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CLONING, GENETIC ENGINEERING, AND THE LIMITS OF PROCREATIVE LIBERTY

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I. INTRODUCTION

Aldous Huxley, it turns out, was partly right and partly wrong. Although not even he could have foreseen the speed at which fantasies such as genetic engineering and human cloning would become clinical realities, his prediction about the power science would come to exercise over reproduction was surprisingly accurate.¹ In 1998, “test-tube babies” hardly raise an eyebrow, and what was once the stuff of science fiction—the artificial womb, “grandmother pregnancies,” and the “made-to-order baby”—is now simply the next horizon in reproductive medicine. However, as Lee Silver argues in *Remaking Eden*, Huxley was wrong when it came to predicting *who* would want such power and *why*: “What Huxley failed to understand, or refused to accept, was the driving force behind babymaking. It is individuals and couples who want to reproduce themselves in their own images. It is individuals and couples who want their children to be happy and successful.”² At least in the United States, the most pressing ethical and legal question posed by the advent of human cloning or genetic engineering today is not, as Huxley supposed, “How do we protect human reproduction (and human nature) against government control?” but “Are there any limits to what individuals or couples may do in their quest for happy, successful offspring, for offspring in their own image and likeness?”

John A. Robertson, Professor of Law at the University of Texas, at Austin, has been a strong and articulate defender of procreative liberty in assisted reproduction. In his well-known work, *Children of Choice*, he argues that the legal and social respect extended to coital reproduction should be granted to those who desire or need to seek assistance in procreating: “if bearing, begetting, or parenting children is protected . . . those experiments should be protected whether they are achieved coitally or noncoitally. In either case they

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1. ALDOUS HUXLEY, *BRAVE NEW WORLD* (1946).

2. LEE M. SILVER, *REMAKING EDEN: CLONING AND BEYOND IN A BRAVE NEW WORLD* 9 (1997).

satisfy the basic biologic, social, and psychological drive to have a biologically related family.”³

But how far should procreative liberty extend? Should respect for the “right to reproduce” encompass the freedom to acquire an offspring through cloning (i.e., somatic cell nuclear transfer), a practice that is not only “noncoital” but *asexual*? Does the “right to reproduce” protect the freedom to select or shape offspring characteristics through genetic engineering, e.g., to select for intelligence, height, beauty, or even deafness?

There are those who argue that any intervention that serves reproductive ends ought to be protected to the same degree as coital reproduction.⁴ Many argue that if we as a society widely accept the rights of parents to shape their children’s destiny *after birth*, e.g., to enhance their children’s chances of success through expensive private education, music lessons, and orthodontia, we should respect their rights to do so *before birth*.⁵ Robertson himself however acknowledges that practices such as cloning and enhancement or diminishment genetic manipulation push the boundaries of public consensus concerning procreative liberty. Not “reproduction” at all but “replication,” Robertson claims, cloning by nuclear transfer may simply “deviate too far from prevailing conceptions of what is valuable about reproduction to count as a protected reproductive experience.”⁶ In the same way, he argues, efforts that go far beyond what is necessary to ensure a healthy, normal birth may not be protected by procreative liberty to the degree that such actions “conflict with the values that undergird respect for human reproduction.”⁷

As Robertson admits, however, determining whether cloning or other novel reproductive options fall under the moral or legal protection of procreative liberty is difficult precisely because the judgment requires a substantive account of what is valuable in the experience of reproduction. Discerning the limits to which parents may go in the pursuit of a certain sort of offspring is equally difficult, as Robertson also admits. Given the “deep ambivalence that surrounds the question of whether children are parental property or separate persons,” it is hard to say precisely at what point creating a child “in one’s own image and likeness” crosses the line from parental prerogative to crass objectification.⁸

3. JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 39 (1994) [hereinafter ROBERTSON, CHILDREN OF CHOICE].

4. NATIONAL BIOETHICS ADVISORY COMMISSION, CLONING HUMAN BEINGS: REPORT AND RECOMMENDATIONS OF THE NATIONAL BIOETHICS ADVISORY COMMISSION 95 (1997).

5. See SILVER, *supra* note 2, at 9.

6. ROBERTSON, CHILDREN OF CHOICE, *supra* note 3, at 169.

7. *Id.* at 172. See also John A. Robertson, *Genetic Selection of Offspring Characteristics*, 76 B.U. L. REV. 421, 436-40 (1996) [hereinafter Robertson, *Genetic Selection*].

8. Robertson, *Genetic Selection*, *supra* note 7, at 481.

This Article intends to show that the problem posed by cloning and genetic selection of offspring characteristics illustrates the inadequacy of the account of procreative liberty advanced by Robertson and others in public policy debates in the United States. Joining his critics, I will argue that the problem of setting limits to procreative liberty requires a thicker conception of reproductive responsibility than the liberal rights position provides: having made individual autonomy the only serious moral value, Robertson is hard pressed to give a cogent rationale for judging some choices, e.g., somatic cell nuclear transfer or intentional diminishment, beyond the pale. Moreover, I will suggest that disagreements over what will count as a legitimate deviation from "prevailing conceptions of what is valuable about reproduction"⁹ cannot be solved without drawing on the very thing current interpretations of procreative liberty such as Robertson's dismiss, i.e., the deeper religious, cultural, and moral traditions through which the human meanings of reproduction and parenthood are both articulated and preserved. It is ultimately an appreciation for the symbolic significance of reproduction that makes it possible to argue that some practices, such as cloning, ought to be resisted even if no material or quantifiable harm to offspring will result.

I do not intend to take up the legal questions at issue in the debate over procreative liberty, such as the likelihood of courts to include proposed interventions such as cloning or genetic selection of offspring characteristics under existing protection for procreative liberty. Also, I will not deal with whether the harm of offspring or women or families, said to follow from this or that exercise of procreative liberty, is sufficient to justify restrictions under the standard of scrutiny used for traditional reproductive decisions. Rather, my concern is with the moral issues that underlie claims for a right to procreate. I am concerned, in particular, with the question of whether the reproductive rights paradigm, advanced most persuasively by Robertson, is adequate for defining the scope of moral obligations and relationships in assisted reproduction.

II. PROCREATIVE LIBERTY AND NONCOITAL REPRODUCTION

The basis for procreative liberty lies in the "centrality of reproduction to personal identity, meaning, and dignity."¹⁰ The presumptive right to freedom from interference in reproduction acknowledges the great importance to individuals of biological and familial continuity; bearing and raising offspring

9. ROBERTSON, CHILDREN OF CHOICE, *supra* note 3, at 169.

10. *Id.* at 30.

is a widely valued rite of passage, signifying the transition from adolescence to adulthood and, for many people, signifying the maturation and fecundity of marital love.

As a constitutional question, procreative liberty has been affirmed most directly in cases involving the right *not* to reproduce, such as the right to obtain contraceptives or to seek an abortion.¹¹ The Court has yet to deal explicitly with the right *to* procreate, in particular with the claims of infertile persons to a right to noninterference in assisted or collaborative reproduction, such as reproduction involving contracts with gamete donors or surrogates. However, argues Robertson, a fundamental right to reproduce can be inferred from the Court's recognition of the personal significance of reproduction and the law's implicit protection for privacy in coital reproduction. In the instances where the Court has dealt with the right *to* reproduce, it has treated marriage and procreation as among the "basic civil rights of man," "essential," and "far more precious than property rights."¹² As recently as the 1992 decision in *Planned Parenthood v. Casey*, Justices Kennedy, Souter, and O'Connor observed:

[O]ur law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education. These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.¹³

If the Supreme Court could be expected to recognize a married couple's right to procreate coitally, it should recognize a couple's right to procreate noncoitally. "The couple's interest in reproducing is the same, no matter how conception occurs, for the values and interests underlying coital reproduction are equally present. Both coital and noncoital conception enable the couple to unite egg and sperm and thus acquire a child of their genes and gestation for rearing."¹⁴ Freedom from interference in procreation, as a moral as well as legal right, ought to be extended to unmarried individuals as well. Reproductive rights are derived from the central importance of reproduction in an individual's

11. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973).

12. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). See ROBERTSON, CHILDREN OF CHOICE, *supra* note 3, at 36-37. See also *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1973); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); John A. Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405 (1983).

13. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

14. John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 960 (1986).

life and require only a capacity to participate meaningfully and an ability to accept or transfer rearing responsibilities; therefore, all those meeting the minimum criteria, whether married or not, ought to be free to exercise them.

Because procreative interests are in some instances dependent on the offspring having certain genetic characteristics, procreative liberty includes the freedom to manipulate egg, sperm, or embryo to achieve the desired offspring, similar to the freedom to impede implantation or abort a fetus with undesirable characteristics. Individuals and couples are not free to alter genetic material in a way that would cause serious harm to the offspring, but they ought to be free to do whatever else will facilitate the development of an offspring possessing those characteristics and traits that make having a child meaningful for them.¹⁵ Procreative rights are not absolute, but "those who would limit procreative choice should have the burden of establishing substantial harm."¹⁶ Claims of harm to society—for example, concerns about the integrity of connections between sexual intimacy, reproduction, and childrearing or anxieties about the commodification of reproduction—are not generally persuasive enough, in Robertson's judgment, to override personal liberty.

III. RIGHTS TALK AND THE CRITIQUE OF PROCREATIVE LIBERTY

Critics of Robertson's version of procreative liberty claim that the language of reproductive rights is inadequate, and in some cases inappropriate, to mediate competing claims and obligations in the sphere of assisted reproduction. Legal scholar Mary Ann Glendon, for example, argues that, as a language of social organization, "rights talk" is inherently flawed. It is rooted in a narrow and impoverished conception of the good society, predicated on an overvaluation of the individual, and "inimical to a sense of social responsibility."¹⁷ When the primary legal and ethical concern is how to protect the interests of individuals against the state, there is no impetus for a serious appraisal of the effects of choices on the *common good*. Except for the barest requirement that one's actions not cause material harm to another rights-bearing entity, promotion of personal autonomy virtually silences all other moral considerations. Only in the narrowest sense do questions of accountability arise, and then only in the most immediate of relationships, such as the sphere of freely-chosen commitments.

In the context of assisted reproduction, criticism of rights talk centers, in part, on its consequences for the general treatment and welfare of children. As Daniel Callahan wrote in response to the National Bioethics Advisory

15. See ROBERTSON, CHILDREN OF CHOICE, *supra* note 3, at 153.

16. *Id.* at 40-41.

17. *Id.* at 223. See MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

Commission's *Cloning Human Beings*:

There are . . . useful warnings [in the Commission's report] about potential hazards to individual children . . . There are also plentiful references to reproductive rights, but for the most part it is the welfare and desires of would-be parents, not the needs of children, that are at the core of that notion. . . . [I]t has been one of the enduring failures of the reproductive rights movement that it has, in the pursuit of parental discretion and the relief of infertility, constantly disassociated the needs of children and the desires of would-be parents.¹⁸

One implication of allowing the interests and desires of would-be parents to drive decisions about reproductive technology is, as Callahan suggests, that several questions are rarely asked: how to pursue the welfare of children generally, what might be required for just reproduction under existing circumstances, whether some arrangements for reproducing are better than others for enhancing the status of children in a particular society, and how investments in potential children relate to social commitments to existing children.¹⁹ Reflecting what Susan Jacoby called "a pervasive sense of entitlement," the argument from individual rights in assisted reproduction too easily trivializes the analysis of means, abstracting the technology from its social context and its implications.²⁰

Even more serious, for many critics, is the potential for rights talk to erode or compromise the primary relationships through which, generally speaking, the welfare of children has been secured. Laura Shanner voices this criticism in a recent article where she argues, "A key problem with claims of a right to procreate is that they too often sound like claims to objects or material resources."²¹ Indeed, there are some reproductive objectives (e.g., those requiring the use of genetic screening, selective embryo transfer, abortion, or genetic engineering) that can only be accomplished by treating the potential offspring as an object to be created, manipulated, and destroyed according to the terms of the reproductive contract.

18. Daniel Callahan, *Cloning: The Work not Done*, HASTINGS CTR. REP., Sept.-Oct. 1997, at 18, 19.

19. *Id.*

20. Richard A. McCormick, *Blastomere Separation: Some Concerns*, HASTINGS CTR. REP., Mar.-Apr. 1994, at 14, 15 (quoting Susan Jacoby, *Do We Have Fertility Rights?*, MINNEAPOLIS STAR TRIB., Nov. 28, 1993, at 27A.).

21. See Laura Shanner, *The Right to Procreate: When Rights Claims Have Gone Wrong*, 40 MCGILL L.J. 823, 859 (1995).

However, parenthood, by definition, is the establishment of *relationship*. In reproducing, one does not so much "acquire a child" as bring into existence a unique and separate individual who, through the care and encouragement of the parent(s), will grow under normal circumstances into social and moral agency. Focusing on the "unilateral, autonomous rights of prospective parents," argues Shanner, "fails to account for the role and status of the child who is produced and who has no say in his or her creation or role in the family."²² Moreover, children are not like cars or other objects, acquired and disposed of according to present tastes, nor are they simply extensions of the self. Rather, while "external to oneself, . . . [the child is] part of an existentially self-defining relationship. . . . Recognition of the child as *an other who defines oneself* captures a[n essential] quality of transcendence"²³ Not entirely of oneself, still the child reflects oneself, one's past and future; he is potentially autonomous, but only by virtue of relationships of care and nurture. In this sense, "'having children' is phenomenologically equivalent to 'being a parent,' much as having true friends is experienced as being a friend, or having a lover involves loving. This attitude of transcendental recognition opens . . . possibilities for interaction, response, appreciation, and understanding of the child as a unique, developing individual."²⁴ The prevailing paradigm of procreative liberty is deficient from this standpoint in that it encourages an objectifying notion of "acquiring children" over a relational notion of "having children."²⁵ Such a view of parenthood is not only impoverished but ultimately destructive of children's interests.

Critics also point to the potentially destructive effect of the procreative liberty paradigm on understandings and experiences of familial relation. As we saw earlier, the importance of reproduction to individuals is assumed to generate the right to manipulate egg, sperm, or embryo to achieve the desired result, to terminate gestation or prevent implantation in the face of undesired results, to enlist the aid of collaborators, and to enter into reproductive contracts for the exchange of gametes or gestational services. What emerges is a view of reproduction in which preconception contracts play the decisive role in defining

22. *Id.* at 858.

23. *Id.* at 859 (emphasis added).

24. *Id.*

25. A similar argument is made by Oliver O'Donovan and Gilbert Meilaender on theological grounds. The religious language of "begetting" captures this sense of an otherness and distinctive nature to the child, who is received in trust but never possessed. OLIVER O'DONOVAN, *BEGOTTEN OR MADE?* 1-13 (1984); Gilbert Meilaender, *Begetting and Cloning*, *FIRST THINGS*, June/July 1997, at 41. As Meilaender writes: "Our children begin with a kind of genetic independence of us, their parents. They replicate neither their father nor their mother. That is a reminder of the independence that we must eventually grant to them and for which it is our duty to prepare them." Meilaender, *supra*, at 42.

rearing rights and duties and in determining the meaning of "parent," and in which the only relevant responsibilities are those that are freely chosen.

Also in question is the underlying presupposition of this view that the genetic-gestational-social dimensions of reproduction can be severed at will and without cost.²⁶ One need not deny that many viable forms of family life exist, it is argued, to think that there are good reasons, nonetheless, to preserve the "natural" relation between biological and social parenthood and its fundamental dependence on spousal love and fidelity. We need only to observe the intense interest of adopted children in finding birth parents or the strong bonds related strangers feel to find truth in the insight that "corporeal, kinship bonds are important to our identities as human beings."²⁷ Driven by the professed importance of genetic connection, a contract view of reproductive rights and duties, paradoxically, relativizes genetic or biological connection in the name of reproductive liberty. Speaking of donor methods of assisted reproduction, for example, Lisa Sowle Cahill charges:

[They] may satisfy the "needs" of the contracting parties, but they do so at the cost of denying the significance of the important dimensions of the relationships they create. While adults may use the arrangement to bring to fruition their own hopes, they create a birth situation in which the child's "natural" relation of offspring to parent is [*a priori* and intentionally] impaired.²⁸

Critics hold that parent-childhood is best understood as "an embodied as well as freely chosen relationship," and as a relationship that is best carried out "as an extension of the mutual spouse-parent relationship (also embodied as well as freely embraced) with which procreative sexual intercourse ideally connects it."²⁹ Two claims are implicated. The first claim is that faithful, committed relationship between spouses provides the most desirable context for procreation in which, at least ideally, children have the benefit of genetic continuity and stable relationship with both biological parents.³⁰ The second claim is that normative features or "core values" of marriage are both identifiable and worthy of social protection. Once again, one need not deny the variety of forms marriage has taken across periods and cultures to admit that it is the assumption

26. See Maura A. Ryan, *The Argument for Unlimited Procreative Liberty: A Feminist Critique*, HASTINGS CTR. REP., July-Aug. 1990, at 6, 9-10.

27. Lisa Sowle Cahill, *Moral Traditions, Ethical Languages*, 14 J. MED. PHIL. 497, 519 (1990).

28. *Id.*

29. *Id.* at 521.

30. *Id.* See also Stephen G. Post, *The Judeo-Christian Case Against Human Cloning*, AMERICA, June 21, 1997, at 19, 22; Ryan, *supra* note 26, at 8.

of physical and psychic partnership that defines marriage, that the mutual genetic contribution to offspring is a central (albeit not necessary) feature of the marital union, and that there is an implicit understanding that partners will procreate, if they are to at all, within the union. That marriage, as physical and psychic partnership, and parenthood, as extension of spousal relation, have long been protected in law and custom is taken as a rough consensus, if not affirmation.

Undermining the core values of marriage or the "ideal" conditions for reproduction is assumed by those who reject reproductive rights language to have negative consequences not just for the parties to any particular instance of marriage or reproduction but to people or society in general. Although many who share the concern would not express it in these terms, the Vatican document *Donum Vitae* captures something of the deep discomfort characterizing the critical position. Speaking of donor methods of assisted reproduction, it argues:

[They] offend[] the common vocation of the spouses . . . and deprive[] conjugal fruitfulness of its unity and integrity; [they] bring[] about and manifest[] a rupture between genetic parenthood, gestational parenthood and responsibility for upbringing. Such damage to the personal relationships within the family has repercussions on civil society: What threatens the unity and stability of the family is a source of dissension, disorder and injustice in the whole of social life.³¹

In its strong form, as in the Vatican document, concern for the integrity of marriage and the intimate family issues is a rejection of all forms of assisted reproduction. In its weaker, more common form, it is expressed as a kind of protective dam, placing the burden of proof on any proposed exception to the norm for human reproduction to show that it does not undermine the core values or ideals at issue.

Although feminists do not, in general, share such concerns for the impact of the reproductive rights paradigm on the integrity of the nuclear family, there has also been a strong feminist critique of the right to procreate motivated by broad commitments to social justice. Some feminists reject the very language of reproductive choice as often illusory for women, particularly for the infertile. As Rosalind Petchesky notes, "[T]he critical issue for feminists is not so much . . . 'the right to choose' as it is the social and material conditions under which choices are made. The 'right to choose' means very little when women are

31. CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGINS AND ON THE DIGNITY OF PROCREATION (*Donum Vitae*) Pt. II A.2 (1987).

powerless"³² In the context of assisted reproduction, women are "powerless" insofar as fertility is bound up with self-esteem and social status in such a way that they are not free to forgo the pursuit of pregnancy without penalty. Women are "powerless" insofar as reproductive technologies concentrate patriarchal and medical power over reproduction, reinforcing the dual identification of women and women's bodies with reproduction and the alienation of the fruit of her labor. Women are "powerless" to the extent that they lack the economic means or social leverage to access available technologies on their own behalf, or are made vulnerable to exploitation either as patients or as collaborators. Rights talk in assisted reproduction is dangerous if, as is often the case, the defense of personal liberty papers over the realities of race, class, economics, and politics that will determine how the technology will be used, for what, and by whom.

Even when feminists do not reject the language of procreative liberty outright, they subject it to a certain "hermeneutic of suspicion." Feminists such as Christine Overall distinguish carefully between support for the right not to be compelled to bear children against one's will (the protection of bodily integrity) and support for the right to pursue reproduction through whatever means are available and necessary. Assertion of a right to procreate has troubling and far-reaching implications:

It shifts the burden of proof on those who have moral doubts about the morality of technologies such as IVF and practices such as surrogate motherhood (as many feminists do). For it suggests that a child is somehow owed to each of us . . . and that it is indefensible for society to fail to provide all possible means for obtaining one.³³

It would seem to imply, she argues, that fertile men with infertile wives are entitled to the services of a surrogate, that fertile people have an obligation to donate gametes to the infertile and genetic surrogates should be compelled to surrender their babies at birth, and that anyone who so desires is entitled to adopt a child.³⁴ At risk, then, is not just the objectification of children, but the objectification of women and of their reproductive capacity. Feminists have insisted, therefore, on the need for a women-centered assessment and appropriation of reproductive technologies, joining a brutal honesty about the interests likely to be served and the costs entailed with a clear memory of the ambiguous quality of reproduction in women's collective history.

32. Rosalind P. Petchesky, *Reproductive Freedom: Beyond 'A Woman's Right to Choose,'* 5 J. OF WOMEN IN CULTURE AND SOC. 661, 674 (1979).

33. CHRISTINE OVERALL, *ETHICS AND HUMAN REPRODUCTION: A FEMINIST ANALYSIS* 170 (1987).

34. *Id.*

Supporting an ideal of inclusive community, feminists have also been deeply suspicious of the largely unexamined eugenic ideology in the background of the debate over access to reproduction. As Robertson defends it, procreative liberty includes the right to refuse transfer, terminate gestation, or manipulate genetic material in the face of undesirable characteristics.³⁵ But the promotion of individual liberty in this case has the potential to reinforce negative standards of "normality" and to sanction ultimately dangerous models of human perfection. In addition to freedom from genetic disease, the offspring qualities most likely to be selected are those that correlate with high social status, such as intelligence, beauty, maleness, and height. Given the reality that "rejection is the flip side of preferential breeding," feminists worry both about the victims (direct or indirect) and the society we will eventually create.³⁶

How seriously ought these objections to procreative rights language in assisted reproduction be taken? *Children of Choice* shows more sensitivity to the critique of procreative liberty than Robertson's earlier essays.³⁷ He readily acknowledges the deep ambivalence many people feel over the expanding intrusion of technology into reproduction. Anxieties about the impact of reproductive technologies on the status of women or the health of the family are understandable. They ought to invite serious public reflection. Yet, in the end, his defense of the rights of individuals to pursue their reproductive goals remains largely unchastened. "In nearly every instance," he argues, "public policy should keep the gateway to technology open, allowing individuals the freedom to enter as they will."³⁸

Robertson dismisses many of the concerns raised above as "speculative fears" or "symbolic perceptions," too weak to prove the case for restricting a particular technology.³⁹ The argument that a commitment to the well-being of children ought to make us wary of severing genetic, gestational, and social bonds at will, for example, is simply unpersuasive: "The intentional creation of families with an absent genetic or gestational parent is a problem only if being reared in a situation in which one biologic parent is missing is itself generally harmful."⁴⁰ Only under circumstances in which collaborative reproduction caused severe handicap or disability of the sort to make the child's "very existence a net burden" would it be legitimate to override procreative liberty.⁴¹ In much the same way, Robertson minimizes anxieties over the

35. See generally ROBERTSON, CHILDREN OF CHOICE, *supra* note 3.

36. For a description of the problem of eugenics, see McCormick, *supra* note 20, at 15.

37. See, e.g., sources cited *supra* notes 12, 14.

38. ROBERTSON, CHILDREN OF CHOICE, *supra* note 3, at 221.

39. *Id.* at 222.

40. *Id.* at 121.

41. *Id.* at 120-22.

objectification of children. Parents reproducing coitally have complex motivations; among them are selfishness and proprietary interest. We should not expect any less from those who want to reproduce noncoitally. Moreover, "harms" of this sort, even if they can be demonstrated, are not normally severe enough to override the presumptive right to procreate.

Arguments against the procreative rights paradigm which invoke the integrity of spousal-offspring relationships are also weak. Such criticisms "reflect moralisms concerning a 'right' view of reproduction";⁴² even where some consensus exists, a majoritarian view of "'right' reproduction" or "'right' valuation of prenatal life, family, or the role of women should not suffice to restrict actions based on differing individual views of such preeminently personal issues."⁴³ Harms to individuals must be distinguished from harms to "personal conceptions of morality, right order, or offense," and even the former must be demonstrable as implicating tangible interests.⁴⁴

Can the procreative liberty paradigm stand against its critics? Is it adequate for understanding moral obligations as well as moral entitlements in reproduction? As we will see, when we turn to the problems of cloning and enhancement genetic engineering, it becomes obvious that the critique is more damaging than Robertson admits.

IV. PROCREATIVE LIBERTY AND THE BORDERLINE CASE

There is a term used by twentieth century German theologians to describe the exceptional or "borderline" case in ethics. In the *Grenzfall* (or *Grenzsituationen*), the usual moral rules do not apply, or their standard application does not seem to fit. Creating confusion or dissonance, the borderline case calls the moral system into question, revealing its present limits with a particular clarity.

The problems of cloning and non-therapeutic genetic engineering prove to be Robertson's *Grenzfall*. The case of intentional diminishment is especially revealing. Even for him, some things that would-be procreators might want to do seem clearly beyond the limits of procreative liberty, such as creating "replicants" programmed for premature death (as in the 1982 Ridley Scott film *Bladerunner*) or intentionally causing deafness in one's offspring. But as he stumbles to find a justification for drawing the line at this point, he shows exactly why the individual rights stance fails as a moral paradigm in assisted reproduction. Having effectively subordinated all other values to the interests

42. *Id.* at 35.

43. *Id.* at 41.

44. *Id.*

of procreators in pursuing a satisfying reproductive experience, he cannot provide a convincing reason, consistent with his position, for why we should object to this use of reproductive technology any more than to any other use.

On what grounds does Robertson hold that the *Bladerunner* scenario or the interests of a deaf couple in having a deaf child fall outside the protection of procreative liberty? Procreative liberty does not include the right "to create offspring who have fewer capacities than they could otherwise have had," he argues.⁴⁵ But why not? If the offspring in question would not otherwise be born at all, and the diminishments are not such that existence would be preferable to nonexistence (as in the case of the intentionally deaf child), what moral objection can be offered to procreation under these circumstances? Robertson's answer is worth quoting at length:

[P]rocreative liberty is a protected activity because of the importance of reproduction to personal identity and meaning. When one deliberately tries to have a less than healthy child to serve extraneous goals, the reproductive interests that are ordinarily valued are so diminished that a meaningful conception of the values underlying procreative liberty appear to be absent. Indeed, the [*Bladerunner*] scenario here treats the engineered individual as an object or thing to serve the fabricator's interests, rather than a new person desired in part for her own sake. *Even if no harm accrues to the lesser engineered person (who has no alternative unharmed way to exist) and the fabricator would not otherwise have created a healthier or more whole individual, one can still conclude that the interests and values that underlie respect for procreation do not attach [here] . . .*⁴⁶

In the case of the intentionally deaf child, Robertson argues that a couple has no more right to produce a handicapping condition than to deny an existing child necessary treatment for a potentially handicapping condition: "Unless it can be shown that children born to such parents are in fact *better off* if they share the parents' disability, stopping parents from prenatal lessening of offspring abilities would not, under the view [he defends], interfere with their procreative liberty."⁴⁷ It is the interest in producing "healthy, normal children for rearing" (which is not the case with enhancement, diminishment interventions, or cloning), which "gives the freedom to reproduce its value."⁴⁸

45. *Id.* at 170.

46. *Id.* at 171 (emphasis added).

47. *Id.* (emphasis added).

48. *Id.* at 167.

Prescinding from the question of whether there might be reasons to think that the child of deaf parents might in fact be "better off" sharing his parents' disability, how does Robertson arrive at the conclusion that it is only the interest in producing "normal, healthy children for rearing" that warrants protection? Throughout *Children of Choice*, it is the procreators' interests in a meaningful reproductive experience that drives the argument for procreative liberty. Moreover, in an earlier discussion, he rejects "wrongful life" arguments against protecting the right to bring a child into the world in a diseased, handicapped, or economically impoverished situation: "If offspring are not injured because there is no alternative way for them to be born absent the condition of concern, then reproduction is not irresponsible because of the effect on offspring who are born less whole than is desirable."⁴⁹ We might think it morally reprehensible, for example, for a woman to give birth to a child with a withered arm when a brief delay in conception might have avoided it, although the decision might be defended given the "net benefit" to the child. If the action is wrong, however, it is not because she has harmed the child; she has simply "violated a norm against offending persons who are troubled by gratuitous suffering."⁵⁰

Robertson anticipates the question of how he arrives at this seemingly contradictory conclusion:

Of course, one might ask why only the interest in raising "normal" children should be protected, if individuals find the same or greater meaning in raising supernormal children [or we might add, "subnormal children"]. At some point a constitutive notion of why reproduction is important has to inform the debate, or else there are no limits to shaping offspring characteristics at all, not even when cloning or intentional diminishment is involved.⁵¹

But that is precisely what is missing from Robertson's account of procreative liberty: "a constitutive notion of why reproduction is important" capable of generating the conclusion that deliberately trying to have a less than healthy or whole child violates the core values underlying procreative liberty. The only notion that Robertson provides as to why reproduction is important concerns its importance as "an experience central to individual identity and meaning," and as a means to fulfill important life plans and satisfy desires to transmit genetic heritage.⁵² Nowhere do we get an argument for the importance of reproduction to societies, which would tell us why aiming to

49. *Id.* at 76.

50. *Id.* The case to which he is referring is drawn from Derek Parfit, *On Doing the Best for Our Children*, in *ETHICS AND POPULATION* 100-15 (Michael D. Bayles ed., 1976).

51. ROBERTSON, *CHILDREN OF CHOICE*, *supra* note 3, at 167 n.40.

52. *Id.* at 24.

diminish an offspring's capacities for social participation or other forms of selective breeding might be said to violate core values supporting procreative liberty, or for the importance of reproduction for children, which would tell us why it matters that we desire our children for their own sake.

More important, as Shanner points out, what is missing here is the recognition of reproduction as establishing an "existentially self-defining *relationship*" between persons who are distinct however much intertwined.⁵³ There is nothing in the contract model of reproduction, predicated on the protection of individuals' negative liberties, that explains why it is better to have children (in the relational sense) than to acquire them (as we acquire other goods conducive to the satisfaction of our desires). Moreover, "[w]hen liberties, contracts, and autonomous agreements are emphasized in pursuing the *objective* of having a baby," as we find in Robertson's defense of procreative liberty,

[T]here seems no reason to prohibit contracts for more specific objectives, such as producing a set of matched offspring [or producing an enhanced offspring] There is nothing within a contract model . . . to distinguish appropriate from inappropriate activities, nor to promote the objective of forming a healthy family rather than acquiring children as objects.⁵⁴

Indeed, preventing this slippery slope in perceptions and behaviors demands what Robertson elsewhere denies but here implicitly admits: that "any contract or agreement be framed in light of values and principles *external* to the autonomous exchange paradigm."⁵⁵

Neither do we have an account of the status of children that would explain why, *even if no harm accrues*, it would be wrong to bring a human being into the world merely to serve the "fabricator's" purposes. Only an account of offspring as potentially autonomous beings with a fundamental human dignity would explain why it is morally wrong to treat them as objects or things, or to manipulate genetic characteristics to serve personal reproductive goals. The *Bladerunner* scenario is provocative by virtue of its crassness. But it merely brings into relief a deep social ambivalence concerning the status of children which Robertson's defense of procreative liberty leaves unchallenged. He concedes that we are confused about whether children are property or persons in the full sense. Most reproductive decisions aim at producing a healthy, normal child; therefore, conflicts between property or personhood paradigms are

53. Shanner, *supra* note 21, at 859 (emphasis added).

54. *Id.* at 862.

55. *Id.*

usually of little importance, and we should aim to protect reproductive liberty.⁵⁶ But the problem of the procreator whose reproductive intentions involve going “beyond what is needed for a healthy birth”—Robertson’s *Grenzfall*—illustrates why the implicit view of children as property that pervades reproductive rights talk is neither unimportant nor benign. It illustrates as well why an approach to procreative liberty that subordinates all interests to those of the procreator is deficient. Here at the boundary, Robertson needs exactly what he has not given us: a way of thinking about just reproduction in which the interests of children are integral rather than accidental.

Cloning is a different sort of borderline case, but it raises similar problems for Robertson’s defense of procreative liberty. Often lumping cloning with nontherapeutic genetic engineering, Robertson argues that such actions are not protected by procreative liberty, as the interests involved “conflict with the values that undergird respect for human reproduction.”⁵⁷ At points, this is simply a formal claim: cloning by somatic cell nuclear transfer may not involve “reproduction” at all if the procreators are not using their DNA or the cells of a previously born offspring.⁵⁸ Even when an individual is cloning his or her own DNA, the process may be better described as “duplication” or “replication” than reproduction. We just do not yet know how to place interests in “duplication” or “replication” within the legal and social categories we now employ to talk about reproductive rights.

But in distinguishing cloning from other interventions that aim at creating a healthy, new, biologically related offspring for rearing, Robertson is also making a moral judgment. Cloning is wrong, he argues, not because it necessarily harms offspring, but because it—like intentional diminishment—goes far beyond what is required for a healthy birth. Cloning “breaks the constitutive rules of protected reproduction”; it “deviate[s] too far from prevailing conceptions of what is valuable about reproduction to count as a protected reproductive experience”; and it “pass[es] beyond the central experiences of identity and meaning that make reproduction a valued experience.”⁵⁹

But, once again, Robertson appeals to something he has not given us: a substantive account of the “constitutive rules of protected reproduction,” a sense of what we mean by “central experiences of meaning and identity” in reproduction, and a rationale for treating one individual’s interest in “self-

56. See, e.g., Robertson, *Genetic Selection*, *supra* note 7, at 481-82.

57. See ROBERTSON, *CHILDREN OF CHOICE*, *supra* note 3, at 172.

58. By “cloning,” Robertson is referring to somatic cell nuclear transfer. Elsewhere, he treats cloning by blastomere separation as simply an extension of procreative liberty. See John A. Robertson, *The Question of Human Cloning*, HASTINGS CTR. REP., Mar.-Apr. 1994, at 6.

59. ROBERTSON, *CHILDREN OF CHOICE*, *supra* note 3, at 169.

replication” differently than another’s interest in genetic transmission. Indeed, even in suggesting that procreative liberty intends to protect interests in producing a “new, *biologically related* child for rearing,” Robertson has qualified his earlier position. In defending the rights of couples to contract for embryo donation, for example, he acknowledged that the recipient would not be reproducing in the strict sense. Yet the desire for a child to rear and the “gestational connection” (which substitutes for “biological relation”) in that case was sufficient to invoke the protection of procreative liberty. Moreover, an earlier agnosticism about the meaning of “reproductive interests” has now given way to the assumption that procreation entails aiming at a *new, healthy, biologically-related* child for rearing. The significance of reproduction is no longer simply whatever the procreator finds meaningful.⁶⁰

Explaining why cloning is morally distasteful, why exerting such a pervasive control over the new individual “violates a basic sense of what makes reproduction valuable,” requires mining the very “majoritarian view of ‘right’ reproduction” that Robertson has previously silenced as a threat to individual rights.⁶¹ We know that an innovation breaks the rules and exceeds the limits of exception only by testing it in light of the deeper cultural and religious traditions upon which our understanding of the rules depends. It is hard to see why self-replication should not count as a protected reproductive experience except against the belief, held by many religious traditions, that reproduction is at its core a shared enterprise, a partnership involving mutual genetic connection. It is hard to see why the degree of control over the offspring expressed in cloning should be troubling unless we accept and understand something of the warning that children are to be “begotten, not made.” It is hard to see why we should count the introduction of asexual reproduction, of the child with a single progenitor, as an unwelcome advance, except against long-held and deeply valued understandings of parenthood as a powerful symbol of sexual intimacy’s “two-in-one flesh” character.

The problem posed by cloning or non-therapeutic genetic manipulation is one of degree, of determining when an intervention deviates so far from “even pluralistic notions of reproductive meaning,” so as to undermine the rationale for reproductive liberty.⁶² But such cases reveal the need for a much broader conception of “reproductive meaning” than the simple invocation of individual liberty. It is only by giving voice to the *symbolic*, to particular accounts of the nature of children or the human significance of reproduction capable of calling into question private conceptions of reproductive meaning, that it becomes possible to draw coherent boundaries of the sort Robertson now draws. More

60. *Id.* at 32.

61. *Id.* at 41.

62. *Id.*

important, such cases bring home the mistake of supposing that the language of procreative liberty can be detached from the religious and cultural traditions on which our understandings of the core values of reproduction depend and in light of which we know what ought to be protected.

Many objections can be raised to Robertson's defense of procreative liberty in assisted reproduction. Among the most important are some we have not even addressed here: the commodification of reproduction, the potential exploitation of patients and donors, the effects of "reproducing for excellence" on individual children and on society as a whole, and the impact of technology on the lives of women, particularly those who are infertile. It has been enough here to show that the procreative liberty paradigm fails on its own terms. Having reduced the moral dimensions of procreative choice to individual autonomy and the pursuit of one's reproductive goals, Robertson cannot provide what the problems of cloning and non-therapeutic genetic engineering require: an understanding of human reproduction that would tell us why we need not let people do anything they want, in the pursuit of whatever reproductive goals they happen to have.

V. CONCLUSION

Two important questions remain. Suppose we agree that the language of rights fails to capture adequately the moral geography of assisted reproduction. Suppose we find the account of procreative liberty in *Children of Choice* deficient. What language, what account of reproductive choice, would suffice? And suppose we think that some reproductive interventions go too far. How should we promote responsible reproduction?

Neither of these questions can be answered here. But it is clearly not enough merely to raise the problems with "rights talk" as applied to assisted reproduction. We need some other way of thinking about freedom in reproduction that can take account of the importance of bodily integrity, of not being forced to reproduce against one's will, at the same time as it rejects the assumption that we are entitled to the child we desire. We need a way of thinking about reproduction that protects the ability of parents to raise children according to their religious and cultural values without falsely construing reproduction as an isolated or private matter. The failure of rights talk to generate a satisfying ethic for assisted reproduction points to the importance of shifting from an individual to a *relational* and *social* understanding of reproduction and shifting from a view of rights as claims against the community to a view of rights as mutual accountabilities.

We also need to discern the most appropriate way to draw limits on the development and use of reproductive technologies. We can fault Robertson on

the definition and scope of reproductive liberty and still agree that banning new or troubling technologies is not necessarily the best way to encourage reproductive responsibility. Some innovations, such as cloning, may be so destructive of persons or of conceptions of human reproduction that they should simply be prohibited. But the fact is that the barn door on reproductive technologies is already wide open. Ultimately, the legal measures we adopt as new technologies are introduced will be far less important than the questions we come to ask of existing technologies: what we demand medicine to do for us, how we weigh our wants in relation to others' needs, and whether we listen or grow deaf to the human body's own wisdom in counting the costs. How we will use the power to create ourselves in our image, for what and for whom, are not finally, or even in the first place, legal challenges at all.

