

## Feel Like Making Babies? Mapping the Borders of the Right to Procreate in a Post-Coital World

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Note to readers:

I am tremendously excited to share and discuss my work with you. In the interest of providing you with a long enough text to spark discussion and a short enough text to avoid consuming too much of your time, the pages that follow encompass the first sections of a longer piece in which I am grappling with how to understand reproduction without sex as a matter of constitutional law. I've given you the full table of contents so that you have a sense of what is in the missing sections. During next week's workshop, I plan to spend a few minutes sketching out the material from Part III of the paper, which focuses on articulating and balancing the various interests involved in procreation. I've been working on the ideas in this piece for some time and continue to find myself challenged by the topic. Your feedback will be enormously useful for me as I complete the writing process. As this is a draft, I ask that you please not distribute it without my permission.

Thanks for taking the time to read the paper. I look forward to discussing it with you soon.

Take care,  
Kim

## **TABLE OF CONTENTS**

<b><u>INTRODUCTION</u></b>	<b>1</b>
<b><u>DEFINING PROCREATION</u></b>	<b>3</b>
PROCREATION IS NOT (JUST) SEX	7
PROCREATION IS NOT (JUST) PARENTING	8
PROCREATION IS NOT (JUST) PREGNANCY	9
<b><u>PROCREATION AS A FUNDAMENTAL RIGHT</u></b>	<b>10</b>
<b><u>BASIS FOR REGULATING PROCREATION- THE INTERESTS AND ISSUES</u></b>	
INDIVIDUAL INTERESTS AS FUTURE PARENTS AND PEOPLE WITH INHERITABLE GENES	
STATE OR SOCIETAL INTERESTS IN PROCREATION	
INTERESTS OF THE FUTURE CHILD	
<b><u>THE PROCREATIVE RIGHT AND REPRODUCTIVE TECHNOLOGY: FROM SKINNER TO OCTOMOM</u></b>	
REGULATING ART: WHAT ARE WE SO AFRAID OF?	
<b><u>CONCLUSION</u></b>	



“Little is of such fundamental concern to us as sexuality and reproduction.”<sup>1</sup>

“[T]he morality of an act is a function of the state of the system at the time it is performed.”<sup>2</sup>

## Introduction

In 1994, John Robertson published the book *CHILDREN OF CHOICE* in which he made a strong case for protecting the procreative rights of those who bring children into their families through the use of Assisted Reproductive Technology (“ART”).<sup>3</sup> When one reads the book now, less than 20 years later, it has an oddly dated feel to it. This sense of reading history is not because the ideas in his book have necessarily aged poorly<sup>4</sup>, but because the world of ART has surged forward so rapidly. Frequently, the ART related stories in the mainstream media incite derision, as evidenced by the coverage of Nadya Suleman or Octo-Mom, and calls for greater regulatory control of ART related practices.<sup>5</sup> Yet lawmakers continue to find it difficult to craft legislation in this arena that is both timely and well targeted. Further, we do not appear to have come to any strong societal consensus about how procreation without sex or non-coital reproduction fits within our traditional understanding of how babies are made. In fact, in many jurisdictions, the failure to have ART related laws on the books seems to speak to a profound inability to think critically and deeply about and deal proactively with the questions and dilemmas created by babymaking technology.

While lawmakers have not been especially active in this arena, academics have not felt silenced. In fact, there is a substantial body of legal writing that calls for a variety of ways to regulate ART and that offers multiple theories of regulation.<sup>6</sup> Within this literature, even those who possess a sincere sympathy for ART users and a desire not to significantly impair access to ART technology, can be accused of not taking the right to procreate using technology as seriously as the law has traditionally taken the right to procreate through coital reproduction.

In the space between legislative inaction and calls for more regulation, lies an opportunity to reassess the basic starting point of all of these conversations. Namely,

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<sup>1</sup> Peter J. Hogarth, *BIOLOGY OF REPRODUCTION* 172 (1978).

<sup>2</sup> Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243-1248 at 1245.

<sup>3</sup> Robertson wrote, “To take procreative liberty seriously, then, is to allow it to have presumptive priority in an individual’s life. This will give persons directly involved the final say about use of a particular technology, unless tangible harm to the interests of others can be shown.” John Robertson, *CHILDREN OF CHOICE* 42 (1994).

<sup>4</sup> One theoretical failure in Robertson’s book is a lack of contending with the issues raised by those in the reproductive justice movement. In a future piece, I discuss how the lessons taught by the reproductive justice movement complicate the story of ART.

<sup>5</sup> See, e.g., Jill Stanek, *Define embryos as human; Opposing view: Now's the time for pro-lifers to promote regulation of IVF*, *USA TODAY*, March 18, 2009.

<sup>6</sup> See e.g., Radhika Rao, *Equal Liberty: Assisted Reproductive Technology and Reproductive Equality*, 76 *GEO. WASH. L. REV.* 1457 (2008); Naomi Cahn, *Accidental Incest: Drawing the Line – Or the Curtain? – for Reproductive Technology*, 32 *HARVARD JOURNAL OF LAW AND GENDER* 59 (2009).

what does it mean to have a right to procreate in a post-coital world? It is this foundational question that this article seeks to answer. Lost in a back and forth about how to regulate ART is whether in fact it should be subject to regulation at all. For, if the law largely stands clear of decisions to procreate coitally, why should it be any less squeamish or any less respectful about regulating how people procreate non-coitally? In other words, if the law largely protects or at least ignores how babies get made in a bedroom, how do we justify regulating how babies get made in a doctor's office?

The legal literature on ART is rich, if not necessarily vast, and yet there are still substantial holes in how we write about, debate about, and legislate on this most intimate part of the human experience. This article's goal is to acknowledge the complications, rather than try to reduce the issues to simple comparisons to coital reproduction, and think about a way to conceptualize non-coital reproduction that protects these reproductive choices as a part of the broader procreative right found in the Constitution. We are called to ponder what it means to procreate in a world in which procreation and sex need no longer be entwined. In part, the inquiry vexes us because the definition of such a right strikes many as obvious. Yet, we make pronouncements about procreative rights based on little more than gut feeling, religious faith, or political tendencies. In this article, I seek to put more flesh on the bones of the slippery fundamental right to procreate in a world in which procreation can be detached from sex. In such a world--- the land of ART--- it is crucial to rethink our basic understanding of procreation on a personal, societal and legal level so that the policies that govern new technology can be built around principles and after careful thought rather than being knee jerk reactions based on fear and fundamentalism. This article maps the contours of the right to procreate first as matter of legal history and biological advancement and offers a framework for determining how to fit ART into our modern day understanding of reproduction.

In writing about a world of post-coital reproduction, I make no broader claims about what the future holds in terms of any more substantial role for ART in baby-making. In other words, there is no claim and frankly no fear here that we are anywhere near a future in which coital reproduction ceases to be the norm. The availability of non-coital reproduction does not portend a world in which people stop doing things the way they have been doing them for a long, long time. For now and for the foreseeable future, the vast majority of people will make babies the old-fashioned way and this article categorically rejects any contention that our society is on a slippery slope to a world in which everybody clamors to have babies through ART. The disincentives to shift from coital to non-coital reproduction are many. They include cost<sup>7</sup>, physical burdens<sup>8</sup>, risks for patients<sup>9</sup>, frequently women, and fetuses, religious

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<sup>7</sup> Liza Mundy, A Special Kind of Poverty, WASHINGTON POST MAGAZINE, April 2, 1983, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A41046-2003Apr16&notFound=true> (last visited October 21, 2010).

<sup>8</sup> Liza Mundy, EVERYTHING CONCEIVABLE (2007).

<sup>9</sup> *Id.*

faith<sup>10</sup> and a general wariness about circumventing “natural” reproduction. Therefore, when this article uses the terms post or non-coital reproduction, those terms only describe what is possible and do not predict what the future holds for humanity on a mass scale. This article neither predicts nor promotes the coming of a Gattaca like society.<sup>11</sup>

Part I offers a definition for procreation in a post-coital world and describes procreation as a process that involves multiple steps and multiple actors. Part II describes the constitutional landscape in which procreation is a fundamental right that can be abridged by the state only in a narrow set of circumstances. This part sets the stage for a claim that non-coital reproduction deserves a deep level of constitutional protection coterminous with coital reproduction. Part III delves into the intertwining interests at stake when individuals decide to procreate including the interests of the state, the public, those who are seeking to procreate, and the potential children who are being created. Finally, Part IV uses the definition of procreation from Part I and the discussion of prevailing interests from Part III to create some boundaries for the ways in which ART should be regulated, if at all, by lawmakers.

### Defining Procreation

Since at least the 1970s<sup>12</sup>, the world has accepted and sometimes welcomed a burgeoning business in babymaking that has taught us a wealth of acronyms. In addition to ART, we can talk and write about AI, ICSI, IVF, SMs and GMs.<sup>13</sup> In this world filled with letters, it is no longer clear what it means to assert a right to procreate. Some scholars, like Robertson, argue that the right to procreate logically extends to married couples and single individuals who have hope of having biological children only with the help of medical assistance.<sup>14</sup> Others question whether ART is, in fact, “procreation” as that term is understood in the legal lexicon and whether those who use such technologies should have access to the same level of constitutional protection thought required for coital reproduction.<sup>15</sup>

Any argument that hopes to end with the conclusion that the use of ART for the purpose of creating babies is worthy of the highest level of constitutional protection must start with a declaration that ART is, indeed, procreation. This article rejects any

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<sup>10</sup> See, e.g., Helen Alvare, *Religious Values and Legal Dilemmas in Bioethics: Catholic Teaching and the New Reproductive Technologies*, 30 *FORDHAM URBAN L. J.* 107 (2002).

<sup>11</sup> The action in the film *Gattaca* takes place in an imagined future in which genetic discrimination is rampant and people with the means take advantage of technology to ensure health and, as a consequence, prosperity for their children. <http://www.imdb.com/title/tt0119177/plotsummary>.

<sup>12</sup> Louise Brown, the world’s first baby born as a result of In Vitro Fertilization, entered the world in 1978. The fertility industry has continued to expand since that birth and is now a multi-million dollar global force. Debra Spar, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* (2006).

<sup>13</sup> AI stands for Artificial or Alternative Insemination. ICSI stands for Intracytoplasmic Sperm Injection. IVF is in vitro fertilization. SMs are surrogate mothers. GMs are gestational mothers.

<sup>14</sup> Robertson, *supra* note 3.

<sup>15</sup> See, e.g., Alvare, *supra* note 10.

formulation of ART that describes these processes as the manufacture of children, playing God, abomination, or defiance of nature. Instead, ART can and should be understood as a tool that increases human capacity, alleviates disability, and creates substantial opportunities for dismantling institutional structures that have denied access and agency to marginalized people.<sup>16</sup> By this I mean that ART provides access to family expansion to those who suffer from infertility, thus alleviating disability. It can open up the possibility of families with biologically related children for same sex couples or single women and it can allow children to be born without life-threatening illnesses. All of these things are to be praised. This is not to say that there are no ways in which people can abuse technology, but whatever such abuses take place in the context of ART can almost certainly be said to have an ethically equivalent counterpart in the world of coital reproduction. The baseline assumption of this discussion, therefore, is that ART is a positive tool for family formation and child creation.

John Robertson has vigorously argued that access to ART should be as deeply protected as access to coital reproduction because both are forms of procreation centered on an urge to form a biological tie with a child.<sup>17</sup> A core tenet of Robertson's argument is that even if a full genetic link does not exist between parent/parents and a child or children, "the interest of the couple in rearing children who are biologically related to one or both rearing partners is so close to the coital model that it should be treated equivalently."<sup>18</sup> Robertson's model seems to leave out those who use technology to create a child without a biological link to any intended parent, such as people who use donated embryos, and thus his account rests almost solely on a reverence for biological tie, which raises its own concerns about exclusion of some procreative choices. Even given its potentially narrow frame, many scholars seem to reject Robertson's sense that regulatory interference with the bulk of ART-related choices is both wrong-headed and constitutionally infirm. Many who write favorably about protecting access to reproductive technology remain inclined to think regulation, perhaps close regulation, is both inevitable, necessary, and welcome at least to some degree.<sup>19</sup> This article stakes out a strong position against regulation and sees regulatory interference as a final, not a first step, in responding to moral qualms about who uses reproductive technology and how it is used. Further, I contend that a belief that regulation is constitutionally possible still leaves many questions unanswered about

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<sup>16</sup> The idea of ART as transformative is not a concept that I will develop fully in this paper, but I think it warrants mention as a response to those who claim that ART is fundamentally about reinforcing heteronormativity and whiteness. See, e.g., Dorothy Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935 ("But these technologies rarely serve to subvert conventional family norms. Most often they complete a traditional nuclear family by providing a married couple with a child. Rather than disrupt the stereotypical family, they enable infertile couples to create one").

<sup>17</sup> Robertson wrote, "Similarly, if bearing, begetting, or parenting children is protected as part of personal privacy or liberty, those experiences should be protected whether they are achieved coitally or noncoitally. In either case they satisfy the basic biologic, social, and psychological drive to have a biologically related family." Robertson, *supra* note 3, at 39.

<sup>18</sup> *Id.*

<sup>19</sup> See, e.g., Naomi Cahn, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS REGULATION (2009).

what should be regulated, how it should be regulated and what checks there should be on state interference into this private realm.

For many, ART represents something that is substantially detached from the old-fashioned way of baby making, which therefore marks its use as foreign, suspect and tainted. As such, those who make babies through ART are not entitled to the respect or protection routinely given to procreative choices rooted in coital reproduction. To combat this tendency, this article constructs a vision of procreation that embraces both coital and non-coital reproduction.

It cannot be doubted that when the Justices of the Supreme Court first held that marriage and procreation are fundamental in *Skinner v. Oklahoma*<sup>20</sup>, they did so based on an assumption that procreation meant coital reproduction. At the time of *Skinner*, coital reproduction was not only the primary means of procreation, as remains true today, but there was no pervasive narrative of infertility and alternative means of reproduction which would have been even lingering in the background of the Justices' decision in *Skinner*. It can be declared with a fair amount of confidence, that the fundamental right to procreate articulated in *Skinner* was not meant to protect access to non-coital reproduction.<sup>21</sup> As such, the procreative right in its earliest incantation was about at least three intertwined ideas----a right to have heterosexual intercourse (perhaps limited to having such intercourse within the confines of a marital relationship), a right to initiate a pregnancy by virtue of an act of heterosexual intercourse, and a right to bring that pregnancy to term. Procreation, in a world before ART, was fundamentally and seemingly irrevocably linked to sexual activity and, therefore, controlling procreation meant controlling sexual conduct or the consequence of sexual conduct. Therefore, people either needed to be kept from having sex or sterilized so that their sexual activity could not result in a pregnancy.

Thus, before one can discuss the constitutionally protected right to procreate in substantial depth, it is critical to define the term procreate for a modern era. Often, people engage in discussion about procreation based on an assumption that each person involved in the conversation agrees with all others about what procreation means. In other constitutional contexts, the academic literature has abandoned the pretext that there is some static and shared meaning that can be ascribed to certain contested yet familiar terms like family or marriage. Despite the obvious challenges that ART brings to the table in terms of understanding or creating a core definition of procreation, legal scholars have put little effort into offering a basic understanding of what is meant by using the terms procreate or procreation. As will become clear later in this article, the synergy between the definition of procreation and the definition of a procreative right or rights is such that how we define the term necessarily presupposes

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<sup>20</sup> *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

<sup>21</sup> In fact, *Skinner* can easily be read as a case focused on equal protection rather than a substantive right to procreate. The majority opinion in *Skinner* focuses squarely on the fact that the challenged statute unfairly singled out one class of felon for involuntary sterilization while leaving other convicted felons to procreate without interference. As Chief Justice Stone points out in a concurring opinion, the deficiency of Oklahoma's challenged act probably lay in its attempt to sterilize any felon and would not have been cured by simply casting a wider net of forced sterilization for criminals. *Id.*

or requires a particular definition of the right that attaches to it and vice versa. This article attempts transparency about the creation process for the definition of procreation that it espouses with due regard for the fact that how the law defines procreation in the first instance has inevitable and indelible consequences on how we think about regulating procreative acts.

Webster's Dictionary defines procreate as "to produce (young); beget (offspring)."<sup>22</sup> To beget means to "to be the father of 2 to produce; cause."<sup>23</sup> These definitions do not provide a sufficient basis for thinking about procreation as a legally cognizable and constitutionally protected category because they lack specificity, include a gender bias that is obviously unhelpful, and do not embrace the idea that there are potentially multiple routes by which babies are made which might warrant separate legal consideration. Black's Law Dictionary is not substantially more useful in that it describes procreation as the generation of children.<sup>24</sup> This too does not do sufficient work to help us understand procreation as a biological, social, political, and legal phenomenon.

Recognizing how core this right is to our common experience of humanity, this article offers this definition of procreation: Procreation is a reproductive process by which a person creates offspring who may or may not have genetic or biological ties to the intended parent or parents. This definition does a few things that the Webster's and Black's definitions do not. First, it identifies procreation as a process. Second, it makes no pronouncements about how that process is initiated, how many people it may involve, or the body in which the future child is created. Third, it announces that this process ends in the creation of offspring, but makes no pronouncement about whether that offspring is in the form of an embryo, fetus or child. Fourth, the definition deliberately does not require a genetic or biological link between the offspring and the person who gives birth because that presupposes a certain avenue of child creation and birth, which excludes the multiple ways in which children can be created and brought into the world. This expansive definition captures a full range of reproductive activity from coital reproduction to the sale of gametes to in vitro fertilization and surrogacy arrangements. The definition serves to situate ART, in its many forms and in its component parts, as a type of reproduction for which constitutional protection is warranted. As a logical extension of this definition, ART, and the actors who put it to use for purposes of creating offspring, should be entitled to constitutional protection as a form of procreation. Whether this means that baby-making through ART is always tantamount to baby-making through heterosexual sex is part of a later discussion in this article. For now, it is sufficient to declare that ART is procreation without attempting to mark any boundaries of that procreative right assuming for the sake of argument that boundaries are warranted.

To help lay the groundwork for the remaining discussion of the procreative right in the constitutional design and beyond, this article makes three primary claims about

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<sup>22</sup> Webster's Dictionary.

<sup>23</sup> *Id.*

<sup>24</sup> Black's Law Dictionary.

procreation. First, procreation is not synonymous with sex. Second, procreation is not synonymous with parenting. Third, and finally, procreation is not synonymous with pregnancy.

*Procreation is not (just) sex*

When procreation leaves the bedroom and is de-linked from a right to engage in procreative sexual activity in the privacy of one's own home, fissures appear in a basic initial rationale for a fundamental right to procreate, which is the reluctance to allow the state to interfere with the coital act that initiates a pregnancy and the eventual birth of a child. Where that coital act disappears, the right to procreate is no longer rooted in a right to engage in sexual activity and it demands some other justification. In other words, those arguing for a procreative right that embraces ART cannot simply assert that if heterosexual procreative sexual activity is protected by the Constitution, then so is any other procreative activity, even if it lacks a sexual component.

Post-*Skinner* courts, including the Supreme Court, have reinforced a liberty interest in sexual activity, procreative or not. Most notably, in *Lawrence v. Texas*, the Court held that a state could not constitutionally criminalize consensual sexual behavior between people of the same sex.<sup>25</sup> Similarly, cases like *Griswold v. Connecticut*<sup>26</sup>, in which the Court found that the Constitutional right to privacy encompasses a right for married couples to access birth control and *Eisenstadt v. Baird*<sup>27</sup>, which extended that privacy right to single people, and *Roe v. Wade*, which established a woman's right to have an abortion<sup>28</sup> taken together can be read to stand for the proposition that non-procreative sex is protected under the Constitution for married people, single people, straight people and gay people. But, the Court's endorsement of a right to sexual activity, especially as articulated based on the facts of *Lawrence*, has little to no connection to procreative liberty. In fact, it is much easier to find in Supreme Court jurisprudence support for a claim that non-procreative sex is constitutionally protected than it is to find support for a claim that procreative sex is protected.

Of course, as a logical extension of a right to non-procreative sex, it is hard to imagine that the constitutional scheme, and the right to privacy found within that scheme, distinguishes between sex for pleasure and sex for procreation. It would be difficult to find a rational or compelling reason to protect one while leaving the other subject to restrictive state regulation. The privacy and bodily integrity issues that protect sexual activity do not dissipate when one engages in sex with the deliberate goal

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<sup>25</sup> *Lawrence v. Texas*, 539 U.S. 558, (2003) (“The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”)

<sup>26</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (invalidating state law prohibiting the use of drugs or devices of contraception and counseling or aiding and abetting the use of contraceptives.) After *Griswold* it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship.

<sup>27</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending *Griswold's* analysis to unmarried people).

<sup>28</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

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to achieve pregnancy, with a hope that a pregnancy will not occur, or with basic indifference to whether a pregnancy does or does not occur. Sex has inherent value and warrants respect apart from procreation

In the end, asserting a claim to a procreative right demands more than simply referencing Supreme Court jurisprudence on sex. Sexual agency and procreative freedom are intertwined for most people and a right to one reinforces the right to the other, but the two rights are self-supporting and self-sustaining. Thus, it is important to be able to disaggregate sex and procreation even in cases where this disaggregation is not necessary. In the end, though, having babies need not be justified based on a right to have sex. Such a limitation would have serious repercussions on ART for no principled reason.

*Procreation is not (just) parenting*

Similarly, it is wrong to rely too heavily on Supreme Court jurisprudence about the primacy of parental rights to support any claim to a right to procreation. As argued above in the context of sexual agency, procreation and parenting are not synonymous, though they are mutually supportive rights. While a right to procreate and a right to parent often work in tandem, one need not follow the other. There is no doubt that the Supreme Court has long protected the primacy of a parental right to the care, custody and control of children.<sup>29</sup> The line between parenting and procreation has legal significance though the line that separates the two is porous given that most pregnancies get carried to term by women who intend to parent the children to whom they give birth. Even so, the fundamental right to parent an existing child is separate from the fundamental right to create a child. Existing practices in family formation, including but not exclusively in the realm of ART, provide multiple examples of ways in which parenting and procreation need not be aligned.

Adoption is an obvious example of the de-linking of procreation and parenting. With some exceptions<sup>30</sup>, when a child is placed for adoption, the goal of that act is to give her a parent or parents who did not participate in the reproductive process that brought the child into being. A second example of the divide between parenting and procreation is the existence of egg and sperm selling which allows an individual to procreate, in the sense of participating in the creation of offspring with whom the gamete provider has a genetic link, without having the obligations of parenting. In fact, a fundamental purpose of egg and sperm selling is to allow the gamete provider to participate in a procreative act without any legal rights or responsibilities for any child born--- in defiance of the genetic tie. A further example is surrogate motherhood in which women agree, often but not always in exchange for money, to carry a child to term who will be the legal and moral responsibility of an intended parent or parents.

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<sup>29</sup> See, e.g., *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158 (1944), *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>30</sup> One exception to the paradigmatic adoption case is same sex second parent adoptions in which the same-sex partner of a biologically or genetically related parent adopts a child who the two intend to raise together. Step-parent adoptions can also involve one parent with a biological or genetic link to a child who seeks to legally share child-rearing responsibilities with a non-genetically linked adult.

Even in cases of unintended pregnancy where a woman decides to keep a child despite the lack of relationship with the biological father, that father can be obligated to pay child support, but can not otherwise be obligated to have a relationship with his biological child. A court can order support, but it cannot order a non-cooperative biological father to visit with a child, participate in decision-making about that child's life or otherwise act as a participating parent. In each of the preceding scenarios, the person or people who contribute to the process of procreation are intent upon not actually parenting a child at the end of that procreative process.

Not only does procreation not obligate me to parent, it is also the case that I am not obligated to procreate in order to become a parent. Again adoption, surrogacy, and step-parent relationships are good examples of this. Without being at all involved in the reproductive process that creates a child, I can adopt a child who will become my legal responsibility in ways that are identical to the relationship between a biological parent and her biological child. An individual or couple desirous of being parents can hire a woman to bear a child, with or without a biological link to the intended parents or the surrogate, and also become parents without participating in a process of perpetuating their own genes. Finally, a step-parent can come into a child's life and assume a parental role without any participation in the process of creating that child. In all of these ways, then, parenting and procreation can be separated. Again, this is not to say that they should always be thought of as separate spheres, but certainly they cannot always be thought of as identical acts that depend upon each other for constitutional legitimacy. The importance of this distinction is one to which I will return at a later point.

*Procreation is not (just) pregnancy*

While pregnancy is certainly a part of the procreative process, until someone perfects the artificial womb, it is only one part of the procreative process. That process starts with the union of sperm and egg<sup>31</sup> inside or outside of the body, placement of that fertilized egg into a woman's uterus, implantation of that fertilized egg into the uterine lining, growth of a fetus during the period of pregnancy and, eventually, birth. All of these steps are critical components of the process of reproduction and while pregnancy is the most drawn out and physically noticeable element of this process it does not stand alone as the definitive procreative act. In the most basic way, to claim that pregnancy is the sole marker of procreation would be to exclude all men from the procreative process, which, of course, is completely nonsensical and counter-productive.

We are challenged to disentangle procreation from parenting, sex, and pregnancy and, in doing so, ferret out distinct and independent rationales for the right

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<sup>31</sup> Of course, the description that I offer here does embrace cloning as a form of human reproduction and some have argued strenuously that human cloning is not, in fact, a form of procreation. See, e.g., Leon Kass, *The Wisdom of Repugnance*, 216 NEW REPUBLIC (June 2, 1997). The definition of procreation offered in this paper does extend to cloning, but this does not mean that state laws making it illegal to clone for the purpose of creating children would automatically be unconstitutional. Rather, it means that such laws would be subjected to the most stringent constitutional scrutiny in order to test their constitutionality.

to procreate. There is nothing in *Skinner v. Oklahoma* that helps us to do this work. In that process of disentangling, the goal is not at all to claim that procreation has no relationship to sex, parenting and pregnancy. Rather, the point to be made is that procreation is linked to all of these things and supported by all of these things, but it is not singularly defined by any one of these things. To the extent that we think each of these elements is important or critical in a legal and societal context, that sense of importance lends substantial legitimacy to the claim that procreation itself, as defined earlier in this paper, is important, legitimate, and worthy of protection. Most important, though, this article makes the claim that procreation without reference to parenting, sex or pregnancy remains important in ways that require protection.

### **Procreation as a Fundamental Right**

Even those who do think that ART is a constitutionally protected form of procreation do not necessarily help us determine just how far the right to procreate extends and what it encompasses. It is clear that a right to procreate does not encompass a right to sell a baby; after all, babies are not property to be bought and sold. It is also clear that a right to procreate does encompass a right for a legally married heterosexual couple to engage in intercourse, create a baby, and have a child. It is in the space between these acts---baby selling and coital reproduction in the privacy of one's home---that the nature of the procreative right demands clarification and increasingly, in the view of this author, protection.

While many laypeople think of procreation as a privilege and not a right, the Supreme Court disagrees. The right to reproduce in American legal history begins, perhaps illogically, with a case about forced sterilization. In 1927, in the midst of a border crossing eugenics movement<sup>32</sup> the United States Supreme Court issued one of its most shameful decisions in *Buck v. Bell*.<sup>33</sup> That case involved a young woman, Carrie Buck, who became pregnant out of wedlock and was forced into a home for the mentally ill as a result of that pregnancy.<sup>34</sup> Though the precise facts surrounding Ms. Buck's appearance in the state run mental hospital do not appear in the case, historical records indicate that her pregnancy resulted from a sexual assault for which the perpetrator received no punishment but Ms. Buck was sent to the mental institution where the institution's administrators later sought to have her sterilized without her consent.<sup>35</sup> Famously in that case, the Court upheld statutes allowing these eugenic sterilizations and wrote, "Three generations of imbeciles are enough"<sup>36</sup>--- a reference to Carrie Buck, her daughter and her mother. By contrast, in *Skinner*, when faced with an Oklahoma statute allowing for the forced sterilization of habitual criminals guilty of certain categories of crimes, the Court declared that marriage and procreation are fundamental rights.<sup>37</sup> Since *Skinner*, courts have continually reiterated the fundamental

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<sup>32</sup> Paul Lombardo, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT AND BUCK V. BELL* (2009).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Buck v. Bell*, 274 U.S. 200 (1927).

<sup>37</sup> *Skinner*, *supra* note 20.

nature of the procreative right.<sup>38</sup> However, every constitutional right, fundamental or otherwise is subject to governmental regulation given the right conditions, including the proper confluence of interests and means. Even so, there are few concrete examples of regulation of coital reproduction as coital reproduction. In other words, there may be ways in which regulatory choices impact decision-making about coital reproduction, but seldom do regulators make a full frontal attack on reproductive choice. For instance, tax breaks for children or reductions in state benefits for pregnancies that occur while one is receiving such benefits can be viewed as forms of procreative regulation, but they do not so much regulate the procreative act as they regulate the context in which procreative decision-making takes place.

In significant ways the discussion about procreative choice has become fixated on a right to end an existing pregnancy. As a result, we do not have a rich jurisprudence that helps us puzzle through the issues surrounding choices to create pregnancies that are very much desired and that the women who carry them hope will come to full term. It seems self-evident that there are many parallels between discussions of abortion and discussions of ART, including that both involve protecting individual bodily integrity from state intrusion, regulation of the medical profession and the relationship between healthcare providers and their patients, our societal understanding of familial and procreative choices as existing in a private realm generally free of state interference, and the state interest in children and future children. However, that abortion is focused on the end of pregnancies and therefore the termination of any potential life whereas ART is concerned primarily with creating life is a dividing line that suggests that our analysis of the issues involved should not focus too heavily upon or become hopelessly intertwined with abortion discussions. Abortion has become the lens through which all understanding of procreative choice is viewed, but debates about termination do not tell us what conclusions can be drawn when a person actively seeks to create a pregnancy, nurture a fetus through pregnancy, and, perhaps, parent the child that hopefully ensues.

As we embark on a discussion of how ART fits in within an existing right to procreate, the existing legal framework available to us is largely bereft of useful tools for building a theory as a protected category of procreation. As described earlier, the early cases on procreation occurred in a world in which ART as the babymaking behemoth that we have today simply did not exist and it can plausibly be argued that if non-coital reproduction did not seriously exist as a category when the court declared procreation to be a fundamental right, then the correct route is to declare that the constitution cannot be said to provide any safe harbor for those who think that coital and noncoital reproduction demand similar levels of constitutional care. Early jurisprudence took place in a world in which jurists likely could not even imagine a future where physicians could compete with nature on such an even plane. Even putting that reality aside, the cases dealing with procreation are remarkably bereft of big picture principles that we could easily extend to ART. Similarly, as the years have progressed, rather than engaging in policymaking, legislating or litigating about babymaking, our legal system

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<sup>38</sup> See, e.g., *Griswold*, *supra* note 26; *Eisenstadt*, *supra* note 27.

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has become entrenched in a war over pregnancy termination producing a series of supreme court cases that, at best, gives a limited guidance on the question of whether and if the question of constitutional protection of choice should be treated differently when the choice being exercised is one to create life. Rather than claim an allegiance or reliance on the text of the constitution or of the few cases about procreation that have been decided by our courts, the argument is this article is based on normative claims of what is right given our larger societal beliefs and norms. I am positing an almost clean constitutional slate when it comes to this discussion of ART.