourage or facilitate its use. Such common issues are no accident, for they reflect the normative choices and trade-offs that the liberal rights analysis of *Children of Choice* entails.

I. Scope and Derivation of Procreative Rights

Several commentators criticize both the importance and the scope that I give to procreative choice. They challenge my claim that procreative liberty is a fundamental right and my conclusion that respect for coital conception strongly implies that noncoital reproduction is also protected.

Both Professor Gilbert Meilaender and Professor Laura Purdy assume that I derive the right to procreate from the existence of the right to avoid procreation,⁴ but this assumption is inaccurate. Although engaging in and

3. The encounter with my critics, however, has shown me several places where my argument could have been clarified or deepened and a few organizational slips corrected. They have also shown me how disputes over the scope of reproductive rights grow out of deeper disputes about rights-based liberalism, the moral and political theory that undergirds this work.

4. See Gilbert Meilaender, *Products of the Will: Robertson's Children of Choice*, 52 WASH. & LEE L. REV 173, 173 (1995); Laura M. Purdy, *Children of Choice: Whose Children? At What Cost?*, 52 WASH. & LEE L. REV 197, 205 (1995).

avoiding procreation are two central aspects of procreative liberty, each aspect "stands on its own bottom."⁵ Each is supported by a separate set of interests connected with quite separate experiences of engaging in or avoiding reproduction, and each has implications for different sets of technologies — Norplant and RU486 have little in common with egg donation and micromanipulation of gametes.⁶

This point matters only because it directs our attention to the reasons for giving priority to both aspects of procreative liberty. In the book I argue that procreative liberty deserves primacy because it is an important aspect of self-determination and well-being.⁷ While some persons would hold that autonomy or choice in itself is always a good, I focus on the particular set of interests that make self-determination in reproductive matters so important to the shape of an individual's life. In my view, reproductive choices have such a major impact on a person's life — on one's identity, one's body, and one's sense of meaning — that we are committed to assigning discretion over them to the individuals directly involved, unless great harm to others from the choice would ensue. The use of reproductive technology, such as assisted noncoital reproduction or genetic screening, should thus be protected if it closely relates to or implicates the interests and concerns that make those decisions so fraught with personal importance.⁸

Professor Meilaender criticizes me for not giving a broader, overarching theory of which life decisions are central and implies that there is no way

5. See *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (rejecting Justice Douglas's theory of penumbras and finding support for marital right to use contraceptives in Due Process Clause of Fourteenth Amendment, which "stands on its own bottom").

6. Professor Meilaender simply errs when he states that "[t]he desire not to reproduce is more foundational in [Robertson's] argument." Meilaender, *supra* note 4, at 181. I am also puzzled by Purdy's assertion that "Robertson sees the right not to reproduce and the right to reproduce as two sides of the same coin. From that fact, he seems to infer that the strong right not to reproduce implies an equally strong right to reproduce." Purdy, *supra* note 4, at 205. I make clear in the text that both the right to reproduce and the right not to reproduce are protected aspects of procreative liberty supported by very different reasons and with different implications. See ROBERTSON, *supra* note 1, at 25-40.

7. See ROBERTSON, *supra* note 1, at 24-25.

8. Professor Purdy found in my emphasis on the personal importance of reproducing an implied duty on the part of women to reproduce that I surely did not intend. See Purdy, *supra* note 4, at 199-200. It is true that many women feel an obligation to want children, thus reinforcing the sexist identification of women with pregnancy and babies. See *id.* But I clearly am emphasizing the freedom to reproduce or not as one chooses precisely because of its great personal significance to women and men.

to distinguish procreative choices from the many other choices that are important to identity and dignity⁹ But I am not offering a general moral or legal theory for determining which personally significant choices deserve special protection. Rather, I am drawing on widespread notions about the importance of procreative decisions generally to individuals and their life plans, which is reflected widely in our practices and considered intuitions, in order to show their implications for a variety of issues that had not previously been considered.

Of course, one could give a deeper and more theoretical account of why procreative choice should be so protected. Such an account would stress the importance of procreative liberty to individual happiness, autonomy, and equality of opportunity¹⁰ But surely the thinness or thickness of presentation of underlying theory is not the issue. I doubt very much that the commentators would find that most procreation — for example, coital reproduction by a married couple — is not *prima facie* important and deserving of special respect precisely because of its role in defining our identity, dignity, and humanity, though they might wish to deny some of the implications that such a position would have for access to new reproductive technologies.

In the final analysis, one's view about the importance of procreative liberty comes down to a normative judgment about the importance of reproductive experience in people's lives. I believe that reproductive decisions have such great significance for personal identity and happiness that an important area of freedom and human dignity would be lost if one lacked self-determination in procreation. Indeed, to deny the importance of procreative liberty would be to grant the state repressive power over our intimate lives in a most fundamental way, as recent experiences in China and Romania have shown.¹¹

Putting the issue in this way helps us see that the critics' concern may be less with the importance of procreative liberty *per se*, and more with the implications that I claim such recognition has for a variety of reproductive issues. Perhaps they fear that by valuing procreative liberty so highly up front, they will be drawn into approving many practices that they find

9. See Meilaender, *supra* note 4, at 178-80.

10. Two excellent unpublished papers by Dan Brock present such a theory. See generally Dan Brock, *Funding New Reproductive Technologies: Should They Be Included in a Basic Benefit Package?*, in OOCYTE DONATION: ETHICAL AND POLICY ISSUES (Cynthia Cohen ed., forthcoming 1996) [hereinafter Brock, *Funding New Reproductive Technologies*]; Dan Brock, *Reproductive Freedom: Its Nature, Basis, and Limits* (n.d.) (unpublished manuscript, on file with author).

11. See ROBERTSON, *supra* note 1, at 25.

offensive or harmful, particularly those involving donors, surrogates, and genetic engineering. The possibility of such a result is heightened by the stringency of the harm test for limiting procreative choices that a commitment to procreative liberty entails.

If the critics are concerned about the potentially wide scope of a rights-based approach to reproductive technology, questioning special protection for procreative liberty is a rational strategy, for such protection provides a method for determining whether a technological alternative to coital reproduction should also be protected as an instance of procreative choice. If one can show that enough of the same interests and values that are involved in coital marital reproduction are significantly implicated in noncoital uses, then novel variations on the traditional coital model should also be protected, for nearly all persons agree that coital reproduction, at least among married couples, is a protected activity. Much of *Children of Choice* is an account of how most reproductive technologies facilitate having or not having essential procreative experiences and thus deserve presumptive protection as an exercise of procreative liberty.

In any event, we are inevitably forced to deal with questions about the nature and scope of procreative rights.¹² There is, of course, much room for dispute and disagreement over what the essential or core aspects of procreation are. I believe that my views are representative of a large segment of the population, though of course some people may not share them. In an important sense, we are constituting or creating our conception of reproductive meaning in the very act of confronting these questions and reaching a conclusion about their importance.¹³

The main points of difference with the four commentators about the scope of procreative liberty — other critics would raise other issues —

12. The fact that there may be disagreement and conflict about the periphery or boundary of procreative liberty does not negate the importance of procreative liberty at the core, where there is agreement. Situating boundaries is always contentious because relevant interests are more weakly present, and thus their importance is more easily contested.

13. Such a process is evident in the ongoing evaluation of the genetic connection as an essential part of reproduction. At one level, it seems essential to the very meaning of reproduction, even when totally separated from rearing. However, at some point, genetic connection *tout court* loses its allure, and the experience of rearing dominates.

Thus Professor Meilaender is wrong when he states that my theory "requires no biological tie to the offspring produced." Meilaender, *supra* note 4, at 175. I am very clear that it does, though I do recognize in Chapter 6, at the end of a discussion of collaborative reproduction, a loop back to our thinking about adoption. In that section, I note speculatively the possible lessening of the importance of genetic connections, but do not recommend immediate legal change. See ROBERTSON, *supra* note 1, at 142-44.

concern the shape and form of families: the importance of marriage for the right to procreate, the propriety of collaborative reproduction, and, to a lesser extent, genetic selection and cloning. It is significant that in a book that discusses seven major technologies the critics pay close attention only to those issues.¹⁴ As a result, it appears that my critics are in favor of most reproductive technologies, but have some doubts about issues most directly implicating changes in the traditional family. Even if they were correct about these disputed family issues, a wide swath of procreative choice for marital reproduction using novel reproductive techniques would remain.¹⁵

A. Marriage

I was surprised to see how important marriage is for all four commentators. Professor Anne Massie and Dr. Howard Jones each argue that procreative liberty should not necessarily extend to single persons.¹⁶ Professor Meilaender writes eloquently about the importance of procreation in marriage as an expression of the love and the telos that binds two persons together.¹⁷ Only Professor Purdy, a feminist who knows how marriage requirements have oppressed women, is untroubled by such a position, though she is concerned about some forms of collaborative reproduction.¹⁸

The commentators make several claims about marriage and the new reproduction that need to be separated. Sometimes, the concern is that procreative liberty be confined to a married couple and not extended to unmarried persons. At other times, the concern is that the use of donors and surrogates violates the essence of procreation as an expression of

14. Professor Massie does address a few other issues, but she is also concerned with these issues. *See infra* part I.D.

15. I am reminded of the old joke about whether a person who would have sex with another for \$1,000,000 but not \$10 is a prostitute. In response to a protest that they are not a prostitute, the response is "but we've already established that; we're just arguing about the price." I believe that my critics have accepted the importance of procreative liberty and are now "just arguing about price," for example, how far it extends. If so, they have granted me the major premise of my argument.

16. *See* Howard W. Jones, Jr., *Comments on Children of Choice: Freedom and the New Reproductive Technologies*, 52 WASH. & LEE L. REV 225, 229-30 (1995); Ann M. Massie, *Regulating Choice: A Constitutional Law Response to Professor John A. Robertson's Children of Choice*, 52 WASH. & LEE L. REV 135, 161-62 (1995).

17. *See* Meilaender, *supra* note 4, at 187.

18. *See generally* Purdy, *supra* note 4.

marital unity, thus distinguishing it from mechanical "reproduction," which does not issue from mutual love in marital union.¹⁹

With respect to the concern about the importance of procreation within marriage, my critics appear to read *Children of Choice* as an argument for recognizing the procreative liberty of unmarried persons as well, for example, of single women or same sex couples having and rearing offspring, or of men and women choosing to be sperm or egg donors or surrogates with no intention of rearing the child. Indeed, Professor Meilaender even assumes that I am ready to extend procreative liberty to a lone impotent male who orchestrates a team of reproducers to bring him a baby to rear.²⁰

There are several misunderstandings here about my position. With respect to the importance of marriage as a minimal condition for the right to procreate, whether fertile or infertile, coital or noncoital, I take no strong position, though I do recognize the arguments in favor of an extension of procreative rights to unmarried persons as well. I point out that as a matter of positive law the United States Supreme Court has never recognized a constitutional right to conceive if unmarried, though the Court clearly would recognize the right of an unmarried pregnant woman to carry a child to term.²¹ However one comes out on the constitutional question, there is no question either legally or morally that a procreative liberty interest is implicated in unmarried reproduction. Surely the absence of a spouse does not mean that a person's wish to reproduce and rear alone or with an unmarried partner of either sex is not procreative. Whether nonmarital procreation is as important as marital procreation, whether it should be constitutionally protected, and whether it poses such great harm that it can be restricted to a greater extent are entirely separate questions.

By contrast, the farthest extensions of single parenthood would also quite clearly seem not to be instances of procreative liberty, at least as we now understand it. Thus Professor Meilaender's nightmare vision that

19. See Meilaender, *supra* note 4, at 187-88.

20. See *id.* at 176 ("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.").

21. The right of an unmarried pregnant woman not to be forced to abort a pregnancy just because she is unmarried is a clear implication of the right to avoid reproduction recognized in *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring); *Roe v. Wade*, 410 U.S. 113 (1973), and of the right to reproduce recognized in *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

respect for procreative liberty would protect the right of a single man or woman to orchestrate the conception, gestation, and birth of a child for that person to rear or allocate to others to rear is simply wrong.²² Such an enterprise should not now be protected as part of procreative liberty because it is so far from our present understandings of why reproduction is valuable and protected. Our present understandings view procreation as something more than a means to obtain children for rearing. A similar argument can be made that gamete donors or surrogates do not have an independent procreative right to be a donor or surrogate, though they may have such a right derived from an infertile couple's need for their services.²³

In any event, if marriage is the main concern, the commentators are in fact ceding a great deal of scope to my claims for procreative liberty because most of the reproductive techniques argued for, including postmenopausal egg donation, cloning by blastomere separation, and freezing embryos, involve married couples and not single persons or third party collaborators.²⁴

B. Collaborative Reproduction

Several of my critics also reject my inclusion of collaborative reproduction as an aspect of procreative liberty. Professor Meilaender, for example, asserts that "many of the considerations Robertson mentions as reasons for the importance of reproductive experience are not involved in" donor insemination, one of the most common forms of collaborative reproduction.²⁵ Meilaender and others have difficulty seeing how surrogacy fits in; even if they did see the fit, they might still reject

22. See Meilaender, *supra* note 4, at 176; *supra* note 20. For example, my theory of procreative liberty would not necessarily give a single man the right to hire a surrogate to provide him with a child, even though a married couple would have such a right.

23. The donor or surrogate will have a biologic or genetic connection with offspring, but if this connection is all, then it may be insufficient to count as a core procreative experience, even though it clearly is procreative.

24. Only Professor Meilaender seems to be concerned about the noncoital aspect of these technologies. His long paean to the importance of marriage sometimes sounds as if he regards sexual union as equally important as marriage for "procreation," as opposed to "reproduction," to occur. See Meilaender, *supra* note 4, at 187-88. However, Meilaender never explicitly states this concern and quickly turns to discussions of topics that are consistent with accepting noncoital conception within a marriage.

25. *Id.* at 179.

surrogacy as inconsistent with an essentialist conception of marriage or because of its other harmful effects.

But the closeness of collaborative reproduction to accepted and revered desires to form families should be clear. The use of a donor or surrogate is as much a *projet parentale* as coital reproduction. Infertile couples have the same needs and desires to have and rear offspring as fertile couples. If collaborative assistance will ensure that an infertile couple will raise a child who is biologically related to both, as occurs in gestational surrogacy and egg donation, then the fact that one component of the procreative trinity of genes, gestation, and rearing is missing would not seem to diminish collaboration's importance as a core procreative choice.²⁶ This conclusion also applies when the resulting child is genetically or gestationally related to at least one member of the rearing couple, as occurs in donor insemination, embryo donation, and surrogacy. Of course, considerable argument and discussion may be needed to see these connections, and some persons may never be convinced that a particular procedure is acceptable.²⁷ But it is clear that persons using collaborative means are as fully engaged in a procreative enterprise as are couples who conceive coitally or couples who undergo medically assisted insemination or *in vitro* fertilization (IVF) with their own gametes. Indeed, the frequent use of donor sperm by married couples (over 30,000 couples a year have children in this way)²⁸ shows that sperm donation fits easily within our ordinary conceptions of reproduction within marriage and would extend to unmarried persons if their freedom to procreate were also recognized. If so, other collaborative procedures should be respected as well.²⁹

26. Consider egg donation. The infertile couple will have and rear a child who is the genetic child of the husband and the gestational child of the wife. This process is very close to coital reproduction — only the female genetic tie is missing. Surely the fact that another woman provided the egg, thus breaking the usual genetic connection with reproduction, does not prevent the infertile couple from regarding themselves as having procreated. Egg donation should therefore be protected as part of procreative liberty.

27. I agree with Professor Purdy that in-depth, case-specific analysis is essential to understand or resolve contested issues, and I attempted to provide it for the seven technologies discussed in the book.

28. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, ARTIFICIAL INSEMINATION: PRACTICE IN THE UNITED STATES 8 (1988).

29. Professor Meilaender has noted an organizational error at the beginning of Chapter 6 of *Children of Choice*. See Meilaender, *supra* note 4, at 174-75. The chapter starts with a brief argument for why collaboration is a central part of procreative liberty but then poses several questions that are discussed in Chapter 2. See ROBERTSON, *supra* note 1, at 119-20.

C. *The Implications of Method*

In answering questions about the scope and boundaries of procreative liberty, we must, as I have noted, pay careful attention to the values and interests underlying reproductive experiences. By focusing on the values and interests that give reproduction its great significance to individuals, we determine whether new situations involve those interests to a sufficient degree to merit support and respect as an exercise of procreative liberty. One's views on whether a new situation implicates procreative liberty will necessarily reveal or define a person's conception of what is central to reproduction and why.

In a pluralistic society, there will be wide areas of agreement and disagreement. Just as everyone will agree that nearly all consensual marital coital reproduction partakes of procreative liberty, nearly everyone will also agree that cloning or intentional diminishment does not share in those values and, therefore, deserves no respect because it is procreative.³⁰ The blurriness of the outer boundary does not negate the existence of a core of clearly procreative experience that reasonably extends to some use of donors and surrogates. Professor Meilaender argues that I cannot reconcile those limits with what I have previously said about the importance of the procreative experience,³¹ but it is precisely the absence of what makes procreative experiences so valued in cloning and intentional diminishment that places them outside procreative liberty's protections. A similar argument can be made about posthumous reproduction. A decision to have gametes or embryos used after one's death — the paradigm case of posthumous reproduction — is too far removed from the experiences and interests that give reproduction its value to deserve respect in its own right. Accordingly, posthumous reproduction may be accorded less protection than

Meilaender is correct in noting that I never then explicitly answer in Chapter 6 the questions raised at the beginning of that chapter, thus leaving him wondering where the argument is. See Meilaender, *supra* note 4, at 175. I should have at that point restated the arguments made in Chapter 2 for protecting collaborative reproduction as part of procreative liberty, or at least referred the reader to them. See ROBERTSON, *supra* note 1, at 39-40.

30. As I note in my discussion of cloning in Chapter 7, cloning may be protected on some other ground, such as the right to rear and educate one's offspring. See ROBERTSON, *supra* note 1, at 166-67.

31. See Meilaender, *supra* note 4, at 176-77. Professor Meilaender states: "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." *Id.* at 177.

reproduction that will occur during one's life.³²

Contrary to Professor Meilaender's characterization of my position, this same approach would now exclude as a procreative experience a situation in which the person orchestrating the collaborative reproductive effort has no biologic tie to the child and may never rear it. Until our widely shared conceptions about what makes reproduction valued change, that brokering experience might not qualify as a form of protected procreation because there is no biologic tie to the person (or partner, for none exists) claiming the liberty. Even if the person orchestrating the effort intended to rear the child, the reproduction still would not qualify as a valued procreative experience under current conceptions of procreation. Of course, it may be that the importance of rearing a child is so central to personal identity and meaning that it too should be protected as a fundamental liberty. But it would be difficult to argue that such a liberty is procreative, at least under current conceptions of procreation. With time, however, those conceptions could change or evolve to include that situation, for some of the same interests implicated in the distinctly procreative experience, for example, the connection with rearing, are present there as well.

Professor Meilaender also mistakenly believes that I argue that an egg or sperm donor who has no intention or wish to be involved in rearing has as much a right to procreate as a married couple.³³ However, I only claim that the donor's experience is a reproductive one. Whether it is worthy of protection in itself depends on how central or important we think that genetic reproduction *tout court* is. In Chapter 5 of *Children of Choice*, I discuss mandatory embryo donation as an alternative to embryo discard.³⁴ I argue that genetic connection without more — reproduction *tout court* — is not a protected aspect of procreative liberty because it is insufficiently involved with the values and interests that make procreation valuable to us.³⁵ The act of donation, however, though not independently protected in the donor's own right, might deserve derivative respect because it is essential for infertile couples, who are partaking of a core reproductive experience, to have access to donations.

32. Posthumous use of frozen sperm or embryos might be protected, however, as an aspect of a surviving spouse's procreative freedom. For a more complete discussion of posthumous reproduction written after *Children of Choice*, see generally John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027 (1994).

33. See Meilaender, *supra* note 4, at 179.

34. See ROBERTSON, *supra* note 1, at 108.

35. See *id.* at 108-09.

Of course, because of his essentialist, deontologic views about marriage and sexual union as the only morally acceptable path to procreation, Professor Meilaender sometimes writes as if no argument could convince him. If he in fact is taking this stark a position, which is akin to the Catholic Church's requirement that the procreative always be tied to the unitive, then he should be against IVF, artificial insemination with husband sperm, and other reproductive techniques that enable married couples to procreate. He may oppose such practices for deontic or even consequentialist reasons, but it is difficult to argue that the married couple using noncoital means to treat infertility is not involved in procreation. If, on the other hand, Meilaender is prepared to accept noncoital technologies that involve the gametes of husband and wife even though he opposes the use of donors and surrogates, then we have a basis for dialogue. We can discuss the extent to which the interests and values that underlie marital procreation exist when a married couple seeks the collaborative assistance of a donor or surrogate and perhaps reach agreement.

D Constitutional Status

Professor Massie raises two other objections to the existence or scope of rights of procreative liberty claimed in *Children of Choice*. One concerns the potential for limiting public debate before all the implications of a practice have become known. The other questions whether reproductive practices should be constitutionally protected simply because of beliefs about their personal importance.

Professor Massie makes the point about foreclosing public debate by citing four controversial issues — access of HIV patients to IVF; postmenopausal egg donation; access of singles, gays, and lesbians to IVF; and surrogacy for convenience — "that might seem ripe for public debate, but that would be virtually foreclosed to discussion if [my] views of constitutional analysis prevailed."³⁶ In her view, granting these choices constitutional status precludes regulation that an emerging public consensus might find desirable.³⁷ In essence, "[t]he conversation is over before it has had a chance to begin."³⁸

This criticism seriously misunderstands the effect of a rights-based approach to public policy for new reproductive technologies. Rather than

36. See Massie, *supra* note 16, at 141; see *id.* at 141-44.

37. See *id.* at 144.

38. *Id.*

foreclosing discussion, a recognition of procreative liberty as a right structures discussion in a way that ultimately enriches consideration of public policy for the technology in question. A rights-based approach begins by asking whether a strong procreative interest is implicated in the practice and, if it is, whether the governmental action or policy at issue infringes it. If so, a rights-based approach then looks at what the alleged harm from the procedure is and asks whether that harm is sufficient to justify overriding or infringing the procreative interests at stake. Rather than ending or foreclosing discussion, this approach makes sure that all relevant factors are considered, and prevents one from making policy on unanalyzed intuitive reactions.

This method may be illustrated with Professor Massie's claim that there would be no basis for a public discussion of whether postmenopausal pregnancy through egg donation should be permitted.³⁹ Whether a fifty-five year old woman has a constitutional right to gestate and to rear offspring conceived with a donor egg and her husband's sperm would depend first upon a showing that a significant procreative interest is involved in the practice. In making that assessment, one would have to examine the extent to which male reproduction at the same age would be protected and whether female reproduction is so different that the natural age of menopause should be a social barrier to the use of technology that would overcome the physical barrier to pregnancy.

A finding that significant procreative interests are involved, however, would not end the matter. The opponents of the practice could still show that the harms to children or others from the practice of postmenopausal egg donation were so severe that the practice could be justifiably limited. Because children sometimes have elderly fathers or are raised by grandmothers, it may be difficult to show that such serious harm to children would arise from the practice that overriding the postmenopausal woman's procreative interest would be justified.

In the end, one might conclude that postmenopausal egg donation does fall within the ambit of protected procreative liberty, but one reaches that conclusion only after a thorough discussion about the importance of reproduction to older women, comparisons to male reproduction, and an assessment of the harms that such a practice is said to cause. Rather than ending or foreclosing discussion, the method of procreative liberty defended in *Children of Choice* opens up and enriches a discussion that might have been foreclosed by an initial visceral reaction about the oddity of pregnancy

39. See *id.* at 142-44.

in older women. Similar discussions and analyses would also occur in subjecting Professor Massie's other examples to the evaluative procedures entailed by a presumptive respect for procreative liberty

Professor Massie's second criticism is that the right to procreate lacks the constitutional status that I accord it because of a distinction between beliefs and conduct in constitutional law⁴⁰ While beliefs are protected, conduct often is not. Massie claims that my argument that procreative practices are constitutionally protected because of the beliefs that individuals have of their importance ignores the way in which many forms of conduct based on protected constitutional beliefs are subject to restriction. To support this argument, she cites the validity of state restrictions that affect religious practices and the time, place, and manner of speech.⁴¹

But my argument for the constitutional status of new reproductive practices is not based on the claim that conduct based on important personal beliefs must always be constitutionally protected. Rather, it is an argument that the conduct based on these particular beliefs should be protected, not because they are beliefs, but because they are beliefs of a certain kind. Indeed, beliefs about the importance of having offspring are so important that coital reproduction by married couples is constitutionally protected, precisely because of the meanings that coital reproduction has for individuals. But if that point is so, then noncoital reproduction should also be presumptively protected because it involves conduct that arrives at the same results that coital reproduction does. If conduct based on beliefs in the case of coital reproduction is protected, then conduct in the case of noncoital reproduction should also be protected.

To strengthen her argument, Professor Massie makes a somewhat different point. She cites cases that involve privacy rights in conduct and claims that they "invariably implicate not only the value of self-fulfillment or self-definition but one or more other values as well [such as] respect for an individual's bodily integrity or social concerns related to the privacy of marital intimacy and the integrity of the family unit."⁴² Massie then argues that assisted reproduction, unlike coital reproduction, does not directly implicate these other values and, therefore, should not be similarly protected.⁴³ She concludes: "Heightened protection is not triggered simply by the fact that any particular conduct represents a search for meaning in life

40. *See id.* at 153-62 (discussing distinction between beliefs and conduct).

41. *See id.* at 154-58.

42. *Id.* at 159.

43. *See id.* at 162.

or because the persons involved are seeking self-fulfillment central to their self-definition."⁴⁴

Professor Massie is correct that all conduct related to a search for self-fulfillment is not automatically protected, but she misapplies this principle to noncoital techniques of treating infertility. Again, it is not the search for self-fulfillment alone that deserves protection, but the particular kind of self-fulfillment at issue. Having recognized that self-fulfillment through coital reproduction is protected, there is no basis for excluding the same experience of self-fulfillment for infertile couples. Although they conceive noncoitally, they seek the same experiences of marital intimacy and family integrity that are involved in coital reproduction. If coital reproduction qualifies for constitutional protection, then noncoital reproduction should as well.⁴⁵

II. Infringement

Beyond questioning the scope and derivation of a right of procreative liberty, my critics have concentrated for the most part on my allegedly overly narrow conception of harm. Before addressing that point, however, it is useful to remember that an intermediate step of analysis exists that becomes important in many questions of public policy.⁴⁶

The significance of establishing that decisions to use noncoital reproductive techniques involve procreative liberty is that it places the burden on the government or party seeking to interfere with that choice to show that its action is justified by the great harm that the use of the technology in question would cause. But this burden of proof arises only if the state or third party has in fact interfered with or infringed the exercise of procreative choice. The mere failure to facilitate or not encourage the

44. *See id.*

45. Professor Massie's point about the involvement of bodily integrity is drawn from abortion cases in which restrictions on abortion may be seen as intruding on a pregnant woman's bodily integrity. *See id.* at 159 (citing *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), and *Roe v. Wade*, 410 U.S. 113 (1973)). A right to engage in coital reproduction does not involve bodily integrity in that sense (unless the state sought to require abortion or sterilization), though it clearly involves voluntary use of the body. But assisted reproductive techniques also involve a voluntary use of the body, though in a somewhat different way.

46. Professor Meilaender does note a problem here, but does not pursue it. *See Meilaender, supra* note 4, at 180-81. Both Professor Meilaender and Professor Purdy raise questions about negative and positive rights, which are relevant to the issue of insurance funding discussed below. *See id.*, Purdy, *supra* note 4, at 204; *infra* part IV.C. They argue that it is inconsistent to give procreative liberty high status and then fail to fund it. As a moral matter, I am now convinced that they are right. *See infra* part IV.C.

choice would not amount to infringement. Questions about whether governmental actions meant to discourage the use of noncoital techniques constitute an infringement of the right, thus casting the burden on the state to prove a compelling need or harm, will also arise and be heatedly contested. Resolution of those questions will usually implicate the same values and interests that drive other disputes about the reach of procreative rights.⁴⁷

III. Harm

A major critique by Professor Purdy and Professor Meilaender is that my conception of harm is too narrow.⁴⁸ This view is a key challenge to my analysis because, although I argue strenuously that procreative choice should be protected as a fundamental right, my claim is for *presumptive* and not *absolute* protection. The clear implication is that procreative liberty need not be respected in all circumstances. Uses of reproductive technology that cause harm — that violate the harm principle — can be stopped and, indeed, should be stopped. What counts as harm sufficient to justify overriding procreative choice is thus crucial. According to Purdy and Meilaender, what I grant with one hand — that procreative liberty is not absolute — I take away with the other by almost never recognizing any effect or consequence as sufficient harm to justify limiting the use of a new technology.⁴⁹ What they see as significant harm never shows on my radar screen and thus is never entered into the balance.

Their eloquent attack on my conception of harm cuts to the heart of the liberal rights-based approaches to human action that informs *Children of Choice*. Liberalism glorifies will and choice. As Annette Baier has put it, liberalism is a morality of obligation and not a morality of care and trust.⁵⁰ In its emphasis on will and choice, liberalism looks only at the present choice

47 See *infra* part IV (discussing infrastructure, regulation, and insurance funding). The main issues of infringement concern enforcing preconception donor and surrogate agreements, paying donors and surrogates for their services, paying donor and surrogate brokers, and publicly funding infertility services.

48. See Meilaender, *supra* note 4, at 173-74, 192-95; Purdy, *supra* note 4, at 218-20, 223.

49. See Meilaender, *supra* note 4, at 173-74, 192-95; Purdy, *supra* note 4, at 219-20. One instance of permissible restriction based on harm that I do recognize appears in my discussion of secrecy and confidentiality of gamete donors and surrogates. I recognize there the interests of children in having information about their progenitors as a compelling interest that would override the collaborators' interests in privacy. See ROBERTSON, *supra* note 1, at 123-25.

50. See ANNETTE C. BAIER, MORAL PREJUDICES: ESSAYS IN ETHICS 3-12, 14-16 (1994).

or act of will and slights larger social and systemic effects. The tradition of classical liberalism on which my argument draws also ignores the importance of deontic violations. Such moralisms, or "mere symbolic effects" as I term them, carry little weight in opposition to the individual's act of will in exercising fundamental liberty.⁵¹

Children of Choice clearly derives from the classical liberal tradition and, of course, will be wanting to the extent that liberalism itself is wanting. At the most fundamental level, the question of the scope of harm concerns the extent to which the state may use its power to impose constitutive or deontic norms on its citizens.⁵² The liberal tradition limiting state power has arguably benefited us all, as our rights to have this discussion and to exercise other basic rights show. Yet others would disagree, or at least would draw the line between public and private authority differently. Public policy questions about the freedom to use reproductive technologies is another arena for confronting fundamental issues of liberalism, for it confronts us directly with varying conceptions of the value of reproductive freedom and the normative assessments that would limit that liberty.

In the end, disputes over the scope of reproductive freedom, as well as disputes over liberalism itself, may best be resolved by inclusion rather than exclusion of competing perspectives. Liberal rights are necessary but not sufficient because they give too little attention to, indeed, often appear to ignore, the real and equally crucial moral norms that Professor Meilaender and others raise. The constitutive and the symbolic norms cannot be suppressed, even if we limit their role in public definition of rights. Thus, it is necessary to supplement a liberal morality of will and obligation with a morality or ethic of trust and care.

It is essential to recognize that fidelity to liberal rights and freedom is not inconsistent with a morality of trust and care. The two can coexist and, in a crucial sense, need each other, as the case of reproductive rights illustrates. Without the warm nurturance of care and trust, the liberal rights-based approach stands naked and cold in the anomic wind, like a figure in an Odd Nerdrum painting.⁵³ Yet warmth and trust need the foundation of liberal rights if they are to thrive.

51. Such moralisms may provide a rational basis for governmental or individual action, but they are insufficient to override the fundamental liberty of individuals in cases of conflict.

52. This question is the core issue that separates Professor Meilaender and me.

53. The paintings of Odd Nerdrum, a contemporary Norwegian artist, usually depict lone or small groups of lanky, naked men in desolate landscapes devoid of warmth or even vegetation.

This central insight, which is drawn from feminist thought, should then guide our analysis of new reproductive technologies. The use of novel reproductive practices need moral guidelines rooted in trust and care. The legal protection that is constitutionally accorded procreative choices may well permit more activities than such a morality would, but that situation is the inevitable price of legal protection of individual rights. The challenge will be to develop a morality of care and trust for reproductive technologies without infringing rights, a recurring issue in liberal democracies.

It is then possible to agree with Professor Purdy about systemic consequences for women and with Professor Meilaender about the importance of constitutive and symbolic norms without relinquishing a strong commitment to procreative liberty.⁵⁴ As I will show after a discussion of their views of harm, their concerns should be reflected in regulation and in the codes of ethics and actual practices that develop in the use of these techniques, not in the use of law to ban or condemn them.

A. Consequentialist Harms

Professor Purdy and Professor Meilaender challenge my concept of harm as too narrow on both consequentialist and deontic grounds.⁵⁵ The main consequentialist criticism is from Purdy, who argues that I inappropriately leave out of the balance the harm to children and women that use of these techniques inevitably brings.⁵⁶

1 Harm to Children

Professor Massie and Professor Purdy argue that I am too accepting of new technologies in part because I ignore their effect on resulting children.⁵⁷ Professor Meilaender's concern that the child born of assisted reproduction will not be viewed as "equal in dignity to those who make it" also expresses this concern.⁵⁸

54. See Meilaender, *supra* note 4, at 192-95; Purdy, *supra* note 4, at 206.

55. See Meilaender, *supra* note 4, at 173-74, 192-95; Purdy, *supra* note 4, at 218-20, 223.

56. See Purdy, *supra* note 4, at 202-03, 206, 218.

57. See Massie, *supra* note 16, at 137-40, 164-70; Purdy, *supra* note 4, at 202-03.

58. See Meilaender, *supra* note 4, at 195. Professor Meilaender states:

We must 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 will teach us to discern the equal humanity of the child as one who is not our product, but,

As Professor Purdy correctly notes, a central feature of my analysis of harm is the claim that the offspring of new reproductive technologies are almost never harmed because of the means of their conception.⁵⁹ Because being the child of assisted reproduction, whatever its psychological and social sequelae, is not a fate worse than death, hence not a wrongful life, the use of the technique that made their births possible cannot be harmful to them.⁶⁰ But for the use of the technique at issue, they never would have come into existence. If this argument is correct, then a large class of moral concerns about new reproductive technologies vanish.

It is important to understand precisely what my argument about the lack of harm to children does. Professor Purdy, like others who have disagreed with me on this point, not only denies this premise but also assumes that I believe that impact on children is always irrelevant to moral or policy assessment.⁶¹ My point is that concern about offspring for their own sake is not a sufficient basis for interfering with procreative choice because no harm can be shown to those who would not be born but for the very technique in question.⁶²

Such births, however, precisely because of the technological means involved, may affect others. If the impact on others is sufficient, then it could be a basis for limiting procreative choice. The burden would be on those who seek to limit procreative freedom on this ground to show both that children are born generally less well-off in some significant way (an empirical claim that may be hard to establish) and that such state of affairs constitutes a serious harm because of either the moral offense that they feel at such a child's existence or the additional costs that its birth entails for others. In my view, it will be very difficult to meet those requirements.⁶³

rather, the natural development of shared love, like us in dignity
Id. at 191-92. He also states that "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." *Id.* at 192.

59. See Purdy, *supra* note 4, at 201.

60. Professor Purdy incorrectly states that my position is derived from Derek Parfit's views in *Reasons and Persons*. See *id.* at 201 & n.11; see generally DEREK PARFIT, *REASONS AND PERSONS* (1984). While I have learned much from Derek Parfit, my views on this point were formed before I was aware of his work.

61. See Purdy, *supra* note 4, at 201.

62. Data and studies are admittedly sparse, but there does not appear to be a higher rate of suicide or psychosocial problems among offspring of collaborative reproduction. See R. SNOWDEN ET AL., *ARTIFICIAL REPRODUCTION: A SOCIAL INVESTIGATION* 50-54, 71-82, 97-104 (1983).

63. This argument would have little weight where the couple pays the medical and

Thus impact on others of a birth which is not itself wrongful to the born child will rarely be strong enough to justify infringing core procreative interests.⁶⁴

2. Harm to Women

Professor Purdy also argues that my conception of harm is too narrow because it ignores wider systemic effects of these techniques on women.⁶⁵ Purdy seems ready to accept any use of technology as long as the consequences, particularly for women,⁶⁶ are shown to be positive. However, she finds that the effects are much more pernicious than I recognize and that, if taken into account, they would require that the scope of procreative liberty be considerably smaller than I would allow.⁶⁷

Professor Purdy is making a key move in feminist methodology. She is asking the "woman question" — how does a rights-based approach to new reproductive technologies affect women?⁶⁸ For her, the key inquiry is whether the use of these techniques helps or hurts women.⁶⁹ Asking this question will often focus attention on effects and consequences that standard approaches to identifying harm tend to overlook. She concludes that a rights-based approach to procreative liberty overlooks three major ways in

rearing costs of the offspring who are damaged or handicapped because of a reproductive technology. But even if they did not, the question would be whether the resulting costs are greater than with other kinds of reproduction that society permits or fosters. It would be hard to show that the costs of rearing children born through assisted reproduction impose such great costs on others that it wrongs those persons who bear those costs to allow such births to occur.

64. For example, being conceived or born with the help of IVF or of a donor or surrogate is unlikely to be a disability under the Americans With Disabilities Act, which defines disability as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2) (Supp. V 1993).

65. See Purdy, *supra* note 4, at 206-11.

66. Because Professor Purdy did not discuss other effects, one does not know her position on this point.

67. See Purdy, *supra* note 4, at 214. It is not clear, however, whether Professor Purdy's concerns would lead to prohibition of the use of certain techniques, or only to regulation of these techniques. As I discuss below, regulations which would meet most of her concerns are consistent with respect for procreative liberty and thus may be enacted without limiting access to most new reproductive techniques. See *infra* part IV.B.

68. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV L. REV 829, 837-49 (1990) (discussing "woman question").

69. See Purdy, *supra* note 4, at 197-99.

which new reproductive techniques harm women.⁷⁰

I agree with Professor Purdy that asking the "woman question" is essential to evaluate fully the impact of the new technologies, but I disagree with her conclusions that answers to the "woman question" would drastically shrink the scope of procreative liberty. Indeed, many of Purdy's concerns arise from her fears about how women would use their freedom of procreative choice. Unless I am misreading the policy implications of her critique, she, in the name of protection of women, would drastically limit the choices that are available to women.⁷¹

Professor Purdy focuses on three "feminist worries."⁷² The first is that techniques that "start out as new options come to be accepted as the standard of care, which women are not really free to refuse."⁷³ This pattern both deprives women of their choice of whether to use the technique and subjects them to the risks and harms that the techniques carry.⁷⁴ This result is of course a real world danger that arises with many medical procedures. The problem may be especially acute for less educated women who, if they are offered the technique at all, may have more trouble saying no. In fact, the evidence shows that women have more choice in these matters than Purdy acknowledges and that many women routinely refuse prenatal serum screening as well as amniocentesis.⁷⁵ Regulation to assure informed consent and to prevent premature routinization of new procedures may well be in order. However, the danger that Purdy notes hardly justifies depriving all women of the right to choose these techniques to realize procreative goals.

Professor Purdy's second problem with my treatment of procreative choice "is that a woman may choose an option that is not necessarily in her

70. *See id.* at 207

71. *See id.* at 223. Professor Purdy may be drawing attention to these issues only so that preventive policies may be adopted, and thus she might not support prohibition. As I argue below, many of her concerns could be met through regulation without limiting the scope of procreative choice. *See infra* part IV.B.

72. *See Purdy, supra* note 4, at 207

73. *Id.* However, Professor Purdy cites only the use of electronic fetal monitoring and ultrasound and does not give an example based on any of the technologies that I discuss in the book. *See id.* at 207 & n.31. Because many other commentators have been specific, for example, citing the routinization of amniocentesis, her points still hold and deserve an answer.

74. *See id.* at 207

75. *See* Dorothy C. Wertz & John C. Fletcher, *A Critique of Some Feminist Challenges to Prenatal Diagnosis*, 2 J. WOMEN'S HEALTH 173, 183 (1993) (concluding that some women "refuse prenatal diagnosis"). In my own experience with this issue, I know two professional women in their thirties who refused such tests and surprised their doctors in the process.

interest" because of biased or incomplete information from providers and the racial, class, and age characteristics of the individual making the decision.⁷⁶ Again, this danger is a real problem in many medical settings other than reproduction. It is a problem that regulation should address, but it hardly justifies a ban on choice altogether.

Professor Purdy's third problem is "that an option may benefit a particular woman, but harm other women or harm women as a class."⁷⁷ Purdy's concern here is exploitation of one woman by another, as she thinks might occur in surrogacy, or that a new technique such as IVF "may function like a safety valve that takes the pressure off individual women, but deflects attention from serious underlying social problems."⁷⁸ Of course, assisted reproductive techniques could lead to exploitation of patients by providers and of donors and surrogates by patients or vice versa. Treating infertility with IVF may also divert attention from the causes of infertility or from the sexist attitudes that identify women with gestational reproduction. But none of these fears is sufficient to limit the choice of individuals and couples who seek to use a new technique to procreate.

Although Professor Purdy's concerns are not sufficient to limit procreative freedom, they do make a good case for regulation to minimize exploitation and to ensure that users are fully informed of success rates, risk factors, and costs. I thought that I had made that point clearly in the book, with respect to both the IVF industry and the recruitment of donors and surrogates, but there is no harm in reiterating it.⁷⁹ In the end, even Purdy acknowledges the dilemma that would arise if women's procreative freedom were limited because of concerns that women cannot choose wisely.⁸⁰ Her ultimate point is that high-tech approaches to infertility like IVF should be discouraged rather than encouraged.⁸¹ As I show in Part V, such an approach does not necessarily negate or deny strong respect for procreative liberty. Indeed, this approach is an important way to combine a morality of will and obligation with a morality of trust and care.

76. Purdy, *supra* note 4, at 208.

77. *Id.* at 209.

78. *Id.*

79. See ROBERTSON, *supra* note 1, at 114-17, 136-39.

80. See Purdy, *supra* note 4, at 208-09.

81. See *id.* at 212-13.

B. Moralisms and Symbolic Effects

For Professor Meilaender, my conception of harm is dangerously narrow because it does not give symbolic and constitutive interests their due. Symbolic or constitutive harms arise when an action or practice violates norms, principles, or rules of right behavior without also causing tangible harm to the interests or liberty of others, or contravenes essentialist understandings of important life activities, such as reproduction, marriage, family, or motherhood. The symbolic harm is felt by persons who hold these conceptions dear. They feel wronged or aggrieved when their conceptions of the right in these activities are not followed by others or enshrined in public policy.

Professor Meilaender sternly criticizes me for discounting or ignoring two major sources of ethical or normative value. Meilaender's first concern is the status of fetuses and embryos, but he never fully engages my arguments for valuing nonsentient fetuses and embryos as symbols rather than as moral subjects in their own right, an essential feature of my analysis.⁸² Other than raising some questions about the precise basis of the right to terminate pregnancy, his ultimate position on a range of issues involving embryos and fetuses is left unclear, thus leaving little room for further dialogue.⁸³

Professor Meilaender's second major concern is that noncoital means of conception and the use of donors and surrogates to treat infertility violates essential understandings of procreation and marriage as a joint teleologic enterprise that promotes human dignity.⁸⁴ His concerns here appear to be largely deontological, for he does not cite the harms or

82. See ROBERTSON, *supra* note 1, at 102-03.

83. See Meilaender, *supra* note 4, at 182-85. Professor Meilaender correctly notes that my reasons for a right to terminate pregnancy could be more clearly stated. However, he errs in stating that, if I rest on a Thomsonian, bodily intrusion justification and not on a right to avoid procreation per se, then there would be no right to cause the death of embryos and fetuses outside of the body. See *id.* at 183-84. This conclusion does not follow. When there is an actual pregnancy, then bodily burdens play a role in the analysis that is missing when there is no pregnancy. One reason why women should have the right to avoid conception, and pregnancy when conception occurs, is precisely because of the bodily burdens involved in pregnancy. I also disagree that Judith Thomson's stimulating hypotheticals in her famous article symbolically beg the question. See generally Gilbert Meilaender, *The Fetus as Parasite and Mushroom: Judith Jarvis Thomson's Defense of Abortion*, 46 LINACRE Q. 126 (1979).

84. See Meilaender, *supra* note 4, at 186-88.

disutilities to women and offspring that concern Professor Purdy, Professor Massie, and other critics of these techniques. Rather, his concern is with my emphasis on "making" rather than "doing."⁸⁵ He attributes to me a very "thin understanding" of human value and claims that my emphasis on will and rights denies the importance of embedded human relations in essential institutions like marriage and the family.⁸⁶

In posing these criticisms, Professor Meilaender is confronting one of the fundamental problems of liberalism. If liberty is to be respected when there is no tangible harm, then people may act in ways that conflict with or offend the conceptions that other persons hold about the practice or action in question. To resolve this problem adequately, one would have to revisit the larger philosophical and religious allegiances that are at stake.

Rather than rehearse that larger issue, let me restate the case for finding that deontologic or symbolic harms are insufficient to override basic moral and legal rights. Contrary to Professor Meilaender's claims, I do not deny the importance, indeed, the necessity, of symbols.⁸⁷ I like my symbols as much as the next person, for they help me to define and communicate through my choices and commitments who I am. Our lives, of course, would be thin and desiccated if we lacked, or were powerless to use, symbols because no symbolic communication, including language itself, would be possible.

Thus Professor Meilaender is missing an important point by accusing me of denying the importance of symbols. He should be addressing the question of the role that one person's symbolic allegiances might properly play in a liberal, pluralistic democracy, not the question of whether symbols themselves are important. The essential question is whether an individual's or group's particular definition or creation of the good through symbols should be imposed on others. However, precisely because symbolic conceptions are self-defining and detached from the tangible interests of others, liberalism commits us to leaving these matters to individual choice.⁸⁸ No group or community view of symbolic goods

85. *See id.* at 189-92.

86. *See id.* at 185-88.

87. *See id.* at 194 ("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.").

88. *See generally* RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993) (discussing detached and derivative interests in human life); John A. Robertson, *Autonomy's Dominion: Dworkin on*

unrelated to such tangible interests may therefore justly intrude on different individual symbolic choices about the good, though they may be acknowledged and supported in other ways, and respected as an individual's fundamental choice.⁸⁹ It is this tolerance over different symbolic conceptions of the good that is at the heart of liberalism. If each is free to choose and live his own life plan, then symbolic conceptions of what gives life meaning must remain free of community imposition so that individuals are free to choose their own symbolic commitments and constitutive practices.

Although directed at me, Professor Meilaender's criticism should be aimed equally at John Stuart Mill, John Rawls, Ronald Dworkin, and others whose political and intellectual struggles have created the liberal rights tradition that undergirds my analysis. Precisely because symbols are crucial to our personal identity, one person's or group's conception of the symbolic meaning of reproductive acts and practices should not constrain the reproductive commitments and self-definitions of others.

Professor Meilaender is thus free to view assisted reproductive technologies as his own constitutive, symbolic views of the good (rooted in a Christian view of meaning and value) dictate. But it does not follow that he should be free to limit the procreative freedom of others on the basis of those views. The symbolic or constitutive concerns of one segment or even the majority of a liberal community are insufficient to override the fundamental liberties of all members of the community. Showing what "doing comes to" in reproduction and other fundamental liberties is so intensely personal that it must be left to the individuals directly involved.⁹⁰

In my view, liberalism's relegation of symbolic concerns to private and associative choices that are beyond public authority is essential for equal respect for persons.⁹¹ Thus, symbolic concerns alone should not be permitted to prevent men and women from avoiding reproduction through

Abortion and Euthanasia, 19 LAW & SOC. INQUIRY 457 (1994) (reviewing DWORKIN, *supra*).

89. At what point such encouragement or support becomes an infringement of liberty may be a contested issue. See *infra* part IV

90. For the source of the phrase "show what doing comes to," see A.R. Ammons, *Boon*, NEW REPUBLIC, Aug. 1, 1988, at 48.

91. In an important sense, the history of liberalism is the history of a series of triumphs over the symbolic, constitutive concerns of church, seigneur, and boss, freeing individuals from the bonds of traditional ways of defining community and right action. Even in liberal societies the battle is not over, as the symbolic and constitutive struggles to recognize the freedom and dignity of women, gays, and lesbians show.

the use of birth control and early abortion or from engaging in reproduction when noncoital or assisted methods are necessary to treat their infertility. At the same time, such concerns should not force people to use technologies to which they are opposed. A less protected position for procreative choice would insufficiently respect persons.

IV Toward a More Inclusive Approach. Infrastructure, Regulation, and Funding

But it is also clear that liberalism, despite its essential role in our lives, is incomplete as a morality or vision of how people should live. It tells us what we have a right to do but gives us little help in determining whether or how to exercise our rights. Nor does it tell us what norms or rules should guide our interactions with others, once it is established that we are not violating their rights.

Despite its defects, the basic structure of liberalism will continue to shape our ethical and legal practices. Liberalism is too deeply embedded in our culture and system of limited democratic government to be blithely scrapped or compromised. Yet many persons are increasingly disgruntled with its narrowness and yearn for connection with what it ignores. Indeed, the commentators' opposition to strong procreative liberty reflects the deeper dissatisfaction felt in many sectors with liberalism itself.⁹²

Yet, just as liberals need to be reminded of the symbolic and systemic effects that their rights analysis tends to ignore, the critics also have to be reminded that liberalism does not prevent (indeed, it explicitly protects) their efforts to identify and encourage the realization of the good as they see it in how new reproductive techniques are used. Both liberals and nonliberals, in all their varieties, need to recognize the insights that each camp can offer and to incorporate them, to the extent feasible, into public policy.

The key point for policy purposes is that having rights to use reproductive technology does not mean that particular exercises of those rights should be encouraged or that policy efforts to discourage or not to facilitate their diffusion would always be illegitimate. Having rights to use

92. The rise of feminist theory and jurisprudence is an example of the dissatisfaction with liberalism that exists in many quarters. See Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV CONST. STUD. 1, 11-17 (1993). See generally Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989).

reproductive technology means only that state and private actors have a duty not to infringe or interfere with that liberty except to prevent great harm. The state and private actors need not promote or encourage those uses directly and, in ways short of infringement, may discourage their use.

Mutual recognition of the limitations of both rights-based and nonrights-based approaches offers an opportunity to move the debate to a higher, more inclusive level. A rights-based approach to reproductive decisions is essential if most people are to be able to exercise their liberty. As the experience of individuals in nonliberal societies shows, the liberal structure of rights of personal freedom is a great achievement that should not be denigrated. But it is not everything. There is more to the world and to procreative life than a rights-based approach can encompass. I read Professor Meilaender, Professor Massie, Dr. Jones, and other critics, including liberal feminists like Professor Purdy, to agree with this statement. But I agree with it as well! Thus there may be considerable room for agreement and consensus here once we move the debate beyond liberalism itself to the ethical dimensions of actual use.

The distinction in moral philosophy between the "right" and the "good" may help situate the discussion.⁹³ The claims that I have been examining about the scope of procreative liberty and the role that tangible and symbolic harms play in limiting its scope have concerned the realm of the "right" — the realm of moral and legal duty. One's right to use new reproductive techniques is protected in part because it violates no duty to others. Nor is there a duty to use particular reproductive techniques. For example, couples who share Professor Meilaender's views about marriage and procreation⁹⁴ could not be required to use IVF or artificial insemination if they are infertile, nor could they be required to have ultrasound or genetic tests for disease or for the sex of the fetus. They certainly could not be compelled to abort or to use contraception.⁹⁵

93. See generally W.D. ROSS, *THE RIGHT AND THE GOOD* (1930) (providing classic statement of distinction between "right" and "good").

94. See Meilaender, *supra* note 4, at 186-88.

95. In very extreme circumstances of compelling interest, forced abortion or contraception might be appropriate, but such cases will be extremely rare. Under the avoidable harm principle, couples could be required to use a technology deemed reasonably necessary to prevent harm in offspring who could otherwise be born healthy. See ROBERTSON, *supra* note 1, at 161-62. Couples may also have to accept the implicit or direct subsidies or encouragement that public policy accords to techniques that they find objectionable. The scope and justification of conscience clauses in the delivery of health services is

But the realm of the "right" is not coincident with that of the "good." While a variety of relationships between the two could be explored, one way to conceive of that relationship is to note that the realm of the good is not necessarily confined to or defined by that of the right. Moralities of will and obligation may define the right, but they do not exhaust the realm of the good.⁹⁶ They are essential if individual visions of the good are to be realized, but they say nothing about the content of the good.⁹⁷ That content is for persons to decide through their values, actions, and associations.

The great defect of rights theory is that it does not tell us whether a particular exercise of the right is desirable or good. A choice might violate no moral duty to others, but still seem undesirable in terms of the particular goods that individuals hold, as in the case of persons who oppose abortion or IVF. Rights theory gives little guidance here. It leaves to individuals the burden of determining the content of the good that will inform and direct their lives generally, and the methods, practices, and norms of reproductive practice in particular. Because reproduction is so fundamental, individuals have the right to decide to use or not to use reproductive technologies.⁹⁸ But there are better and worse ways to use these techniques and to relate to offspring, physicians, patients, donors, and surrogates. A particular morality or ethic for their actual use is necessary to promote the good. The right permits such moralities to be developed, but it gives no guidance on how to do so.

The ethic to be developed for use of these techniques will reflect particular conceptions of the good. It will focus on using techniques in a better or the best way, not on whether techniques should be permitted at

beyond the scope of this Article.

96. The right and the good are of course related, but there is an important distinction between them, as my differences with Professor Purdy and Professor Meilaender illustrate. For example, Purdy is concerned with the effect of assisted reproductive techniques on women. *See generally* Purdy, *supra* note 4. Even if she agreed that no moral rights of others were violated by particular applications, she might still reasonably assert that the practice of surrogacy was on balance bad for many women and, thus, for women overall. Similarly, one may agree that there is a right to abort a pregnancy without finding every instance of abortion to be good.

97. This point does not include the minimal sense that any conception of the good has to allow the right its due. If rights are essential, then it will be a violation of the good to violate them.

98. *See* Carey v Population Servs. Int'l, 431 U.S. 678, 684-85 (1977); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965); *see also* Skinner v Oklahoma, 316 U.S. 535, 541 (1942).

all. Purely symbolic concerns may be publicly recognized, as long as no infringement of rights occurs. As long as rights are not infringed, a rights-based approach does not prevent public policy from guiding or regulating practice so that a particular vision of the good may be realized.

If this situation is the case, the discussion should focus not on *whether* but on *how* the new technologies should be used. It is necessary to identify the best ways to utilize assisted and collaborative reproduction in order to minimize suffering and to realize the good that they offer. In defining norms to guide practices that cannot be prohibited, one can recognize or express the symbolic and constitutive values that rights analysis puts to the side. While precise definition of the line between "infringing" and "discouraging" is difficult, most policy issues will not involve such close questions. Thus, there is ample room for individual conceptions of the good to inform public policy and individual practice within rights-based liberalism. These possibilities also show how a rights-based approach to reproductive choice based on a morality of will and obligation can coexist with a morality of trust and care.⁹⁹

Persons concerned about the impact of assisted and collaborative reproduction on essentialist conceptions of marriage, the family, and motherhood, as well as those persons who are more bothered by systemic effects, may thus seek policies that implement their vision of the good. Whether they succeed in keeping to the "not encourage" rather than the "infringe" side of the line will depend on the technology and regulation at issue in any given case. Many issues will be contested, as a brief survey of three issues involving support or discouragement shows.

A. *The Problem of Infrastructure*

One set of support or discouragement issues concerns the legal and social infrastructure needed for effective use of these techniques. If the general societal infrastructure of legal rights and duties, enforcement of contracts, determination of family and rearing rights, and other regulatory and financing apparatus were not available for participants in assisted reproduction, the use of these techniques would be discouraged, though of course these techniques would not be prohibited altogether.¹⁰⁰

99. See generally BAIER, *supra* note 50.

100. In my view, the lack of a general societal infrastructure for assisted reproduction would also be unconstitutional. If the use of donors and surrogates is part of an infertile couple's constitutional right to procreate, then laws that prevent people from recruiting or

There are two problems, however, with such an approach. First, it would treat infertile couples unequally. For example, refusing the legal infrastructure of contract enforcement for surrogate contracts, as some jurisdictions and many commentators recommend, when other medical and reproductive contracts, including contracts for assigning rearing rights and duties in sperm and egg donation, are enforced, appears to be a form of discrimination against a particular kind of infertility.¹⁰¹ If noncoital reproduction is a basic right and cannot be prohibited, such an exclusion would appear to be an unjust discrimination against infertile couples.

Equally serious, such a position would end up creating great harm for those who will nevertheless go forward and use the technique in question. Without resort to the courts and the development of laws to protect the participants, there will be more disputes and problems than would otherwise occur. Denying infrastructure as a means of discouraging the use of a technique while recognizing that there is a right to use the technique in question unfairly harms those who, as is their right, choose to go forward. This situation is akin to punishing the children of welfare mothers to deter the mothers from having more children and poses a major problem for a morality of care and trust. Thus the community may be required to provide a legal infrastructure for assisted reproductive technologies, even though such a structure may facilitate, and to that extent subsidize, the use of technologies that, under particular conceptions of the good, one wishes were not used.

B. Regulation

Moralities of will and moralities of trust and care may intersect in regulation. Certainly nothing in a liberal rights-based approach to freedom or in the theory of procreative liberty articulated in *Children of Choice* prevents a regulatory response to the dangers that exist in the use of these techniques. Indeed, I have argued for regulation at several points in the book in ways that are unique in the literature.¹⁰²

My particular regulatory concerns have been with assuring full information, free choice, and informed decision-making. This idea

relying on surrogates arguably infringe that right. If so, laws that ban paying money to donors, surrogates, or others who arrange the contracts would be unconstitutional, for the alleged harms are no more valid here than in the banning of surrogacy altogether.

101. See generally MARTHA A. FIELD, *SURROGATE MOTHERHOOD* (1988).

102. See ROBERTSON, *supra* note 1, at 114-17, 136-38.

includes gathering and disseminating accurate information about risks, costs, and success rates; certification and monitoring for quality control; waiting periods; and other procedures to make sure that procreative liberty is exercised freely and knowingly

When one begins to discuss the need for regulating particular techniques, there is much room for agreement and disagreement. The right to reproduce may well limit how far regulation may go, but it leaves ample room for regulatory measures that aim to prevent the worst effects. Careful and sensitive regulation to assure fully informed and free choices and safe and effective reproductive techniques can address many, though not all, of the concerns that Professor Massie, Professor Purdy, and Professor Meilaender have. Of course, the very fact of regulation is an imprimatur of sorts, but the alternative — unregulated use — is even worse.

C. The Funding Dilemma

Perhaps most difficult is the question of private and public health insurance funding of IVF and other assisted reproductive techniques. Insurance funding will greatly increase the use of these techniques and make more likely the ill effects on women and society that so concern my critics. Insurance funding will also lead to more physicians offering IVF, thus raising questions of quality and regulation. The number of IVF cycles occurring yearly in the United States would increase, more stimulation reactions and other complications would occur, and more multiple births would take place. Much greater regulation will be necessary to prevent the worst effects. Persons who wish to discourage the spread of these techniques would strongly oppose their funding, as would those who want to conserve health care funds. With some exceptions, this view is the stance that society has taken to date.

But there are good arguments in favor of funding as well. A strong justice argument exists for coverage based on the importance and efficacy of the technique. Failure to fund creates a major inequity, with only the rich and wealthy having access to technologies that could benefit the less rich as well. Insurance coverage for one or two cycles of IVF, and coverage of other techniques as efficacy is demonstrated, would greatly reduce that disparity. Nor should the burden of conserving health care funds fall disproportionately on the infertile. Infertility is a serious problem that with respect to funding deserves equal treatment with other

nonlifesaving medical procedures. Because many health needs that are arguably less meritorious and cost-effective than IVF are now covered, IVF should be covered as well.¹⁰³ If cuts in the health budget are necessary, infertility treatments should be compared to other nonlifesaving benefits and should not be singled out to bear the brunt of cost savings.

Professor Meilaender and Professor Purdy claim that I am inconsistent in my treatment of this issue, that I am now being stingy about the scope of a right that I previously defined so lavishly. They ask: If procreation is so important that it has fundamental right status, then should it not also be funded by the government for those persons who lack the means?¹⁰⁴

The distinction between negative and positive rights — between government interference with an individual's actions and government's failure to fund that action — is a standard aspect of liberal legal theory. A right *against* state interference does not necessarily create a legal right *to* state funding. Many very important things, as a matter of right, are not funded by the state, including free speech, travel, abortion, and other forms of medical care.¹⁰⁵ Although constitutional status as a negative right does not automatically create a positive right, regardless of how desirable funding the activity for those persons who cannot afford it may be,¹⁰⁶ one may nevertheless argue that as a moral matter, an activity that is so valued that it deserves negative right status should also be provided to those without means.¹⁰⁷ If the distinction between moral and legal rights is kept clear, Professor Purdy's and Professor Meilaender's point that there may be no basis for distinguishing between negative and positive reproductive rights is apt.

The question raises a dilemma at the very heart of liberalism — its inattention to justice and, thus, its willingness to tolerate inequities in the

103. See generally Brock, *Funding New Reproductive Technologies*, *supra* note 10.

104. See Meilaender, *supra* note 4, at 181, Purdy, *supra* note 4, at 204.

105. The Supreme Court has recognized the distinction between a right against state interference and a right to state funding. See, e.g., *Harris v McCrae*, 448 U.S. 297 (1980); *Maher v Roe*, 432 U.S. 464 (1977).

106. In one sense this idea is not the case. Every negative right has some infrastructure or expenditure of costs by the state and others that support or facilitate its exercise, if only in providing an infrastructure of services that make its exercise possible.

107. As Dan Brock points out, the moral right to positive reproductive rights is not based merely on the fact that the interests involved deserve negative right status, but rather on the particular kinds of interests that reproductive choices involve and their connection to fair equality of opportunity. See generally Brock, *Funding New Reproductive Technologies*, *supra* note 10.

distribution of major necessities.¹⁰⁸ Once considerations of distributive justice enter, the distinction between the negative and the positive, funding and not funding, starts to collapse. If distributive justice is given its due, every negative right has the potential to become a positive right, thus requiring subsidies even beyond those inherent in infrastructure and regulation.

In the current political climate, it is unlikely that large scale funding of IVF will occur in the United States, though Canada, Great Britain, and France provide IVF as part of a national health care benefits package.¹⁰⁹ The allocation of resources to the new reproductive technologies is an issue that needs further study and debate. It shows another limitation of liberalism — the failure to provide for basic needs — and may have to await further development in liberal theory and practice before it can be resolved.

V Conclusion: Toward a Morality of Care and Trust in Assisted Reproduction

In the end, liberals, conservatives, and feminists may be less divided in their concerns about new reproductive technologies than their disputes over the scope of rights contained in this Symposium indicate. All of us recognize that some aspects of procreation are of fundamental importance, and all of us want human dignity respected and suffering prevented in the procreative choices that are made. Yet we disagree about the importance and effects of particular practices and the rules that should guide procreative conduct.

I do not agree with Professor Massie, Professor Meilaender, Professor Purdy, and Dr. Jones that a strong recognition of procreative rights will harm the family, women, and offspring in the ways that they have stressed. Yet I see enough potential problems in how the infertility industry operates and how donor and surrogate arrangements are made to agree that more regulation is in order and that greater attention to care and trust among all the parties would be desirable. Reasonable persons might also disagree over how much public policies should encourage or discourage their use.

108. As my colleague Richard Markovits reminds me, the fault is not liberalism itself, but rather that the political systems that liberalism creates often give inadequate attention to the demands of justice.

109. See, e.g., 1 ROYAL COMM'N ON NEW REPRODUCTIVE TECHNOLOGIES, PROCEED WITH CARE: FINAL REPORT OF THE ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES 524-26 (1994).

In my view, our common concerns about reproductive technology do not justify infringing the right of persons to use novel reproductive techniques to realize their procreative plans. But they do alert us to the need for protective or ameliorative action to lessen the potential for harm. Many of these concerns can be addressed through careful attention to issues of regulation, infrastructure, and funding. But public policy cannot deal with all of the questions and challenges that remain.

At bottom, the moral problem of new reproductive technology is a problem of how individuals should relate to one another in the varying roles and practices that technological assistance in reproduction entails. If greed, selfishness, and power drive those relations, the worst fears of the critics may be realized. On the other hand, if participants respect the needs of others, honor their free choice, and treat them as equal players, reproductive technologies may be used well and productively for all concerned.¹¹⁰

The best strategy will be to adopt policies that encourage respectful, beneficial uses, while minimizing those that harm or ignore the interests of others involved in the reproductive endeavor. Public policy, however, can carry us only so far in this direction. At some point, those directly involved in providing and using new reproductive technologies must develop attitudes, ethical codes, and patterns of practice that assure respectful treatment. This places a duty on doctors, nurses, and embryologists to respect the needs of infertile couples for full and accurate information, emotional support, and high quality care. It also places responsibility on the couples who seek their assistance to be fully cognizant of the social, psychological, and moral significance of their novel efforts to conceive and give birth to offspring. They are involved in the creation of new life and may be expected to show care and concern for the embryos, fetuses, and offspring that they produce.¹¹¹ They should also be respectful of the needs of the donors and surrogates who assist them.

In philosophical terms, we must create a morality of care and trust for how the new reproductive technologies are to be used to supplement the

110. It is too soon to tell which pattern will dominate. Just as there is cause for pessimism from some practices, there is also ample evidence that many providers and consumers use these services respectfully to the benefit of all concerned. At bottom, it is a question of the attitude of the persons involved in the reproductive enterprise: Do they approach others with an attitude of respect, care, and trust, or are they treating them as mere means to their own selfish ends?

111. I do not mean to imply that couples may not have a right to discard embryos or abort fetuses, but rather that they should be attentive to the symbolic meanings that others bring to these practices so that they will not unthinkingly or frivolously offend them.

morality of rights that protects the underlying procreative choices involved. Attention to both moralities is necessary if the freedom to use reproductive technology is to be used wisely and well.

NOTE
