

Procreation: Power, and Personal Autonomy: Feminist Reflections

Chapter 4

Recasting Reproductive Freedom: Individual, Group, and Global Perspectives

Since Adam downward the rights of humanity have been confined to the male line.¹

Mary Wollstonecraft *The Vindication of the Rights of Women*

After a brief historical retrospective, I will focus on contemporary controversies that bear on reproductive freedom, particularly insofar as they turn on contested understandings of the nature and significance of reproductive rights and intertwined concepts including autonomy, equality, and personal choice. My intent is to attend to the theoretical background that shaped current ways of thinking and speaking about reproductive freedom, particularly the unfinished voluntary agenda that links freedom (or liberty) with equality.

Though autonomy, agency, and choice are values endorsed by all feminists, these concepts are given radically variant readings both within feminist circles and outside them. I will critically examine the conception of reproductive freedom embedded in the marriage between libertarian ideology and the fertility industry and then confront problems that lie in the path of a more adequate account of reproductive freedom, an account that recognizes both the centrality of gender within prevailing social structures and preconditions for equitable social arrangements that free women for full social participation. I begin with a much celebrated British case which raises a host of legal and ethical issues about reproductive rights and personal autonomy. Then I consider several themes evoked by the case: in the quest for equality between men and women, how should we incorporate biological differences and heterogeneous social roles? Should there be a free-standing right to nondiscrimination?

Natalie Evans and her male partner, Howard Johnston, started in vitro fertilization treatment in 2000 after they had been trying to conceive without assistance for some time.² During the treatment she was diagnosed with a precancerous condition of her ovaries and offered one cycle of IVF followed by surgical removal of the ovaries. Her ova were retrieved, six were fertilized with her partner's sperm and frozen. Evans was told to wait at least two years before her health was restored sufficiently to allow safe

¹ Mary Wollstonecraft: *Vindication of the Rights of Woman*, New York, Penguin, 1978 (first printed 1792), 185.

² This account is drawn from the judgment in the *Case of Evans v. The United Kingdom*. 6339/05 Eur. Ct. H.R. Available at <http://news.bbc.co.uk>

implantation of the embryos. She inquired about freezing her unfertilized eggs. She was told that the procedure had a much lower chance of success than embryo freezing and was not performed at that clinic. Her partner reassured her that they were not going to split up and he wanted to be father to the child. Both then signed the required consent forms. The couple separated six months later. Johnston sent a letter to the clinic where the embryos were stored withdrawing his consent and requesting their destruction. He wanted to get on with his new life and didn't want to be a father. Since UK's 1990 Human Fertilisation and Embryology Act requires consent of both parties at each stage of the external fertilization process and again before the embryos can be transferred, his withdrawal blocked Evans from using the embryos. When the Human Fertilisation and Embryology Authority (HFEA) which implements the Act ruled against her, she appealed to the House of Lords. After another negative ruling she took her case to the European Court of Human Rights. She argued that the British ruling violated her human rights.³

Bloggers had a field day over the Evans case. Right to life advocates stressed the embryo's "right to be born." They claimed that it was morally preferable that Evans be allowed to use the embryos rather than "abandoning" them along with the thousands of unclaimed embryos in storage facilities. Others contended that Evans's partner had every right to withdraw consent, that such withdrawal is the male counterpart of a woman's right to abortion. Still, others searched for technological resolutions of the underlying moral problem. Advances in egg freezing techniques would allow women to safely bank their ova, thereby circumventing the need to rely on a male partner's continuing consent. Scholarly commentators wondered about comparative harms and implications of the view that embryos are a kind of property. Another pointed out the "profound difference" between the situation of Evans and her former partner. He could still have his own genetically related children but without access to these embryos she could not.⁴ Eventually the European Court of Human Rights ruled against her too. Several judges expressed sympathy for her plight but few defended her reproductive rights over her former partner's control of their joint biological material.

The issues that surfaced in the Evans case have been adjudicated in conflicting ways by courts under the jurisdiction of the European Court and others, including Canada and the U.S. France stipulates that consent for embryo transfer is revoked when a relationship ends. Austria and Estonia allow the female partner greater autonomy. The man's consent may be revoked only up to fertilization. In Hungary the woman may proceed despite divorce or death of her partner and in Spain the man may withdraw consent only while still living with the woman who provided the ovum. Comparable issues have also surfaced in the U.S. and Canada.⁵ Several commentators have drawn analogies to U.S. case law where different jurisdictions have often issued incompatible rulings on the custody of embryos. Pimentel argues for a U.S. law that would parallel the British regulations.⁶ Feminist commentators on the U.S. case of *Davis v. Davis V. King* (often cited in relation to Evans) reach an antithetical conclusion. They tend to

³ Her brief cited Articles 8 (right to respect for private and family life) and 14 (freedom from discrimination) of the European Convention on Human Rights.

⁴ M. Somerville: "Whose embryo is it anyway?" available at <http://www.christianity.ca>

⁵ Somerville also includes a more extended discussion of Canadian regulations.

⁶ G. J. Pimentel: *Evans v. United Kingdom, to Procreate or Not to Procreate: Which Right is Greater?* Available at works.bepress.com.

concur with Christine Overall's assessment that "decision-making about cryopreserved embryos should, in cases of disagreement, be assigned to the woman who is entitled to choose whether or not they will be implanted in her uterus."⁷ Virtually any jurisdiction that is called upon to resolve disputes about the disposition of embryos is bound to confront similar morally and legally troubling issues whether they have mandatory regulation (as in the UK) or a market-based system (as in the U.S.).⁸

Lurking beneath the surface of the immediate issues addressed during the controversy are even more pervasive questions that transcend such broken relationships, questions about asymmetries between the situation of the parties and the bearing of these asymmetries on the reproductive freedom of each of the partners. None of the courts that heard the Evans case dealt forthrightly with power relations tied to popular gender stereotypes.

I turn now to controversy about underlying issues including the reproductive rights of interested parties, asymmetries between the parties, the bearing of consent on reproductive autonomy, and links between autonomy, genetic connection, and personal agency.

Gender Equality: A Problematic Concept

The case brings to the surface several inequalities between the circumstances of Evans and Johnson. Her illness ended her capacity to become a biological parent. His parental capacity was still intact. He might still father a biological child with another partner. She could not. So in the end his rights were determinative. His assertion of his right extinguished hers. Wholly ignored during the proceedings, however, were sex based biological differences. She had to undergo a surgical procedure to extract her gametes. He needed only to masturbate into a cup. Because of such inequalities, particularly those based on biological difference, her preferences should, arguably, have greater weight than his. Unfortunately, throughout Western history male prerogatives have predominated. I turn now to recapitulate historical attempts to right this imbalance.

The second wave of the feminist movement exposed to intense scrutiny the quest for gender equality that marked the first wave. The mistake of Mary Wollstonecraft and her heirs, many claim, was to associate equal rights with kind of decontextualized individualism that is oblivious to the actual conditions of women's lives. Critical barbs have pointed not so much to the *activist* strategies that Wollstonecraft's descendants champion that are the appropriate objects of feminist critiques of rights-based language, such as abortion rights, but to misleading *theoretical* expositions of rights. Particularly objectionable are abstract individualist formulations of rights that tie the quest for liberty and equality to a vision of a moral world divided into discrete individual domains. Feminists have criticized this conception of moral rights and obligations on several grounds, including its unquestioned acceptance of prevailing structures of power and authority and its failure to acknowledge relational matrices which

⁷ "Frozen Embryos and 'Father's Rights': Parenthood and Decision-Making in the Cryopreservation of Embryos" in *Reproduction, Ethics, and the Law: Feminist Perspectives* and Joan C. Callahan, ed. 1995, Bloomington, IN: Indiana University Press, 178-198.

⁸ R. Thornton. European Court of Human Rights: Consent to IVF Treatment. *International Journal of Constitutional Law* 2008; 6: 317-330.

resist division into individual territories. Moral theories which give centrality to individual rights, they point out, tell us nothing about what *should* be done when no one has a right to claim that it be done. They foster a false perception that only what can be claimed by individuals as their *personal* due is a matter of legitimate moral concern.

The agendas of the social movements that culminated in the revolutions of the late eighteenth century provided the context for the family of concepts that have been pivotal to both feminist and non-feminist discourses about reproductive freedom ever since. The ways in which political debate reframed concepts like equality, choice, and individual autonomy shifted the locus of discourse from the rights of monarchs and feudal lords to the claims of individual citizens and subjects.

Observing the French revolutionary fervor from across the channel, Mary Wollstonecraft was astonished and indignant that the rights and liberties the revolution proclaimed to be the birthright of all reasoning creatures were still being withheld from women. She urged "to allow women to share the advantages of education and government with men, (to) see whether they will become better, as they grow wiser and become free."⁹ Yet despite the reasonableness of her goal, two centuries later women's demands for full and equal participation in public life are still contested.

Mary O'Brien faults the program of the revolution itself. She writes:

To lump liberty, equality and fraternity together is to make a categorical error. Fraternity is the ideologically formulated condition of an actual liberty, the brotherhood of fathers who are forced to be free. It is universal only in male terms, and absolutely precludes a truly universal freedom and equality, for its condition is the suppression of women (1981, 158).

O'Brien's reading of the revolutionary slogan reflects a hindsight indiscernible to Wollstonecraft, herself.¹⁰ For she had no position from which to view social conditions beyond the pervasively gendered character of her own social reality. Only retrospective interpretation can reveal why, after successive waves of feminist protest, barriers to achieving just and equal social arrangements still adhere so tenaciously. For though Western democratic legal systems have been effective instruments for extending the liberties of many historically disadvantaged groups, they have not been nearly as effective in advancing women's liberties--particularly where their reproductive capacities are involved.

Though the appeal to 'fraternity' in the revolutionary cliché does, Annette Baier points out (1994,19), invoke a note of mutual concern absent from the call to liberty or equality, it also reveals the illusory nature of the "gender blind" conception of liberty and equality that our liberating forefathers bequeathed to us. It is not truly blind to gender at all. The conceptual framework embedded in the revolutionary project privileges a masculine ideal of moral agency as the universal norm. It tacitly universalizes the perspective of those whose life experiences exclude pregnancy, birth, and primary

⁹ *Ibid.* 286.

¹⁰ It also suppresses other senses in which the word 'fraternity' is used in French: the bond of solidarity and support that unites human beings and the subjective felt sense of that bond. Though both senses were initially understood as applying principally to men, arguably, they shouldn't be so limited. This point opens up an alternative strategy for recognizing equality in difference.

responsibility for the care of children and other family members. In an article revisiting the construction of the French republic following the revolution, Jane Kramer points out how the concept of *parité* was used to sacralize the state and confer a kind of divine right on the male citizen.¹¹ At the same time that women were granted civil rights on rationalist and universalist principles they were excluded from political rights and did not even achieve the right to vote until after the Second World War. Meanwhile, men were enshrined as the “political representatives” of the French family.¹²

Awareness of this kind of gender bias motivated activist feminist reformers during the early stages of the second wave. Shulamith Firestone, for instance, seized on technological transformation of reproduction as women's best hope (1971). As we have seen, defying traditional conceptions of women's nature, she insisted that women's oppression stems directly from biological motherhood which she took to be more a barrier to self-fulfillment than a vehicle for it. Women will not be the equals of men, she contended, until they are freed of the burdens of childbearing. Only technological reproduction could assure women full liberty and equality.

As we have seen, too, by the late 1970s enthusiasm for such a program of technological transformation had waned. A new generation of feminist scholars argued that equalizing the biological functions of men and women was the wrong way to go about building social equality. Their arguments stressed two interrelated themes. First, the very term “woman” is not primarily a biological concept but a historicized one that acquires meaning through social institutions and practices embedding patriarchal interests. Second, the reigning paradigm of equality is modeled on male agency, a conception of men freed from domestic labor by their power to relegate these tasks to others over whom they have control. Thus, genuine equality, feminist legal theorists repeatedly emphasized, cannot be achieved merely by extending commonly recognized moral principles to women. Overcoming women's subjection requires disrupting prevailing structures of power to reinvent and redefine ways of experiencing reality and create new communities within which women can devise innovative practices, habits, and roles. Cynthia Daniels in her analysis of fetal rights politics points to the relevance of such rethinking and re-experiencing for the public domain:

Because public life has historically been defined in masculine terms, gender equality entails not simply integrating women into the public world on the same grounds as men but transforming public structures to reflect the needs and concerns of women." (1993, 58).

Rebecca West makes a related point that extends beyond the public domain. Given the opportunity, she observes, women use their full capacities of mind and body, not because they want to be the equal of men, "for that is a point in which it is difficult to feel interest for more than a minute or two unless one has an unusually competitive mind," but because such free use of one's powers is in itself good.¹³

¹¹ Kramer, J. 2000. “Liberty, Equality, Sorority.” *New Yorker*, 5/29/2000.

¹² *Ibid.* 86.

¹³ *Black Lamb and Grey Falcon: A Journey through Yugoslavia*, Macmillan London Limited, 1942, 679.

Lawmakers who use strategies to *equalize* the liberties of men and women without disturbing prevailing legal arrangements often fail to recognize the point of women's demand. In matters relating to childbearing in particular, this evasion either leads them to overlook biological difference completely, as in the case of Evans and Johnson, or enmeshes them in tortuous locutions. Grudgingly acknowledging that women and men are not 'similarly situated' biologically, they speak of "pregnant people" or "pregnable persons."¹⁴ A common strategy in the law governing the civilian workplace is to subsume pregnancy under the category of disability, so pregnant women who need to take time off from work to give birth or need temporary modifications in their working conditions must fit into niches already carved out for the disabled. So in her discussion of the Angela Carder case Cynthia Daniels remarks that "(w)oman is the name of a disability" (1993, 52).¹⁵ Such ad hoc strategies present little challenge to social arrangements designed for the convenience of those who need make no accommodation for reproductive work. So pregnancy remains a ground for excluding women from equal consideration in the workforce and full control over their own reproductive capacities. Moreover, even though child rearing activities are more a function of social custom and acquired talent than a matter of inborn aptitude, most child care still falls to women, and their identities and social roles have by tradition and acquired talent been intimately bound up with nurturing and caring activities. As the workforce is presently structured, these circumstances disadvantage women too. Any program for overcoming women's legal and social disadvantages should be responsive to such features of women's biological and institutionalized circumstances.

Within the last generation some Western European countries have made notable gains toward altering workplace structures and integrating women without requiring them to trade off pregnancy and child rearing for workforce participation. In Europe, recognition of the importance of women's social roles has led to relaxation of abortion laws, even in such strongly Catholic countries as Spain and Italy. Some European governments have helped fund child care and educational facilities for preschool

¹⁴ Such contortions are aptly illustrated in a case that was discussed during the Supreme Court confirmation hearings of Ruth Bader Ginsburg that illustrates succinctly both the devices used to exclude pregnant women from employment and the kind of argument that is likely to be made to adapt constitutional precedents to the conditions of women's lives. When Catherine Susan Struck, a careerist in the Air Force, became pregnant she was allowed only two options, either an abortion or discharge. Neither was acceptable to her. Abortion was contrary to her religious beliefs and discharge would separate her from the career to which she was firmly committed. She offered to limit her absence from active duty to the accumulated leave she had already earned and then give up the infant for adoption. The Air Force refused her offer and she brought suit citing three constitutional issues: religious liberty, personal choice and the denial of equality vis-à-vis a man equally responsible for the conception. (Not until after she had prevailed in both the trial court and the court of appeals did the Air Force relent).

¹⁵ Elizabeth Wolgast discusses this issue in connection with the Supreme Court ruling on the Hyde amendment in *The Grammar of Justice* (1987, ch.2); and Wendy Brown gives it a different twist in "Reproductive Freedom and the Right to Privacy: A Paradox for Feminists" (Diamond 1983). It is a frequent topic in Catherine MacKinnon's work where it is given distinctively different emphasis.

children, mandatory parental leave policies, and comprehensive health care schemes that free individual parents from the burdens of funding their children's health care from their own personal resources.

In the U.S., though, the ideology that separates public life from domestic responsibilities persists tenaciously. Until the Family Leave Act was passed in 1993, there was virtually no public recognition that work in the domestic sphere contributes to societal well-being. And that measure provided only token relief in emergency situations: a twelve week unpaid leave restricted to those employed by larger companies which only the privileged can afford without considerable personal sacrifice.¹⁶ Persisting discourses misconstrue the struggle for equal rights. One was manifest already in the 1920s feminist debates about the Equal Rights Amendment (ERA). Another has cropped up within a rights discourse tethered to abortion politics. I will take up the latter first.

Kristin Luker (1984) shows that U.S. abortion controversy is not primarily about the moral status of embryos but about women's control over their reproductive capacities and values tied to their traditional domestic role. The force of her argument is nowhere more evident than in the subsequent proliferation of "fetal rights" rhetoric which, not only reflects polarization, but intensifies it by subordinating the interests of pregnant women to the well-being of their fetuses so that women unwilling or unable to terminate their pregnancies within the parameters allowed for abortion may be held legally responsible for insuring a healthy outcome. Anti-abortion rhetoric is often crafted to serve rhetorical ends by juxtaposing infertile women against women who abort. This rhetoric portrays the infertile as trying to create new life and women who abort as destroying it. This reduction of complex circumstances and motives to just two diametrically opposed options plays on a common misunderstanding of the reproductive rights movement and shows the need to emphasize the unique personal relationship between a pregnant woman and her fetus. I will return to this point later.

Increasingly, the legal system is being used to press fetal interests independently of pregnant women's interests and sometimes in opposition to them.¹⁷ Ironically, even the *Roe v. Wade* decision legalizing abortion has been turned against pregnant women who depend on care within hospitals that serve the indigent. That ruling has also been used to override their refusal to submit to cesarean section.¹⁸ Prior to *Roe*, legal recognition of the fetus was almost always contingent on subsequent live birth. Parental interests were paramount. Increasingly since *Roe*, the fetus has been regarded as a separate entity possessing rights of its own independent of the pregnant woman and often hostile to her preferences and interests. Though judicial rulings have sometimes cited the *Roe* decision, that ruling does not itself provide warrant for this practice. The *Roe* court itself noted that U.S. law had never treated fetuses as legal persons in the whole sense. Yet employers sometimes use such rulings as a pretext for terminating employment (especially from high-paying jobs) of those referred to as "potentially pregnable women" by

¹⁶ For readers interested in further detail and exploration of the moral dimensions of the Act, see Kittay 1999.

¹⁷ The Angela Carder case, for instance. See Daniels 1993, Ch. 2.

¹⁸ See, for instance, Veronika E.B. Kolder, Janet Gallagher, and Michael Parsons "Court Ordered Obstetrical Interventions" in *The New England Journal of Medicine* 316, 19, 1987, 1192-1196. Kolder et al.'s worries are being borne out by recent legal trends.

alleging their potential exposure to toxins which if they were to become pregnant, could endanger their fetuses.¹⁹

One of the most flagrant of these industrial health hazard policies was struck down by the Supreme Court, but in so doing it effectively exonerated industries from any collective responsibility for reproductive safety and shifted responsibility to individual women (Narayan 1995). Courts have also put the onus on pregnant women to insure a healthy birth if they fail to follow medical advice. And many pregnant women have been subjected to punitive measures that violate their legal rights. Legal scholars have spoken of the "dubious legal grounds" on which court-ordered obstetrical procedures rest; and, in fact, appeals courts have frequently overruled lower court rulings restricting the legal rights of pregnant women, usually on the ground that the laws used to punish their conduct (e.g. delivering drugs to a minor through the umbilical cord) were never intended to be applied to fetuses. These rulings have given some comfort to defenders of reproductive rights, but their relief is short-lived whenever state legislators pass new legislation tailored explicitly to fetuses.

The political climate begun in the Reagan/Bush years cultivates a public discourse that advances the status of fetuses by diminishing women's status. Such policies deny women resources to promote fetal health (e.g. adequate nutrition, prenatal care, drug treatment programs) and impose on them the entire burden of responsibility for safeguarding fetal well-being. The dogma of fetal rights is, however, only one factor among several that forces women into such no-win situations. The reduction of moral discourse to competing rights claims is framed within a discourse that disavows collective responsibility for health and well-being and equates all moral claims with individual interests. By elevating the status of the fetus to a rights holder this discourse jeopardizes the welfare of both the fetus and the pregnant woman. By endowing the fetus with rights appropriate only to actual individuals, the fetus is isolated from relationships essential to achieving a self-sustaining life. This discourse ignores both the life conditions of women on whom fetal health and well-being depend and the community of caregivers on whom they must rely to sustain their well-being. In a widely publicized case a woman's physician recommended that she remain in bed and abstain from sex until she delivered. But the capacity to follow physician advice is bound to depend on the support network available to a particular woman--her relation to her partner, and whether she is alone or surrounded by caring others.²⁰ The language of competing rights obscures background conditions that abet or hinder women's abilities to provide adequate care for themselves and the fetal lives within them.

Viewing Mary Wollstonecraft's consternation through the lens of the fetal rights controversy, it becomes clear that appeal to universal human rights may only marginally touch many injustices embedded in social institutions that have evolved historically under conditions of privilege. Fetal rights rhetoric presupposes the model of abstract individualism. It is a precondition for viewing the fetus as an individual.

¹⁹ Part IV in Callahan (1995) includes several articles that address these issues in addition to Callahan's own introduction. Note particularly the contributions of Gallagher, Bertin, and Narayan.

²⁰ See R. Tong: *Theoretical Medicine and Philosophy* (2000) 21(6), 1-7.

Women's Rights: The Lingering Effects of Abstract Individualism

A dispute that plagued women reformers in the 1920s immediately after the establishment of female suffrage still resonates within contemporary controversies, both within feminism and in the broader political arena. The National Women's Party pressed for an Equal Rights Amendment to the Constitution to forbid discrimination on the basis of gender. But feminists working to transform workplace conditions for women saw the gender neutral strategy of ERA supporters as a threat, both to incremental achievements regulating the terms of women's employment and the more extensive employment gains they aimed to accomplish. Alice Paul, a leader of the National Women's Party, was pressed by supporters of protectionist legislation to rephrase the ERA more narrowly so it would not jeopardize efforts to secure better working conditions for women. Florence Kelley justified the protectionist strategy this way:

So long as men cannot be mothers, so long as legislation adequate for them can never be adequate for wage-earning women; then the cry Equality, Equality, where Nature has treated Inequality, is as stupid and deadly as the cry Peace, Peace, where there is no peace.²¹

Along with other opponents of the ERA, she argued that stress on abstract equality between the sexes would hurt women by ignoring sex-specific differences. But proponents feared that retaining legal distinctions based on gender would only reinforce prevailing social inequities.

Martha Minow points to the dilemma embedded in opposition between the two groups: ignoring sexual differences would undermine efforts to mobilize women against them, but emphasizing them would confine women to gender stereotypes.²² By framing the issues oppositionally no strategy was left that women seeking treatment either as individuals or as members of a group could jointly support to secure both protection and equality. Prevailing ideologies about individualism, freedom of contract, and gender differences prevented them from redefining the terms of the debate.²³ So instead of focusing on a workplace model that the law should promote or prohibit, legal controversy was narrowly centered on whether differences between men and women were sufficient to justify treating women differently. And instead of reformulating the prevailing conception of equality to recognize the claims on society of those who are disadvantaged by the natural and social lotteries and the social contribution of those who carry out society's caring functions, defenders of freedom of contract and ERA supporters both acquiesced to the dominant ideology of abstract individualism.

The terms of that debate shifted very little in intervening years. In academe few challenged schemes that stress formal equality maximizing liberty within a laissez faire environment until John Rawls made normative theory respectable again. His 1971 volume: *A Theory of Justice* had enormous influence and set off a host of ripple effects. In 1985 Norman Daniels extended Rawls's theoretical framework to bioethics. Daniels placed constraints on liberty to compensate for bad luck in the natural

²¹ Cited in Minow 1990, 256 who refers to Kelley's *Shall Women be Equal* (National League of Women Voters, 1922), p. 41 quoted in Nancy Cott, *The Grounding of Modern Feminism*, 138.

²² Minow, *ibid* (257) citing Cott again at 142.

²³ *Ibid.*

and social lotteries and recognized some social responsibility for personal well-being. In subsequent years, legislative measures, such as the Family Leave Act, ameliorated the working conditions of some on an ostensibly gender-neutral basis. But among most theorists and policy makers, liberty-maximizing measures permitting racist, sexist and classist choices persisted as long as they were consistent with procedural fairness, a strategy that inevitably widens material gaps between the affluent and the impoverished.²⁴

Virtually all feminists are convinced, however, that theoretical and practical strategies that focus on the quest for legal equality alone are inadequate to the task of achieving gender justice or eliminating the marginalization of other historically disadvantaged groups. Nonetheless, feminists from different political orientations have not come together around the kinds of legal reforms needed to remedy gender inequities. Equality-oriented strategies will not affect gender-specific attributes and social roles unless they address the distinctive historical and cultural circumstances of differently situated groups.

Admittedly, the ground is shifting. More opportunities have become available to women in the workplace who now make up almost half of the U.S. workforce (2012). But dominant preconceptions about gender and individual achievement persist in both the public and private spheres--even within schemes that aim to achieve equality of opportunity. To a great extent inequalities arise from varying conditions across the life cycle, especially those that intensify dependency and disadvantage women who bear the bulk of society's responsibility for the care of children, the sick, and the disabled. Consider, for instance, the disadvantage women suffer in divorce proceedings that fail to factor in the unpaid economic contribution of their domestic labor. Or the unique needs of pregnant women who may require significant social support. Programs to equalize opportunity may originally be intended to reduce the kind of inequalities that libertarian schemes give rise to, particularly their effects on historically disadvantaged groups, but the very term 'equality of opportunity' exemplifies the ambiguous nature of equality language I noted within discussion of the ERA controversy. Any measure of equality that aims for universality is bound to incorporate both ideological and practical aims and will inevitably have different effects on women and men, rich and poor. For its application requires classifying people into groups, then analyzing intergroup variations, and assessing outcomes (Sen 1992, 118). Even when equality is achieved in formal procedures and public facilities, inequalities in wealth and income will likely persist. So people's well-being and living conditions may remain grossly unequal. Abstract equality, even if it incorporates equality of opportunity, is not likely to touch inequalities that bear on people's most immediate needs and surely cannot insure people's overall freedom to lead the kinds of lives they find personally meaningful and valuable.

Proposals to ration health care over the life cycle succinctly illustrate difficulties inherent in formal opportunity equalizing schemes. Some have proposed a rationing scheme that specifies kinds of medical care appropriate for people at differing stages of life and reallocates health care resources among generations.²⁵ These strategies depend predominantly on apportioning care over a statistically normal life span. Though they appear on the surface to achieve intergenerational equity, they depend on a generalized conception of a *normal life span* which risks perpetuating injustices to groups already underserved by

²⁴ See Mahowald 1994, note p. 72.

²⁵ Notably Norman Daniels (1985, 1988) and Daniel Callahan (1987).

traditional health care systems, particularly in the U.S. where marginalized groups currently constitute a sizable proportion of the 17.1 percent who are uninsured.²⁶

Women, particularly, are likely to suffer under age-based rationing schemes. In the U.S. women of reproductive age spend substantially more on health care than men in the same age group and maternity care and contraceptives have often not covered by health insurance.²⁷ Also, women tend to live seven to eight years longer than men and in the 65 plus age group many more women than men are without spouses. Moreover, older women are less likely to have private insurance than men and their limited financial resources need to be spread over a longer lifetime, which makes them more dependent on publicly funded insurance. One out of five elderly women lives in poverty (the highest rate of any group in the U.S.).²⁸ Applying the same criteria for a “normal” life cycle to both women and men would intensify the plight of these women.²⁹ So under such rationing schemes the disadvantages of the less well-off inevitably escalate. They would be denied comparatively more years of life and the quality of their remaining years would be severely diminished. The social respect afforded them would, most likely, lessen too. And their misfortune would be further compounded by society's tendency to grant greater social respect to elderly men than to elderly women. Any scheme to equalize health care opportunities that does not take such facts about women's circumstances into account disproportionately impacts women and intensifies their social disadvantage.

The current enthusiasm for market solutions to the ills of health care systems portends further structural changes that are likely to magnify inequalities in the distribution of resources. Cuts in governmental funding push more people into the category of the underinsured. In the U.S. most health maintenance organizations (HMOs) are now for-profit businesses that reward physicians who save them money and increase their revenue. Their cost savings are returned to investors instead of being retained within the health care system to care for the least well off. . Only sweeping reforms could reduce gaps between the rich and the poor and enhance opportunity for a minimally decent standard of living. The need for a just vision of health care responsive to the disparate impact of reform proposals on women and

²⁶ www.gallup.com/poll/152162/amerucabs-uninsured-2011.aspx

²⁷ The National Women's Law Center reports that insurance carriers routinely charge women as much as thirty percent more for insurance than men under a practice known as 'gender rating.' See NWLC. "Turning to fairness: Insurance discrimination against women today and the Affordable Care Act" at: http://www.nwlc.org/sites/default/files/pdfs/nwlc_2012_turningtofairness_report.pdf

Note also the Kaiser Family Foundation article, "Expanding Medicaid under health reform: A Look at Adults at or below 133% of Poverty" at: <http://www.kff.org/healthreform/upload/8052-02.pdf>

²⁸ See L. Weiss: "Unmarried women hit hard by poverty" 09/10/2009 at: http://www.americanprogress.org/issues/2009/census_women.html

²⁹ See also Nora K. Bell, "If age becomes a standard for rationing health care," in Helen B. Holmes and Laura M. Purdy (1992), *Feminist Perspectives in Medical Ethics* (Bloomington, IN: Indiana University Press), pp. 83-90.

other social groups that have been historically underserved by health care systems has never been more pressing.³⁰

Feminist Responses to Embedded Inequalities

Contemporary feminists have mounted multiple responses to the implications of formal equality schemes. Several bear directly on issues that impact reproductive technologies. A critique that had a large following in the 1980s gives priority to the removal of patriarchal structures that dominate women. Catherine MacKinnon stresses legal remedies to qualify universal principles and undermine the gender dominance of men (1987, 1989, 2005). This view has been modified by feminists attentive to power hierarchies that affect the condition of both women and men. bell hooks asks: "Since men are not equals in white supremacist, capitalist, patriarchal class structure, which men do women want to be equal to?"³¹ Picking up on this point, others recommend amending universal moral principles so that white middle class men no longer count as the standard against which equality is assessed. They urge recognition of the interdependence of equality and difference and the need for moral discriminations that take into account the systematically different treatment of specific groups.³² Joan Scott trenchantly observes that: "equality might well be defined as deliberate indifference to specified differences" (1990, 138). Michael Walzer makes a complementary point: "The root meaning of equality is negative; egalitarianism in its origins is an abolitionist politics. It aims at eliminating not all differences, but a particular set of differences, and a different set in different times and places."³³ Building on the apparent paradox embedded in this vision of equality, Martha Minow coined the term "dilemma of difference" which she applies to quandaries like the one that vexed 1920s feminists (1990). Ignoring differences, she points out, perpetuates the power of the dominant, but focusing on them risks perpetuating the stigma and marginalization of the dominated.

³⁰ For a fuller discussion of problems in applying a formal equality of opportunity principle without taking into account its differential impact on diversely situated groups see KM Dixon: "Oppressive limits: Callahan's foundation myth," *Journal of Medicine and Philosophy* 19,1994, 613-637; N. Jecker: "Age-based rationing and women," *Journal of the American Medical Association* 266,21,1991,3012-3015; N. Jecker, ed., *Aging and Ethics: Philosophical Problems in Gerontology* (Humana Press, Clifton, New Jersey), 1991.

³¹ See hooks: "Feminism: A Movement to End Sexist Oppression" in *Equality and Feminism*, ed. A. Phillips. New York, New York University Press, 1987. hooks hits on a central problem with the white middle-class women's movement, E. Kittay points out (1999). It presumes an egalitarianism (among men) into which women can integrate themselves. I extend the criticism to MacKinnon insofar as she subordinates all other forms of oppression to sexual oppression, neglecting relevant features of the life circumstances of systematically oppressed men (who, admittedly, might also oppress women).

³² I draw here on a theme that has been elaborated by a number of feminists. A novel formulation of it has been offered by Diana Meyers (1994) that draws on the philosophical tradition of impartial reason coupled with what she calls "empathetic thought." The former recognizes sameness; the latter appreciates difference. What is distinctive about her treatment is the depth with which she develops her conception of empathetic thought.

³³ Michael Walzer, *Spheres of Justice* (New York, Basic Books), 1983, xii.

Eva Kittay calls this the *difference* critique of equality. In an essay that challenges the Rawlsian framework on which Norman Daniels' age-based rationing system depends, she develops an alternative *dependency* critique which maintains that:

by construing society as an association of equals, conceived as individuals with equal powers, equally situated in competition for the benefits of social cooperation, one disregards the inevitable dependencies of the human condition, thereby neglecting the condition both of dependents and those who care for dependents (1995, 10-11).

Difference critiques emphasize historically constructed differences. Though they change over time, some are more persistent than others. But the dependencies Kittay focuses on marks every individual's life in varying degrees at different times throughout the life cycle. Everyone starts out as one who is cared for and many become carers at a later stage. Underlying her proposal is a subtlety that qualifies any principled conception of human equality and calls attention to central human inequalities. The relation between caregiver and recipient is from one perspective a relation of unequals, but becomes recognizable as a relation of reciprocal equality once we acknowledge the universality of human dependency needs and grant caregivers appropriate respect and resources. Societies require appropriate structural transformations in order to fully recognize the equality of carer and cared for and to reconstruct dependency relations in non-exploitive ways. Given the developmental nature and fragility of human life, dependency permeates each of our lives.

Incorporation of these perspectives into healthcare theory would bring into focus the centrality of human relationship to happiness and well-being and the grounding of human relations in dependency relations. All of the critiques I have noted problematize dominant liberal assumptions about the terms on which substantive equality might be achieved. In combination they challenge basic assumptions underlying gender-blind, race-blind, and class-blind approaches to equalizing people's opportunities to lead meaningful satisfying lives. Each orientation emphasizes different facets of the work that needs to be done to remedy inequalities that perpetuate injustices to historically disadvantaged people. MacKinnon's dominance critique points to the need to transform power relations that subjugate women; the difference critique emphasizes the multiplicity of group-specific oppressions that need to be overcome; and the dependency critique challenges liberal tendencies to privatize the relational web of personal lives which removes embedded inequalities from public attention.

Feminist appraisals of the reproductive rights movement reflect all of these critiques of equality. However, gender-based disparities are more conspicuous where reproductive issues are paramount. The dilemma of difference that has afflicted feminist struggles for equality has its parallel in advocacy for reproductive rights. Though biological differences may be somewhat culturally plastic, they cannot be ignored despite the tendency of judges deliberating about pregnancy to refer to "pregnant people" or "pregnable persons." Such overreach for gender neutrality inadvertently calls attention to a difference that can't be overlooked. However, the opposite tendency to base the case for legal remedies explicitly on gender difference tends to entrench stereotypes even further.³⁴ Though the dependency critique's emphasis on care aims to elevate the status of those who do maternal work, many feminists eager to slough off the association of caregiving with "women's work" take issue with any strategy that centralizes

34 LP: I wonder how much this tendency is due to bad faith interpretations by people unconvinced of the need for genuine equality, rather than any real problem with recognizing genuinely morally relevant differences.

caring labor. Underlying each of these differences is a tension among both substantive and strategic approaches. Some are more individualistically oriented; others emphasize collective features of women's condition.³⁵

Challenges to the Language of the Reproductive Rights Movement

Some target the reproductive rights movement for advancing an individualistic agenda. Both disability scholars such as Kittay, and ecofeminists including Irene Diamond (1994), stress affinities between the appeal to individual rights and masculinist ideologies of personal control and domination. They chide those who emphasize rights discourse for neglecting relational values tied to care and interpersonal connection. They point out that the 'right to choose' is not the appropriate response to social conditions that offer impoverished and isolated women no viable alternative to abortion. Needed instead is a more inclusive moral framework that moves beyond appeals to individual rights. If pregnant women unable to take on the responsibilities of child rearing were offered suitable support during pregnancy and opportunity for continued relationship with their child even where they did not retain custody fewer women would be likely to opt for abortion. Then some restrictions on abortion access might be justifiable.

³⁵ I recognize an ambiguity here and the importance of distinguishing between individualistic and non-individualistic conceptualizations of equality/difference as well as individual vs. collective aims. I address specific aspects of these issues in a later chapter.

The group of radical feminists that I discussed in the previous chapter extend the critique of rights language and individual choice to access to fertility treatment as well as abortion. One of their principal spokeswomen puts it this way: "Does the desire, the need, the wanting of choice have no limits? If a time comes when the rights of one group of women place the majority of women in a dangerous position, does not the concept and terminology of rights become meaningless?" (Rowland 1987, 79). Other members of this group, Janice Raymond (1991) and Renate Klein (1992), disparaged the abortifacient RU486 despite the dearth of other options to terminate an unwanted pregnancy. Raymond's 1993 book expressed a more generalized ambivalence to surgical abortion. Other members of the group have criticized the choices of lesbian women who request artificial insemination. Ostensibly, their major objection to all these practices is their spill-over effect, that by intensifying dependence on a patriarchal medical establishment, they extend the identification of all women with their reproductive potential.

Neither rejoinder is responsive to the need for practical strategies to address present social conditions. The vision that guides the ecofeminist approach seems directed more to those who already have control over the basic conditions of their lives than those living on the margins who never enjoy the control that economic security and reliable social support that others take for granted. Rowland's complaint begs the question. It presupposes that there is a meaningful sense in which all women constitute a homogenous social group; that fertility technologies can be shown to bring greater harm than benefit to women collectively; and that the forbearance of individual women who heed their advice and avoid medical remedies can significantly reduce those harms. In a later chapter I focus on these issues, but here I mention them only to point out that these objections to rights discourse operate on a different level than the reproductive rights movement. They do not distinguish sufficiently between how women would choose to live if they made their own ground rules and how it is necessary to maneuver within a prevailing political order that has been constructed around interests and values that only marginally consider women's needs. Strategies that oppose expanded abortion options or tolerate abortion restrictions play into the hands of anti-abortion lobbyists. To tolerate restrictions under prevailing social conditions effectively endorses the illusory promises of care and attention that abortion opponents so glibly extend to women at the doors of abortion clinics. Virtually any society includes women whose projects are incompatible with the demands of pregnancy. Laura Purdy remarks that we would not want a society in which women who changed their minds about continuing a given pregnancy did not have the opportunity to end it (1996). The idiom of rights calls attention to the indispensability of the abortion option for any social scheme that would meaningfully extend full social participation to women. A moral framework that emphasizes care and interpersonal connection can also accommodate the rights of individuals.

The Libertarian Defense of Reproductive Freedom

The terms of much feminist criticism of reproductive rights discourse has been framed in reaction to the work of John Robertson, and other libertarians. Here I single Robertson out because he claims to accommodate feminist concerns and has thus been the target of much feminist criticism for actually failing to do so. I, too, contend that, like many other libertarians, his work aptly illustrates how treating people solely as individuals obscures the experience of oppression. Julian Savulescu represents the most

extreme version of the utilitarian view that one ought always to choose the alternative that maximizes good consequences.³⁶

Within a political climate where mainstream legal scholars are frequently indifferent to feminist scholarship, legal scholar John Robertson's effort to take feminist analysis seriously in his formulation of reproductive rights is, in some respects, commendable. In his book *Children of Choice: Freedom and the New Reproductive Technologies* (1994) as well as numerous essays Robertson cites feminist scholars frequently, particularly where they share his distrust of state power.³⁷ He picks up some themes that have featured prominently in feminist writing, but seldom appreciates their full weight and fails to notice others.

Robertson bases his case for reproductive rights on the desire for offspring which, he claims, is "central to individual identity and meaning in life" (1994, 24). He argues that this right should be interpreted far more extensively than U.S. law is presently acknowledges, and that "the principles that underlie a constitutional right to reproduce would seem to apply to the infertile as well" (38). Laboratory conception, he insists, promotes choice. Recognizing the couple's right to use a surrogate is necessary, he insists, "to avoid discrimination against infertile wives (40)."

³⁶ Note the Wikipedia article on him, and his much cited 2001 *Bioethics* article, "Procreative Beneficence: Why We Should Select the Best Children," Vol. 15, no. 5-6: 413-426.

³⁷ It is important to bear in mind Robertson's influential position on the ethics advisory panel of the principal society that defends the interests of the fertility industry. Otherwise, his references to the work of feminists may mislead readers who are unaware of his broader agenda or fail to recognize his skewed reading of feminist literature.

Against those who argue that those who lack physical ability have no legal claim on assistance to reproduce, he appeals to the First Amendment right to read books and its import for the blind. That right prevails regardless of the means by which the information is acquired (39). It cannot be overridden without "a clear showing of substantial harm to the tangible interests of others" (35). He acknowledges the difficulty of demonstrating that a harm is sufficiently compelling to override a presumption favoring individual rights. To those who point out that the culture of the reproductive clinic has a distorting effect on judgment, he recommends more comprehensive information by clinical services providers. To those who stress that contracts to bear a child may lead to unanticipated harms, he stresses the deprivations people suffer if they cannot enter into such contracts. He extends priority to the preferences of individual consumers to a host of techniques that provide what he terms "quality control." These include genetic screening technologies, selective abortion, the selection of gamete or embryo donors, and fetal therapies. All of these interventions are brought together under the umbrella of core interests that make reproduction meaningful (33-34).

He insists that this right does not extend so far as to *demand* services of others but is limited to the freedom to seek out the willing assistance of medical practitioners and third party reproductive collaborators. But his willingness to invoke the apparatus of the state to enforce reproductive contracts undermines that claim. Indeed, some commentators wonder if his passion for reproductive choice admits of any bounds at all, for more recently, he has provisionally extended the scope of this right to human cloning, as well.³⁸

Yet when the autonomous preferences of a pregnant woman are incompatible with a third party's judgment of the rights of her fetus, he is willing to deny the woman's liberty. Significantly, his characterization of maternal duties during pregnancy, including state coercion of pregnant women, reveals a conservative bent not easily reconcilable with the voluntarism of his stance on innovative technological therapies. This is evident particularly in his reading of the constitutional grounds for his reading of procreative liberty. Though he recognizes that the same values and interests that undergird coital reproduction extend to the unmarried, he believes that states may be justified in limiting access to infertility therapies on the basis of marital status, sexual orientation, or disability unless anti-discrimination laws explicitly prohibit such differential treatment (38). He acknowledges, though, that his reconstruction of reproductive rights is speculative insofar as the scope of procreative liberty has never been fully established in law.

Robertson's apologetic for the fertility industry has evoked extensive criticism from many quarters, not only feminist bioethicists but also among legal scholars, theological conservatives, and communitarians. Here I discuss only themes that illustrate the need for a more nuanced conception of reproductive freedom, leaving other issues to theologians and legal scholars who challenge his interpretation of constitutional law.³⁹

³⁸ In response to the U.S. Presidential Ethics Commission's recommendation that congressional legislation be introduced to ban the cloning of human beings, Robertson declared that "(i)f cloning is considered to be a type of reproduction, then a law banning cloning might be considered an infringement of people's reproductive rights." Cited in the *New York Times* article by Gina Kolata: "Commission on cloning: Ready-made controversy," 6/9/97, A10.

³⁹ An entire issue of the *Washington and Lee Law Review* (52(1) 1995) is devoted to critiques of Robertson's book by a representative collection of authors including a feminist philosopher (Laura Purdy), a theologian (Gilbert

Robertson's defense of the right to reproduce makes it tantamount to a *basic good*. But just why this principle should be so fundamental is far from obvious. Purdy notes that there are good reasons for taking self-determination to be the more basic principle from which procreative liberty is derived (1995). For, self-determination is fundamental to exercise control over one's person, secure resources necessary for survival, and pursue a personally meaningful existence. Certain goods are termed 'basic' within a ranking of moral values largely because every human needs them to sustain a distinctively human life regardless of their specific circumstances. To be deprived of a basic good is in itself a harm. Rawls, for instance, calls them primary goods and includes both those he deems 'natural'—health and vigor, intelligence and imagination—and such social goods as rights and liberties, powers and opportunities, income and wealth.⁴⁰ The place of a "right to reproduce" within such a schema is debatable. For though reproduction is necessary to species survival, many individuals live full, rich, and satisfying lives without ever reproducing. Purdy faults Robertson for encouraging people to care too much about their ability to have children and for reinforcing the traditional identification of women with childbearing.⁴¹ Sherwin problematizes the centrality of reproduction in human life plans. She calls attention to people who approach sexual activity with little apparent thought to its reproductive potential.⁴²

So the right to reproduce would not seem to be so basic a good after all, at most a derivative good which many happily forego.

Other liberal societies also tend to isolate married couples' reproductive activities within a private realm that's not readily intruded upon. But this right is not often recognized as a 'claim right' imposing moral demands on others. It seldom even evokes the kind of moral pull that calls forth spontaneous voluntary support (as, say, the inability to pay the cost of an organ transplant). Gross inequities in access to infertility treatment are seldom viewed as so morally troubling that they elicit widespread social support.⁴³ Of course, whether they *should* arouse moral concern is a separate matter. There is a grim irony, though, in claiming as a *right* access to a service that only an affluent privileged few have the resources to command.

Robertson's argument also raises troubling questions about the relationship between *means* and *ends*. His analogy between blindness and infertility implies that means are mere instruments for the efficient achievement of the ends sought. His quasi-legal framework makes no provision for differences

Meilander), and a physician (Howard Jones). Other law journals have concentrated on more technical reviews. Note particularly the excellent review by Radhika Rao in the *Michigan Law Review* (93, 6, 1473-1497, 1995). See also Susan Sherwin in the *Hastings Center Report* (25, 2, 1995, 34-37) and Helen Bequaert Holmes in the *Women's Review of Books* (20, 2, 12/9/95).

⁴⁰ It is noteworthy that Rawls does not specifically include in either category people's dependency needs, a point emphasized by Kittay (1995).

⁴¹ Purdy, *op.cit.*

⁴² *op.cit.* 1995.

⁴³ In fact, in Britain which tightly regulates fertility services and offers free treatment, waiting lists in some geographical areas are so long that many women are likely to out-wait their reproductive potential before reaching the head of the queue. This is known locally as the "postcode lottery."

between sexual and medicalized reproduction. Once a more efficient way to accomplish the end becomes available other methods can be abandoned without loss of value.⁴⁴ But the use of different techniques to satisfy the desire for children have different moral weight and bearing. The intervention of medical practitioners with values and purposes of their own transforms their meanings. Donor insemination and contract pregnancy each involve distinctive kinds of relationships--among adult parties and the children they bear too. Unlike sperm donation, a contract to bear a child, exposes the gestational mother to significant bodily and psychological risk. Contracting parties, their attorneys, and physicians cannot so readily dodge their share of responsibility for these effects. The anonymity prevalent in sperm donation is seldom available to the woman who agrees to bear a child for another. The two types of relationship influence the contracting couple's relationship in different ways, they have dissimilar impact on the child's sense of identity, and involve distinctive social policy issues.

The intermingling of a conceptual framework derived from traditional ways of understanding gestational, genetic, and rearing arrangements with a language better suited to marketplace transactions changes the definition of family.⁴⁵ Legal policy that keeps the state out of people's bedrooms is not automatically extendable to the reproductive marketplace. For non-sexual reproduction enmeshes individuals in a complex web of institutional structures endowed with the power and authority to advance goals that may be antithetical to the aims of individual procreators.

Moreover, Robertson's uncritical claim that procreative liberty has roots in personal identity takes little account of the background conditions that make it possible. The voluntarism underlying his view ignores the ways culturally conditioned gender norms and powerful institutional authorities shape and interpret people's choices. More attention needs to be given to multiple levels of decision-making. Standard accounts of patient autonomy obscure the degree to which choices are limited at prior decision-making levels. By the time individuals make decisions in the medical consulting room their options are likely to have been narrowed significantly (Sherwin 1996). Too, Robertson's unrelenting faith in the powers of the medical establishment may run counter to the well-being of women patients. Many feminists are wary of those who offer more choices--particularly technologically intense ones--as solutions to problems technologies impose. For it is the technology that opens infertility to medical choice. Laura Purdy notes that Robertson's "rhetoric of choice would be more convincing if the medical establishment had a better record on women's welfare" (1996).

It is by no means clear what kind of work the discourse of choice accomplishes within Robertson's framework. Choice discourse may disguise the powerful influence of paternalistic authorities over the options of individuals. If, say, a woman's physician tells her that a specific technological intervention is "for the good of her baby" and implies that she would be irresponsible not to use it, she is unlikely to do otherwise. When women realize that if they disregard physician advice and give birth to a disabled child they are liable to be condemned as criminally negligent, their only options will be to follow

⁴⁴ I discuss this issue in the context of Firestone's view of reproduction. Note also Grimshaw's view, 1986, chapter 7.

⁴⁵ Robertson's view here is reminiscent of the ownership model of family relations criticized by John Locke in his attack on Robert Filmer's divine right patriarchalism--though Robertson extends such powers to the medical fathers too.

medical advice or avoid physicians.⁴⁶ Personal choice does not determine their action. Power relations do. How events play out will depend on one's positioning within hierarchies of social class and authority. Scope for choice-making is likely to expand as one ascends the class hierarchy, but the appearance of choice, even for middle class women, may disguise coercive social structures that manipulate them to taking responsibility for situations not of their own making.

Robertson's unbounded characterization of consumer choice leaves readers wondering why he is so reluctant to support mandatory regulation of the fertility industry; for, arguably, such regulation would enhance people's powers to make informed choices and insure that the services provided to them meet minimally acceptable quality standards. Some regulation would seem warranted even if choice has no intrinsic importance in his argument but is only instrumentally important to his conclusion.⁴⁷ Undoubtedly, the option to exercise choice is a necessary component of moral agency. But if choices are to have fundamental a value within a conception of a good life, attention needs to be directed to appropriate means as well as the ends sought.

In response to such criticism Robertson contends that reproductive rights do not entail a positive right to assistance but only a negative right to search for qualified collaborators. But he has difficulty sustaining this distinction between positive and negative rights. He endorses use of state power to enforce preconception agreements and to guarantee the purchase of sperm, eggs, and gestational services. Though he associates state enforcement of preconception contracts with negative rights, he fails to explain why government must provide the judicial resources needed to exercise the right to procreate but is under no obligation to contribute financial resources to exercise that right.⁴⁸ Rao (1995) draws connections between this incompatibility in Robertson's account and his failure to recognize how constitutional rights tend to butt into one another. Similarly, state protection of the rights of one party to a procreative contract risks violating the parental rights of other parties and the rights of future children who are not parties to that contract. Disturbing in this connection is Robertson's extension of property language to human gametes and embryos--and by implication to the children that are born from them--especially in light of his apparent reservations about for-profit fertility clinics.⁴⁹

Overall, in her critique of Robertson's view, points to asymmetries that he fails to recognize between the right to reproduce and the right not to reproduce. Hence, we will be stuck in a position where

⁴⁶ This situation is reminiscent of the case of Pamela Stewart. See Daniels's insightful account of this case (1995).

⁴⁷ The appeal to choice seems to serve at least two functions: the ideological one I've referred to and a social one insofar as it facilitates repudiation of responsibility for those who lack the material resources to seek out fertility services. In *All Our Kin* (1974) Carol Stack points out how the dominant social group often uses this ideological maneuver to disown responsibility for the misfortunes of welfare mothers.

⁴⁸ More recently, Robertson has acknowledged this point and admits now that his argument entails a positive right to services. In his response to critics, he states: "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." *Washington and Lee Law Review* 233,52,1995, 247, note 46. Of course, the other way out, preferred by some critics is to reduce the scope and status of procreative liberty--at least insofar as it applies to the right to reproduce (in contrast to the right not to reproduce). I have more to say on this point below and take it up again in a subsequent chapter.

⁴⁹ Robertson, *ibid.* note 7, 237.

access to infertility services is no more than a privilege available to those who meet requisite social criteria--such as being heterosexual and married (1993). She invokes a distinction between a weak and strong version of the right to procreate and supports a limited application of the positive right to circumvent unjustified discrimination in access to services. Recognizing, as well, that not all interventions in the reproductive process are morally equivalent, she establishes a ranking. A woman's right to reproduce may conflict with another woman's right not to reproduce, say, where one woman wants to rear a child and arranges transfer of her fertilized ova to another woman to gestate who later opts for abortion. The right not to reproduce, Overall argues, is more firmly established and would trump the positive right.⁵⁰

Though Overall's device for dealing with conflicting rights is ingenious, I wonder whether it extends far enough to dislodge the individualistic bias of Robertson's account. Partiality to individual interests obscures troubling moral issues, such as assignment of responsibility for preventive measures and recognition of societal interests in preserving continuity between procreating and parenting. Robertson's shift from negative to positive rights illustrates weaknesses embedded in that distinction and problematizes a moral framework that assigns so much moral work to rights. For a claim to a negative right alone would be of little interest without access to the resources that enable exercise of the right. The right to noninterference is vacuous without authoritative enforcement (consider difficulties women experience in securing access to abortion facilities, enforcement of prohibitions against rape, and other forms of physical abuse). Securing the right to self-determination also requires considerable social cooperation. Like all claims to equality, its exercise requires mutual recognition of interdependence between self and others and granting to others the same respect one claims for oneself.

⁵⁰ A similar situation arose in the Stern-Whitehead case though Whitehead was the biological as well as the gestational mother. She initially signed a contract stipulating that if the biological father asked her to abort she could not refuse. Subsequently, the judge voided this provision stating that she could not be asked to waive her constitutional rights (*In the matter of Baby M.*, 217 N.J.Supr.313, 1987, affirmed in part and reversed in part, 109 N.J. 396, 1988). This approach also resembles the line of reasoning employed by the judge in the *Davis v. Davis* case which concerned the custody of a divorced couple's frozen embryos. Priority was given to Mr. Davis' preference to have the embryos destroyed over Mrs. Davis' wish to implant them (Tenn. Cir. Ct, 1989; reviewed Tenn. Ct. App., 1990). Remarking on this case, Rosemarie Tong does not question the decision per se but, rather, the alacrity with which the court acknowledges a man's right not to procreate, given that it took previous courts so many years to recognize women's right not to procreate! (1997, 232)

An analogy between reproductive rights and “the right to die” might be informative here. The (negative) right of the competent adult to refuse life prolonging treatment even when it would lead to almost certain death is far more firmly established in law and morality than the (negative) right to reproduce. Yet third party assistance to end that life would introduce a different set of moral and legal issues extending far beyond the rights of the individuals affected. The right of refusal flows from the right to bodily self-determination, a right to be left alone, and to keep intruders at bay, but the putative reproductive right pertains to a ‘right’ to seek out collaborators to end that life. Claims for assistance implicate others in *causing* death and raise moral questions about the responsibility of those (such as physicians) who hold a position of public trust. Overall's device for prioritizing rights does not stretch far enough to address this conflict. For the problem is not that pursuit of the right to die bumps into other rights, but that involvement of particular others bumps into competing moral and social values. So Overall's response to Robertson introduces a useful distinction but does not affect the individualistic bias of his account, particularly his unqualified claim that laboratory conception promotes choice. Neither does this rejoinder challenge Robertson's stress on medically intensive interventions and his disregard of alternatives such as preventive measures and adoption. The individualistic bent also diminishes the moral and social significance of relational links between generations and between donors whose bodily parts are appropriated and recipients who appropriate them as commodities.

Another key difficulty with Robertson's individualistic framework is its near obsessive preoccupation with state power which he sees as invariably repressive. Feminist analysis has emphasized the multiple sources of power and its operation across economic, political, and ideological arrangements. Feminists recognize that state power has been deployed both in opposition to and in support of women's interests. Robertson acknowledges in passing that social policy needs to protect women from new forms of private sector coercion (231), but he fails to recognize how power is embedded in the organization of social relations, particularly relations between the “infertile couple” and her medical practitioner. Nor does he give due weight to the power of insurance carriers who often deny coverage to people who undergo genetic screening tests (even without regard to the outcome) or those who live in communities with a high incidence of genetic disease.⁵¹ Legislatures in several countries are currently working on proposals to protect the insured from such arbitrary discrimination by insurance companies.⁵² The aims and ends of individuals who use these technologies may be threatened more centrally by private insurance carriers and other institutional interests than by state power. Alliances between regulatory and medical authorities shape fertility problems in distinctive ways that obscure the search for alternative solutions. Robertson is so wary of state power that he ignores the positive contribution the state's regulatory

⁵¹ For detailed discussion of this phenomenon see Henry T. Greely "Health insurance, employment discrimination, and the genetic revolution" in Kelves and Hood (1992) and the *New York Times Magazine* for 9/15/95. Despite the federal 2007 Genetic Information Nondiscrimination Act, protection from discrimination is still incomplete. See David Schultz, “It’s legal for some insurers to discriminate based on genes,” NPR, Jan. 17, 2013, at <http://www.npr.org/blogs/health/2013/01/17/169634045/some-types-of-insurance-can-discriminate-based-on-genes>.

⁵² This issue has particularly urgency in the U.S., the only developed country that does not provide some form of universal health care coverage.

capacity can make through its regulatory capacity to minimize the negative externalities of the marketplace. His justification of a laissez faire policy leaves physician prerogatives untouched.⁵³

The mesmerizing influence of libertarian ideology obscures the multiple sources of power and the threat to reproductive freedom from non-state powers. Overt sources of power are readily identifiable but covert ones are frequently obscured, often by processes of internalization. Sandra Bartky (1990) explores the processes of internalization through which noncoercive measures such as disciplinary techniques and controlling functions can be deployed to normalize practices that advance the interests of selected groups and shape options to further the aims of those able to master such powerful forces. Her own examples are derived from the cosmetic industry and the pornography trade, but her analysis is readily extendable to the fertility industry. To show why people comply so readily with normalizing practices that don't support their primary long-term interests, Bartky distinguishes two senses of internalization. Something is internalized when: (1) it is incorporated into the structure of the self, one's mode of perception and self-perception which allows the self to distinguish itself from other selves and from things that are not selves and 2) the sense of oneself as a distinctive and valuable individual is tied to how one is perceived and what one knows, especially what one knows how to do--what gives one a sense of mastery, competence, and a secure sense of identity (77). Like neuroses that have secondary benefits but don't advance people's chief goals, compliance with such norms brings advantages. Consequently, these people are likely to resist letting go of this self-perception and sense of competence. Having a feminine body may be essential to a woman's sense of herself as a desiring and desirable subject. And caring for babies may be the only kind of activity she is confident of doing well. So normalizing techniques are likely to be far more effective than the overt exercise of power in producing new norms of motherhood that intensify the identification of women with mothering and control available options. Those who have mastered such disciplinary techniques can control the availability of options and offer only certain kinds of solutions (medical ones) to the problems of infertility thereby eclipsing other ways of defining fertility problems.

⁵³ Incidentally, it is akin to the appeal to "privacy" used by the American Medical Association in its amicus brief in *Webster v. Reproductive Health Services* (492 U. S. 490, 1989). To protect the turf of the medical establishment the AMA argued that government intrusion on abortion decisions was objectionable because of its potentially disruptive effect on the private relationship between physician and patient. Feminist legal scholars note that reducing the abortion rights to a privacy right (acquired by walking into a doctor's office) is likely to provide only very limited protection to women seeking abortion. For unlike basic rights that inhere in individuals as such, privacy rights belong to a person only derivatively. For an interesting treatment of this issue that includes a discussion of the basis for this right see Susan F. Appleton: "Doctors, patients and the constitution: A theoretical analysis of the physician's role in 'private' reproductive decisions" in *Washington University Law Quarterly*, 63(2), 1985, 183-236. Though Robertson does not espouse the view that reproductive rights are derivative, the effect of his position is similar to the AMA's insofar as neither takes into account the power of physicians to shape and delimit a woman's options.

Robertson does acknowledge some of the difficulties I have mentioned. But he reinterprets them as *private* matters to be resolved on an individual basis by what he calls “responsible use,” rather than as problems that call for collective response. He grudgingly grants the state only a minimal regulatory role as a neutral arbiter keeping parties to certain ground rules such as protection against false and misleading advertising. The formal individualistic framework of his quasi-legal approach to the institutionalization of infertility obscures broader social and psychological dimensions of these issues.

Rethinking Reproductive Rights and Wrongs

Though an appeal to rights in the wrong theoretical hands can easily get out of control, it may still serve useful purposes if is circumscribed within a fitting context. To show this I will focus on two interrelated themes that I have alluded to briefly within my critique of Robertson's libertarian view: feminist critiques of a rights framework and controversies about the priority of choice.

In the European Commission Report on reproductive technologies Jonathan Glover complains that the appeal to rights

seems to give us the framework of an approach to moral problems without much substance. Everything depends on what rights we have; and more fundamentally, on what procedure we use to determine what rights there are (1989, 27).

In fact, European bioethicists, generally, give only scant attention to rights talk and often deride American obsession with rights language. Notably lacking, though, in many European countries are the informed consent protections that Americans take for granted. In Britain physicians have, until very recently, enjoyed virtually complete clinical autonomy. Efforts in France to pass living will legislation were opposed by the medical profession as an assault on their authority.⁵⁴ Patient advocates in these countries often look to America for strategies that might give patients greater voice in protecting their own interests. But the rights framework that has played such an important role in U.S. bioethics discourse has its roots in unique features of American experience linked to specific historical events that flagrantly violated individual rights including other rights-based health initiatives, the civil rights movement, and struggles for women's rights.

The revolutionary movements of the late-eighteenth century and the suffrage movement demonstrated that rights talk can be useful in combating oppression. Even if rights discourse cannot provide a full-blown account of moral relations, it may have concrete uses within limited moral domains. Rights language often serves important political purposes outside libertarian theory. It calls attention to submerged voices and injustices inflicted on those lacking other access to power. As Patricia Williams points out, if the socially excluded cannot appeal to rights they are likely to remain disempowered (1991,

54 LP: Somewhat ironically, the recent Lambert case had some family siding with doctors who wanted to end the life of a paralyzed individual in a vegetative state; other family members had recourse to the European Court of Human Rights which ruled the move impermissible. (*The Telegraph*, “European Court Tells France to Keep Paraplegic on Life-Support,” June 25, 2015, at <http://www.telegraph.co.uk/news/worldnews/europe/france/10924423/European-court-tells-France-to-keep-paraplegic-on-life-support.html>). More recently, a court sided with the state, however.

152-154). A well-focused appeal to rights can be a vital tool for gaining access to those who wield power and waging the struggle against injustice.

Feminist philosophers who train their attention primarily on moral dimensions of particular relationships tend to emphasize limitations of rights language.⁵⁵ Diana Meyers notes that appeals to rights are often made when there is a breakdown in loving and caring relationships among people--when their interests are neglected. She sees the morality of rights primarily as a morality of self-defense used to protect people from assaults on their personal integrity, aggression and severe deprivation (1987, 146). Rights, then, provide a kind of safety net to keep people who lose their balance from falling to their destruction. They accomplish this by concentrating on human dignity *in general*.⁵⁶ So an appeal to rights provides only a generalized perspective that captures only one dimension of morality. Even securing equal rights for all members of society would not suffice to eliminate all injustices, Meyers maintains (1994, 155). For it could not tell us how to respect people individually. An additional perspective is needed that focuses on the development of empathy and other particularized moral sensitivities to enhance responsiveness to other people's circumstances.

Such caution in invoking appeals to rights need not, of course, preclude the use of rights language altogether. It is worth remembering that the rhetoric of rights predates the ascendancy of libertarian theories that totalize rights language. Moral discourse emphasizing the centrality of rights is a descendant of older concerns about obligation and justice, virtue and happiness that have been ubiquitous in general and popular discussion since antiquity. But not until the seventeenth century were legal dimensions of this discourse applied specifically to the situation of women. In England, the first printed compilation of women's rights appeared in 1632. Called: "The Lawes resolution of women's rights: or, the laws provision for woemen (sic). A methodological collection of such statutes and customes, with the cases, opinions, arguments, and points of learning in the law, as doe properly concerne women. . . .," it provides a narrative description of laws relating to property, inheritance, dowry, elopement, marriageable ages, widowhood, etc.⁵⁷ In his conclusion, the author expresses the hope that bringing together all the relevant materials from obscure volumes will benefit women and enable them to understand their position better. When I spotted it in the British Library exhibit case the volume was opened to a page that addresses wife beating.

Particularly noteworthy is the author's limited scope: women need only *understand* their legal position; no mention is made of changing it. In this respect the goals of the French and American Revolutions represent an historical advance in women's condition. As Wollstonecraft so emphatically observed, these movements fell far short of their ideals, but their stress on the universality of rights laid the groundwork for contemporary rights claims. Wollstonecraft's protest against the status quo reminded those in power that women were not merely loyal subjects petitioning their favor, but claimants

⁵⁵ Some, including Tronto (1993) and Benhabib (1992), are cautious about *any* generalized appeal to moral principles in order to allow space for dimensions of morality that do not lend themselves to principled treatment.

⁵⁶ Minow and Shanley (1996) defend a theory of relational rights that seeks to accommodate the concerns that motivate Meyers within a reconstructed liberal framework.

⁵⁷ It was published in London in 1632 by the assignees of John More, for John Grove 1632 (British Library Document # 228. C12), pp. 128-129.

demanding their due under already established principles of justice. The struggles for voting rights, for full participation in the workforce, and equal opportunity for minority populations are all descendants of this protest, grounded in a conception of a common humanity based on shared human needs.

An alternative way to reconnect rights claims to a more inclusive moral matrix is to view them as derivative from a theory of obligation.⁵⁸ This would shift the focus from the agent claimant to the recipient who is obligated to honor the claim. This move would also achieve the desirable political effect of rights advocacy (obliging others to acknowledge what is due to the less powerful) without precluding the appeal to other moral categories, such as the particularized moral sensitivities that Meyers stresses. Introducing rights language into such a framework would shift the moral perspective from the powerful to the powerless, from those who make policy to those affected by policy made by others, thereby addressing situations where those others fall short of their moral obligations to rights claimants. Such a strategy could also be incorporated within a theory of obligation by emphasizing social dimensions of rights bearers' interests. Insofar as they have a personal stake in objective social conditions, they stand to gain or lose depending on the outcome of social arrangements.⁵⁹

At The Margins of Individual Choice.

Like other market-driven views of human relations such as Richard Posner's, libertarians take choice to be solely a personal affair having little relevance for social relations beyond a narrow circle of intimate relationships.⁶⁰ Robertson extends the narrowly focused rhetoric of choice, so prominent in abortion debates, to infertility interventions with little added nuance. The sources and consequences of choices have little import for him. Like the fertility clinic whose motto is "You're not a failure until you stop trying,"⁶¹ this interpretation of infertility treatment throws the entire responsibility for technological success or failure onto the individual patient. Success is solely a function of individual effort. What happens within the woman's body is presumed to lie within her own control if only she allows the experts to continue doing the work of nature. Hence the appeal to choice naturalizes some preferences to the

⁵⁸ This is the strategy employed by Onora O'Neill (1988, 2002).

⁵⁹ Some moral frameworks give substantially greater prominence to this perspective. See, for instance, Joel Feinberg's "Harm and self-interest," (*Rights, Justice and the Bounds of Liberty*, Princeton U.P., 1980, 45-68). Feinberg and others who share his perspective lay great stress on the scope of liberty granted to individuals. Having a right is a function of having interests that are constitutive of one's good and can be conferred or withheld. The great weakness of this view lies in its disregard of the interests of intermediate groups.

⁶⁰ Marilyn Strathern offers some insightful observations about the voluntarism and narrow focus on human affairs pervading Glover's (1989) treatment of the technologies (1992, pp. 33, 46, and *passim*). But his approach is still far more conservative and carefully qualified than either Robertson's or Posner's who extends the market-driven strategy even further than Robertson. Note, for instance, his defense of baby selling in his *Sex and Reason* (Cambridge: Harvard University Press, 1992, Ch. 15) and his articles discussing the regulation of adoption such as: "Elisabeth M. Landes and Richard Posner, "The economics of the baby shortage," *Journal of Legal Studies* 7 (1978), 323 and Richard Posner, "The regulation of the market in adoptions," *BUL Review* 67 (1987), 59.

⁶¹ Cited by Elizabeth Beck-Gernsheim (1995).

detriment of others and blocks objections to technological medical interventions reclassified as “natural.”⁶² This label also serves to eliminate the need for any further explanation.

Feminists have had an ambivalent relationship to the kind of moral minimalism that marks much advocacy of abortion rights, that sees liberty as a primary good and individual autonomy as the essence of personhood and the principal mark of agency and personal identity. They have expressed misgivings about relegating reproduction to a sphere of “privacy” that isolates reproductive acts from the cluster of meanings and values surrounding childbearing that have been central to the lives of individual women and to ties among women that transcend generations and communities. Overemphasis on choice lends itself to an impoverished sense of personal and social values. Susan Bordo (1994) comments on the tendency of this perspective to neglect other moral aims that are not expressible as matters of individual preference--relational ties, sexual equality, a nurturing stable child rearing environment. In an insightful critique of the liberal tradition, Seyla Benhabib points wittily to the fallacy imbedded in the view that "human selves just spring up like mushrooms." The identity of the self, she contends, depends less on one's choices than on how an individual shapes and fashions circumstances over which one has no choice--birth, family, language, culture, and gender--and weaves them into a coherent narrative that represents her own life story (1987,166).

Others have pointed out how the stance that takes individual liberty to be a primary good may play into the hands of anti-choice feminists who characterize abortion as an act of violence.⁶³ The ease with which abortion opponents have appropriated feminist rhetoric to defend a program for social change that is antithetical to feminist aims illustrates one of the principal weaknesses of any conceptual framework that relies on abstract acontextual principles. A truncated conception of choice contributes to a distorted perspective from which the abortion option seems arbitrary and rootless, a mere expression of a non-rational preference (like the consumer choices of 'economic man'). Historian Rickie Solinger in her commentary on the adoption of choice language by liberal feminists following the Roe decision remarks:

I am convinced that choice is a remarkably unstable, undependable foundation for guaranteeing women's control over their own bodies, their reproductive lives, their motherhood, and ultimately their status as full citizens (7, 2001).

Her point applies not only to the usage chosen by liberal feminists to refer to abortion without rankling opponents, but also to radical feminists who use choice language to urge women to resist medical remedies to infertility. Choice rhetoric detaches reproductive freedom from a comprehensive vision of moral rights and personal identity. Transfer of the language of commercial transactions to personal decisions about reproduction trivializes determinations that are central to one's major life projects. The market model is too vacillating to represent a right so central to women's capacity for self-determination. For both heterosexual and lesbian women who want babies and for those women for whom this is not the right time for a baby (or for whom no time may be the right time), reproductive

⁶² For fuller elaboration of this point, see Davis (1995).

⁶³ For more than a decade now this has been a recurrent theme in the writings of some who claim allegiance to feminism. Note Wendy Brown's "Reproductive freedom and the right to privacy: A paradox for feminists" (in Diamond 1983). She complains that abortion involves "surrendering one's body to technological intrusion" (p. 322). Also see Linda McClain's "Equality, oppression, and abortion: Women who oppose abortion rights in the name of feminism" (in Weisser and Fleischner 1994).

rights may be indispensable to their ability to pursue plans and projects they see as basic to their self-identities.

Not only did the adoption of choice language fail to defuse opposition to abortion, but it also failed on several other counts as well. Choice rhetoric also blinded abortion supporters to other deficiencies of the choice model. It depends on an abstract conception of individuals as independent beings who exercise choice in isolation from surrounding others and presumes that existing social institutions are as stable and unchanging as abstract individuals.⁶⁴ In actual fact, the opposite is often the case. Novel opportunities are constantly making their way into preexisting social frameworks where they may actually curtail people's ability to exercise agency, either by closing off some choices or imposing psychological constraints on the exercise of others. The first casualties after passage of Roe were poor women who lacked the material resources to exercise the abortion option without public assistance. New modes of birth control challenged established divisions between contraception and abortion further inflamed abortion controversy.⁶⁵ Similarly, the availability of reproductive technologies reconfigures activities surrounding reproduction in ways that affect not only the particular women who seek them out, but others as well. And the accessibility of new modes of reproduction inevitably influences the way we view 'normal' reproduction. The new choices offered by post-menopausal pregnancy may impose a kind of 'coerced voluntariness.' A woman whose self-esteem is linked to being of use to others may not find it easy to decline a request to gestate a child for a son or daughter. Such women are likely to see themselves as selfish if they give priority to their own interests over the urgent pleas of infertile offspring. In such ways technologies purportedly intended to expand choices often end by constricting them.

Fortunately, subjective consciousness does not have to be any more fixed and immutable than objective material and social conditions. Instead of merely acting out of socially constructed expectations, increasing numbers of women are asking how such expectations apply to the circumstances of their particular lives. Mardy Ireland's (1993) study of childless women belies the view that reproductive choices can be fitted into a unitary framework that permits a global assessment of what is good or bad for women collectively. Some of her subjects regard maternity as an organizing element of their personalities; others have delayed childbearing to focus on other interests first. A third group have organized their identity in ways that do not include maternity.

Though it is possible to speak of the 'choices' these women have made, choice does not seem the appropriate idiom to capture the unifying theme of their narratives. "Choice" is not an option for many of these women. The traditional woman who sees maternity as integral to her identity cannot easily say no to it. For the third group the desire that would prompt choice is missing. Only in the case of women who defer childbearing for a later juncture in their lives is it meaningful to speak of choice in the agent-oriented sense. But even here the processes through which these women rethink their identities over

⁶⁴ On this point and for a far more detailed and comprehensive discussion of these issues see Minow (1990), especially chapter 6.

⁶⁵ LP: However, the line between contraceptive and abortifacient has been deliberately muddied by those who (1) argue (questionably) that the allegedly magic moment of valuable human life begins when the sperm meets the egg, and (2) falsely, that morning-after pills—and some hold, even The Pill—prevent implantation. See Laura Purdy, "Is emergency contraception murder?" at RBMOnline - Vol. 18 Suppl. 1. 2009 37-42 Reproductive BioMedicine Online; www.rbmonline.com/Article/3449 on web 12 December 2008.

time and reorient themselves to their social world can hardly be captured in the language of choice.⁶⁶ Their decisions feel more like *positions* affecting their relation to their own identities within the context of their lives. Few of them have made deliberate choices in the way those in thrall to the market model think of choice---resources to be consumed, freely available to all who can bear the price.

Reproductive choice, like sexual object choice, is a misnomer. Both are more like orientations to the surrounding social world than deliberate consumer choices. Richard Mohr points out that coming to have a sexual identity doesn't have the same sort of structure as decision-making. The "choice" of a sexual partner does not express a trivial desire that might be comparably fulfilled by simple substitution of the desired object. If, say, people who ate a certain food were threatened with prison terms, shattered careers, family alienation and loss of housing, they would, no doubt, substitute something else for it. Having a certain sexual orientation is not like making a career choice either, even a very serious one. For people don't set out to be homosexual the way they prepare for a musical career or an academic one--or even the ways they work to acquire the discipline and habits associated with such choices. Mohr calls it "a given material condition of life" that's accompanied by certain capacities and limitations. Hence it is more like a discovery than a choice.⁶⁷ The desire for a child seems to share some affinities with Mohr's characterization of sexual object "choice." This would explain, in part, why women can become obsessively preoccupied with the quest for a child and why they can be readily manipulated by those who promise to fulfill their desire. Characterization of such desires as choices is as grossly misleading as Robertson's market model of reproductive choice. There is a poor fit between the language of choice anchored in a fully conscious level of experience encompassing intentional projects and plans, and the usual ways people go about baby making. Unlike, say, a decision to use short-acting contraceptives, becoming pregnant seldom falls straightforwardly within the domain of deliberately reasoned action. Other people's influences and unrecognized unconscious or preconscious elements stemming from internalized social norms may be at work here. Emphasis on choice language distorts the relational structures that shape personal identities and subjective experience. I return again to this issue in a subsequent chapter.

Conclusion

How, then, do these multiple considerations bear on reproductive freedom? What conditions would a conception of individual liberty need to satisfy to fully recognize the psychological and social structures that shape women's experiences and facilitate liberation from structures and stereotypes that perpetuate women's subordination?

First, liberties would be situated within a context that makes it clear why self-determination should be respected, how it is related to surrounding values such as personal autonomy, and how it is

⁶⁶ I realize that some existentialist philosophers (Sartre and Camus come to mind) use choice language in a more extended sense. But often this is a rhetorical device to jar readers out of complacency. Often too, it is indicative of an exaggerated sense of what individuals might accomplish in the social world if only they altered their personal attitudes. I am using the language of choice in a sense more closely tied to those feminists I referred to in my response to John Robertson's conception of reproductive freedom.

⁶⁷ Cited in *13 Questions in Ethics*, G. Lee Bowie *et al* (New York, Harcourt Brace Jovanovich) 1991, 127-128.

interconnected with obligations to safeguard collective well-being. There are additional grounds beyond individual liberty, say, for insuring access to abortion services or leaving it to individual women to regulate their own conduct during pregnancy as freely as any other adult, and there may be other reasons for providing access to fertility services at public expense. Both individual and societal interests in maximizing health and safety need to be factored in, as well as public interest in maintaining a balance between births and deaths.

Second, reproductive interests that lock women into traditional gender roles would be clearly distinguishable from those that are basic to women's opportunities to participate in a full range of societal activities. Reproductive rights should be firmly anchored in the lived experience of women who are most centrally affected and should take adequate cognizance of both the materiality of social relations and the materiality of women's bodies.

Third, exclusive preoccupation with either individual or group interests would be exposed as untenable. An adequate account of the moral dimensions of procreation would seek a balance rooted in a vision of human relationships that encompasses both subjective dimensions of personal experience and interconnection among experiencing subjects. It would stress the importance of cultivating empathetic knowledge and concern for others as indispensable human traits to overcome the excesses of self-absorption and self-abnegation.

Fourth, an acceptable understanding of reproductive liberty would demonstrate the importance of a systematic public policy that emphasizes alternatives to medical solutions for problems that are fundamentally social. As a beginning: there would be more adequate methods of prevention to reduce occasions requiring either abortion or infertility treatment. Also, there would be safer, and more timely, non-intrusive methods of birth control and abortion and less intrusive, less pressured conditions to circumvent infertility. For those for whom adoption is not a viable option, such a restructuring would include alternative opportunities for intimate relationships with young children.⁶⁸

Lastly, a reconstructed conception should restore the centrality of *being* a parent engaged in caring practices that make for a child's flourishing. Unlike accounts that emphasize procreative liberties and processes of gestation and undervalue parental responsibilities, an adequate framework would recognize that procreation is not an independent detachable activity. Procreative values would be reconnected to a more comprehensive framework that recognizes the full significance of responsibilities for rearing children and appreciates how being a parent is bound up with the continuing self-development of adults and major life goals.

In the chapter that follows I consider further ways of speaking collectively of women's situation that acknowledge the significance of differences among women. I weigh both the social and personal interests at stake. I will consider feminist modifications of the concept of personal autonomy that take fuller account of the life circumstances of those whom the prevailing theory relegates to the margins. An important dimension of my focus in succeeding chapters will be to resituate procreative rights within a

⁶⁸ On the limitations of the adoption option see Barholet (1993), Narayan (1994), Mahoney (1995), and Smith (1996). For a discussion of problems in current adoption procedures, see *Family-Making: Contemporary Challenges*, (eds.) Francoise Baylis and Carolyn McLeod, Oxford University Press, 2014.

more inclusive context that fully recognizes subjective dimensions of individuality, the bearing of relational ties on personal autonomy, and societal interests.