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*503 CAPACITY AND AUTONOMY: A THOUGHT EXPERIMENT ON MINORS' ACCESS TO ASSISTED REPRODUCTIVE TECHNOLOGY

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Autonomy figures significantly in judicial and political policy debates involving reproductive decision-making. However, medical and legal policy debates focused on reproductive decision-making too often suffer from reductive assumptions captured by our nation’s ongoing internal struggle about abortion. In that context, competing interests about access to abortions, the constitutionality of the procedure, questions of personhood, and concerns about where life begins predominate and significantly define how the lay public and legislators speak about reproductive decision-making. Yet this narrow discourse partially engages one subset of the reproductive field and misses many others. Assisted reproduction and the umbrella of technologies cabined within that framework serve as telling examples. Despite the high demand for assisted reproductive technology (“ART”) services, this type of reproductive decision-making typically escapes sustained social, legal, and public policy review. To date, there exists only one federal law tied to ART, and its main charge-
-to require the collection of data on “success rates” --serves as a passive reminder that in 1992 Congress once considered the issue. [FN1] This project takes up a blind spot in reproductive decision-making; it considers minors' capacity to make informed decisions regarding the use of ART. It also offers a departure from traditional reproductive health framing, and takes an interdisciplinary approach [FN2] to analyze the legal, medical, and psychological discourses concerning the rights, capability, and capacity of minors to consent to health care and medical procedures. [FN3] That analysis serves as a backdrop to test a thought experiment on the socio-medical risks and benefits of controlled access to ART for minors. [FN4]

This Article engages a nuanced, narrow framing of teenage reproduction, avoiding the undeniably compelling, but reductive approach to evaluating reproductive health and autonomy, which casts such discussions along blunt lines: choice is the primary or exclusive concern of women in matters of reproductive health; the legal rights of children deserve recognition and protection; parental rights trump those of their children; and teen pregnancy concerns only the poor or racialized minority communities in the United States. Such reductive framings oversimplify reproductive health care and decision-making and create a false debate between children's rights and parental authority or children and society. By taking a prospective approach, we attempt to peek into a realistic future, [FN5] one where the use of ART by minors is not only contemplated, but also perhaps encouraged by some teens, their families, and physicians. [FN6] A provocative news release issued by the University of Pittsburgh, portends the inevitable:

One of the nation's first comprehensive programs to help preserve or restore fertility after cancer treatment for not only adults, but also preadolescent girls and boys, has been established by a network of experts in reproductive medicine and cancer at Magee-Womens Research Institute (MWRI), Children's Hospital of Pittsburgh of UPMC, Magee-Womens Hospital of UPMC and the University of Pittsburgh School of Medicine. [FN7] Who will benefit or be harmed by that not too distant future? [FN8]

We rethink the deeply entrenched framings that understand children and reproduction through rigid, inflexible, nonoverlapping lenses: moral poverty, pure autonomy, economic irresponsibility, and government burden. [FN9] The project unfolds by first analyzing the dichotomous assumptions: that adolescents lack the cognitive capacity to consent to serious health care decisions, and most especially reproductive health care, and the counterpoint, that teenagers of reproductive “biological age” are necessarily gifted with the best decision-making capacities for their reproductive health matters. The conflict between both views centers on capacity: legal, cognitive, and emotional. The project then considers whether the umbrella of adolescent consent should include ART procedures in certain circumstances. [FN10]

This Article serves as a vehicle to advance an important conversation evaluating the efficacy of recognizing an adolescent's capacity to provide informed consent in matters of reproductive health and pregnancy-related intervention. Moving beyond issues of access to hormonal contraception and pregnancy termination, this project centers on the viability of the hypothesis that adolescents possess the capacity to consent to or participate in assisted reproductive services. It offers critical analysis of three situations for which we may wish to evaluate adolescent use of ART: (1) adolescents as cancer survivors or youth facing impending loss of fertility due to other medical conditions or illness, (2) adolescents as altruistic donors for ailing relatives who wish to parent, perhaps analogized to situations of sibling donor status or other familial organ and tissue donation, and (3) adolescents living separately from and financially independent of parents or legal guardians [hereinafter “P&Gs” ] in a marriage relationship.

We engage law and medicine to study the nuances of ART as a health care resource for adolescents. Part II briefly takes up the reproductive rights of adolescents within the broader spectrum of minors' and women's decision-making authority. It provides a backdrop for understanding the competing decision-making interests between children, parents, and the State. Part III traces the recognition of adolescents as health care consumers, separate from their parents. It engages
medical sciences to map the evolutionary staging and development of adolescence. Part IV then studies case law, analyzing the doctrinal underpinnings of adolescent health care decision-making. It considers the case for adolescent capacity by analyzing the tenets of informed consent. Part V examines the case for adolescent utilization of assisted reproductive technologies. It considers the appropriateness of ART falling within the scope of adolescent reproductive health care decision-making. Taking into account moral, legal, and cognitive capacity considerations, we suggest that in limited, regulated circumstances, use of ART may be appropriate in this population. Part VI concludes the Article.

II. Minors' Rights in Context

In the United States, minor consent statutes serve as the primary vehicle for granting medical decision-making authority to minors. The content of minor consent statutes varies by state, but they generally permit specific medical treatments and services to minors without notification of or permission from a parent or legal guardian. In most states, these services include reproductive health care, which in the majority of statutes includes care related to the diagnosis and treatment of pregnancy and sexually transmitted infections. Nevertheless, the capacity of minors to consent to their own health care, and particularly to reproductive health care, remains a contested theme among diverse stakeholders concerned with promoting the health and well-being of adolescents. Indeed, these statutes are continually debated on the grounds that they interfere with the rights of P&Gs to determine the destiny of their minor children. Opponents of the statutes characterize them as challenges to parental authority, claiming that the consent statutes move the jurisdiction of parenting away from the family locus, while simultaneously promoting and condoning promiscuous behaviors.

The notion that minors might possess interests apart from their parents, or that these interests may conflict, will not evoke robust contestation or discord in contemporary legal or medical discourse. Cases involving child exploitation or abuse present the most obvious examples where the best interests of children and parents diverge and where the law intervenes on the child's behalf. These types of abuse cases reveal how parental duties to care for their children and parental rights to raise their children might be in conflict: the duty to parent responsibly proscribes parental license to abuse children. Notwithstanding the most vivid illustrations of parent-child conflicts of interest in the abuse and exploitation context, historically, children lacked legal recourse or recognition of their “rights” independent of their parents. Indeed, the language of minors possessing “rights” inscribes a newer legal conceptualization, one that evolved concomitantly with other broader notions of fairness and justice in wholly separate spheres of legal movements: women's rights, civil rights, and social justice.

This section briefly considers children's evolving legal rights and capacity against two important relational models: the parent and society. Understanding this evolution helps contextualize the relatively new concept of “adolescent rights.” It also exposes historical fault lines to reveal a broad, deeply entrenched, and inflexible legal conception of parental rights, one that casts children as property and parents as not only protectors but also owners. In this section, we address those thematic inquiries through a process of distillation, where we envision the issues on a spectrum-- one that includes as its grounding or starting place, the U.S. regulatory and jurisprudential legacy of consigning women as property generally, and wives more specifically, to their husbands. Through this methodology we offer a grounded and analytically rich synthesis that recognizes girls’ legal interests and social statuses as bounded to broader legal conceptions and framing of mothers and wives.

A. Children and Mothers as Property

To understand why children were viewed as the property of their parents requires a broader conception of the rights
and duties associated with persons and within families. Under English and colonial American common law, wives became the property of their husbands upon marriage, [FN22] and likewise, *510 children were recognized as the property of their parents. [FN23] Bell v. Bell's Administrator sets forth the general judicial principles of women and their property status in the United States. [FN24] The case, brought to determine the ownership of a slave, Linda, and her children, centered on the question of to whose estate--husband or wife--the slave woman and her children belonged. In reaching its decision, the Alabama Supreme Court iterated a general rule of law, “that the wife's possession of chattels is the husband's possession, and that the husband's property in the wife's chattels springs into existence with the commencement of her possession during the coverture, as if the manucaption had been his instead of hers.” [FN25] The court’s reliance on Clancy’s treatise Husband and Wife, demonstrates that its holding was not an aberration, but consistent with legal norms. Citing Clancy, the court asserted,

as a general rule, the wife cannot possess personal property; that, as far back as English jurisprudence could be traced, marriage conferred on the husband dominion over the possession of the wife; that, in the contemplation of law, the wife is scarcely considered to have a separate existence; that the unity of the persons of husband and wife is the source whence the wife's disability to possess personal property is derived, and that the husband takes the wife's chattels, which come into the wife's possession in her own right, whether it be by gift, or bequest, or in any other way. [FN26]

This conceptual framing of women and children as the property of male heads of households morphed into an entrenched American jurisprudence in which children could not sue their parents [FN27] for even the most heinous assaults and women's rights independent of and against their husbands were conservatively construed, including in matters of sexual independence. [FN28] *511 Furthermore, these issues were relegated to the private, “and therefore beneath the notice of law and politics.” [FN29]

1. Sexual Property

The concept of women as sexual property conveyed via their social status and conduct, such as contractual terms of their marriages, captures important aspects of our approach to this research and the thought experiment presented herein. First, at a methodological level, understanding young women's sexual autonomy and capacity necessitates a broader inquiry into the legal statuses of women along similar and divergent spectrums. This approach calls for looking within the explicit bounds of the law to understand how law functions to protect the rights of these groups or to undermine their security. Second, and equally important, we recognize the importance of utilizing the tools of social science to study the impact of formal law and specifically grappling with exogenous rules to understand how social behaviors are shaped according to cultural expectations. To this end, it is insufficient to ponder the capacity and autonomy of female minors in isolation of valuable qualitative empirical sources, including case law, biographies, narratives, and other means of excavating truth. Thus, for scholars to understand the concept and status of children as property--as a bridge to frame enlightening discussions on children's welfare, interests, and rights--it requires us to be cognizant and deeply discerning about the roles of power, social license, institutional organizations, and culture within American statutory regulations and jurisprudence.

The place where we begin is women's and girls' sexual independence as it helps to explain how women's sexuality became the domain of men's concern and control. The historical account that men were bread winners and protectors of women and therefore entitled to their wives and daughters' virtue*512 (and thus legally privileged to control their sex), is an incomplete and unacceptable explanation for a gender power hierarchy that endured for centuries. In her elegant analysis of domestic violence and rape exemption statutes, Sally Goldfarb offers a nuanced alternative answer: the deeply entrenched “ideology of nonintervention in the family” permitted violence against women and girls through “[d]octrines like interspousal tort immunity, parental tort immunity, and the marital rape exemption in criminal law . . . .” [FN30] As

a result, women were left with “little or no recourse” against incest, marital rape, and domestic battery committed by their “protectors.” [FN31]

The origins of wives' sexual subordination [FN32] to husbands likely predate the marital rape canons. Legally, however, it was in Sir Matthew Hale’s acclaimed 1736 treatise, Historia Placitorum Coronae, History of the Pleas of the Crown, that a legal shift materialized. Hale proclaimed that a “husband cannot be guilty of rape” because marriage conveys unconditional consent, whereby wives have entered a binding contract and ‘hath given up [themselves] in this kind unto [their] husband[s], which [they] cannot retract.’ [FN33] No prior English common law articulated this standard, but Hale's new rule found broad appeal among parliamentarians, and was foundational to jurisprudence on women's sexual authority in the United States. Nearly every state adopted such a law and North Carolina, in 1993, was the last state to rescind the marital rape exemption. [FN34]

That American legal jurisprudence, from its earliest origins through the late 1980s, is replete with cases where courts refused to recognize and enforce wives' sexual independence (or a right to refuse sex) against their husbands, [FN35] provides an important context and historical backdrop for the questions presented in this section and the broader Article.

In State v. Paolella, a case involving the kidnapping at gunpoint and rape of an estranged wife, a Connecticut court acknowledged that “[c]ertainly there is ample evidence at this point for the court to find that the . . . basic elements of the rape have been proven.” [FN36] However, the Supreme Court of Connecticut on appeal strictly construed state legislation, to pronounce the following:

*513 General Statutes § 53a-65(2), which defines the sexual intercourse prohibited under §§ 53a-70(a) and 53a-70a(a), excludes married people. Under this statutory scheme, a defendant married to the alleged assault victim cannot be found guilty of violating those sexual assault statutes. A finding of non-culpability based on the ‘marital exemption’ of § 53a-65(2) necessarily depends upon proof of the fact that the victim and the defendant were legally married . . . . [A] finding by the trier that the alleged offender and the victim were married exonerates the alleged offender, regardless of the proof of forcible sexual intercourse. [FN37]

In reviewing dozens of rape cases involving husbands' sexual assaults against wives for this Article, what becomes clear is that historically, when presented with a compelling case of rape, judges often refused to engage in a robust constitutional law analysis, which might have included an equal protection query. [FN38] Instead, judges abnegated their authority to exercise discretion, even in cases where evidence of rape was undisputed. As the Colorado Supreme Court explained in 1981, marital exemptions from rape prosecutions promoted legitimate state interests in preserving family relationships and preventing juries from grappling with “intimate sexual feelings, frustrations, [and] habits” of married couples. [FN39] The court turned on its head what juries have been asked to do since that institution came into existence. Legally, then, it could be argued that U.S. courts were never concerned with women's capacity or autonomy in evaluating choices with regard to sex, sexuality, and reproduction. [FN40] Those types of questions were unnecessary to ask and answer, because women's and girls' responses were irrelevant, even in the most brutal cases of rape.

In Commonwealth v. Fogerty, a case involving the brutal rape of a ten-year-old girl, the Supreme Court of Massachusetts announced that the men who “ravished” the child could not plead exceptions. [FN41] However, in very telling dicta, the court concluded by reminding the public, “[o]f course, it would always be competent for a party indicted to show, in defence [sic] of a charge of rape alleged to be actually committed by himself, that the woman on whom it was charged to have been committed was his wife.” [FN42] Similarly in People v. Henry, a provocative case where prosecutors alleged the *514 rape of a thirteen-year-old girl by her father, the court noted that it could not be disproved that the girl was not married—to her father or someone else—which would bar the state's prosecution of rape. [FN43] The court chided the prosecution for not demonstrating that a thirteen-year-old child who lives at home is not married to anyone, including the father. [FN44] Thus, despite her pregnancy, childbirth, prior testimony, and the father's jailhouse confession to an of-
This legacy is informative for scholars seriously concerned about the evolution of women's legal autonomy generally, and specifically within the domains of reproductive decision-making. At a pragmatic level, courts historically and consistently participated in relegateing wives' sexual independence to the control and province of their husbands. [FN46] In this way, women lacked meaningful access to courts and, therefore, justice. [FN47] As Robin West explains, “marital rape exemptions are strikingly easy to trace to misogynist roots, from Hale's infamous argument that a married woman is presumed to consent to all marital sex and, therefore, cannot be raped, to the common law's assumption that marriage results in the unification of husband and wife . . . .” [FN48]

Both through the legislative process and judicial opinions, law functioned as a tool to relegate women's sexuality to the province and control of their husbands. The “marital exception,” for example, shielded husbands from criminal liability for the sexual assaults and rapes inflicted on their *515* wives. [FN49] According to the American Law Reports 4th Edition on marital rape, “[u]ntil very recently, the courts were nearly unanimous in their view that a husband could not be convicted of rape, or assault with intent to commit rape, upon his wife as the result of a direct sexual act committed by him upon her person.” [FN50]

This notion of property ownership was less a legal fiction than a platform by which duties could be understood and imposed on parties responsible for the health and safety of those considered “vulnerable” and “fragile.” [FN51] For example, Blackstone's discussion of marriage in the late eighteenth century captured the notion that wives' identities and legal rights were subsumed within the broader scope of their husbands' identities. [FN52] This model, borrowed from coverture laws abroad, functioned to preserve legal and social order, and to promote familial harmony. [FN53] According to Blackstone:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-[F]rench a feme-covert . . . . Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage . . . . For this reason, a man cannot grant any thing [sic] to his wife, or enter into covenant with her: for the grant would be to suppose her separate existence; and to covenant with her would be only to covenant *516* with himself: and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage. [FN54]

2. Coverture: Duties, Discipline, and Responsibilities

The coverture model for governing women, however, lacked flexibility in its blunt application. What it provided (or promised) in terms of promoting health and safety for women and children it sometimes lacked in enforcement of good care, commitment to harmonious conduct, and accountability. [FN55] The judicious writings of Dorothea Dix, a prominent nineteenth-century author, teacher, and activist, detailing her research across the United States of women “turned out” by their husbands and fathers, provide vivid illustrations of the crude conditions under which women barely survived:

It is impossible to enter upon individual histories here, and I think that the plain facts, stating recent outward conditions, are sufficient to show that society at large is unfaithful to its moral and social obligations . . . . I know of sisters and daughters subject to abusive language, to close confinement, and to “floggings with the horse-whip.” . . . I know of many cast out from dwellings, to wander forth, and live or die, as the elements, less merciless than man, permit. [FN56]
Common law duties required husbands to support their wives. Such duties thereby conferred a “right of support” to wives. But, courts made clear that such a right was not absolute. [FN57] For example, a wife was to be supported at the family home, but if she departed her husband could deny support. [FN58] That is to say, with the duty to promote and protect came also the right to control how a wife would be supported, and the power to punish with impunity and without consequence. Coverture-based civil law regimes meant that women could not sue their husbands if abuse occurred. The Supreme Court warned that if Congress had intended to grant women permission *517 to sue their husbands, thereby altering the common law governing husbands and wives, it would have articulated its intent with “irresistible clearness.” [FN59]

Equally important to this research then, is to advance a more nuanced and illimitable understanding as to why wives, given the prior discussion, might brave public embarrassment and judicial disincentives, risk their safety, and endure possible stigma in order to utilize the judicial process to sue their husbands. For this we turn briefly to representative cases, research, narratives, and case studies. Margaret Turano succinctly articulates how women’s living and social conditions under English common law rule created the impetus for action:

The husband had a right to the couple's children and could name a person other than his wife as their guardian. If a woman left her husband, even for a good reason, the court could order “their infant child, then at her breast” to be delivered to him. This was true even if he was living in adultery with another woman, unless the wife could show that the husband would “abuse his right” to custody of the infant. If the couple had a minor child who wanted to marry, only the consent of the father was required, not that of the mother. If a deceased father had appointed a guardian other than the mother, that guardian’s consent, and not the mother’s, was required. [FN60]

Courts answered women by reaffirming a commitment to the English common law tradition, which denied wives the right to sue their husbands for battery, and justified the denial by asserting the state’s interest in promoting marital harmony and emphasizing the joined nature of husbands and wives. As an indivisible unit, courts reasoned, one could not recover against the other. In the United States, courts adopted the language of “gentle restraint” to describe the type of physical punishment husbands could legally inflict on their wives without fear of criminal punishment or civil liability, while women were foreclosed from using the American tort system to seek remedies against their husbands. The North Carolina Supreme Court advised in North Carolina v. Oliver that its position had evolved, “[w]e may assume that the old doctrine, that a husband had a right to whip his wife, provided he use a switch no larger than his thumb, is not law in North Carolina.” [FN61] Yet, in its holding, the North Carolina Supreme Court issued the following response on domestic battery, “if no permanent injury has been inflicted, nor malice, cruelty nor dangerous violence shown by the husband, it is better to draw the curtain, shut out the public gaze, and leave the parties *518 to forget and forgive.” [FN62] A similar posture was adopted by courts throughout the United States, emphasizing the social importance of maintaining “domestic harmony” as a public policy value and goal. Courts in Maine articulated this goal slightly differently under the same general principle. In Abbott v. Abbott, the court denied Mrs. Abbott the opportunity to recover for injuries she sustained after a brutal battering by her husband. [FN63] In that case, the court emphasized that the “husband and wife are one person.” [FN64]

Interspousal and parental immunity doctrines, which emanated from coverture rules, were justified as furthering individual and broader social goals. Family immunity defenses advanced policy goals associated with the coverture model, in that the U.S. tort doctrine protected husbands and fathers from tort liability and discouraged litigation from wives and children. As a public policy matter, courts deemed it in society’s interest that households reside in harmonious companionship, unimpaired by the tensions that could arise from litigation.

Courts refused to acknowledge that avoiding the marital tensions and disharmony that could possibly result from litigation did not cure physical, emotional, and sexual abuse in the marital homes, or violence inflicted on children. Cover-
ture rules did not ensure the safety, care, and betterment of women and girls. Instead, those most severely abused during the height of coverture became caught in a complex social decline that included homelessness (as a means of escape or abandonment) or forcible incarceration in mental health facilities.

Ralph Reisner and Christopher Slobogin trace this history with notable adroitness and depth. According to the authors, forced incarceration in asylums served as a warning to women, particularly as life in these facilities included floggings, unsanitary conditions, and sexual abuse. [FN65] Due Process was an illusory concept in mental health asylums. Parents could—and sometimes did—incarcerate their daughters for failure to conform to expected social behavior. [FN66] On the other hand, adolescents could not refuse submission to corporal punishment or, for that matter, medical interventions and experimentation compelled by parents. [FN67]

*519 The subordination of women and children can be understood in parallel, particularly because children have historically been regarded within the law as the property of their parent(s), and more specifically the possessions of their fathers. [FN68] Justifications for such treatment of minors mirror defenses of the coverture model for women, including the interests of social order, obedience, and familial harmony. [FN69] According to a Mississippi Supreme Court decision,

[t]he peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. [FN70]

Roller v. Roller provides a chilling and seminal example of judicial deference to parental authority and the fragile association of parental “rights” or “interests” with that of the (female) child. [FN71] In that case, the Washington Supreme Court maintained that a fifteen-year-old girl could not pursue a cause of action against her father for rape. [FN72] The case exposes a deeply entrenched view of parental authority in relation to the child, and remains stunning for two reasons. First, the underlying charge of rape was not in dispute, nor denied by the father. [FN73] In fact, the court recognized rape as a heinous action, but opined that there would be no principled way to *520 differentiate between rape and “any other tort” in actions by children against their parents. [FN74] Second, the court was persuaded by the father's plea, which emphasized the importance of maintaining domestic tranquility and harmony. [FN75] The court ascribed to the view that familial accord was “conducive to good citizenship” and so “worked to the welfare of the state.” [FN76]

Based on the forgoing, it becomes clear that the child as a separate entity is not an inherent legal premise. [FN77] In civil law contexts, courts afforded prophylactic protection of parental interests through the affirmative defense of parental immunity laws. [FN78] In cases in which children were harmed by their parents, courts endorsed an immunity regime that balanced children's interests against prevailing social and legal commitments to promote social welfare, preserve familial harmony, and protect disciplinary order in households. [FN79] Courts' reluctance to interfere in domestic disputes between children and parents not only captures an important historical note, [FN80] but places this Article's thought experiment in context: historically, the notion of children's rights was more illusory than real, the law generally deferred to parents in matters of domestic dispute, and considerable deference was granted to parents generally, and fathers primarily, in the guidance and rearing of their children.

In a recent article in the Annals of the American Academy of Political and Social Science, Professor Elizabeth Bartholet emphasizes that “current law in the United States gives children very little in the way of rights and places overwhelming emphasis on parents' rights, justifying this often as consistent with children's best interests.” [FN81] Bartholet dispels any doubts about the historically marginalized legal status of children in the United States, explaining that “United States lawallows the state to protect children but does not impose on states a constitutional duty to protect children. Under U.S. law, the state's power to protect children is limited by parents' constitutional rights to be free from un-
due state intervention.” [FN82] Nor does *521 the United States invest children with a constitutionally recognized interest in the State's protection. [FN83]

The promotion of familial harmony in judicial opinions reflects the use of social and legal values as a means to guide youth toward healthy life trajectories and meaningful participation in society. [FN84] The conflict, however, is that courts' deference to family and parental authority has not always resulted in meeting the needs and securing the best interests of the child. [FN85]

B. Rethinking Minors' Rights

Let us now turn to considering the applicability of a rights discourse to children. In Part II.B we turn briefly to the perception of rights. We take up the issue of why moving toward “actual” children's rights might be better achieved by a nuanced framework, rather than blunt rulemaking in Part II.C.

In recent years, scholars have taken up the cause of “children's rights” across a vast spectrum, from the protection against labor exploitation to a broader sphere of rights: the right to refuse psychotropic drugs, [FN86] to be free from a medically chartered, parent-designed life, [FN87] to be spared a future of physical disabilities resulting from parental utilization of preimplantation genetic diagnosis, [FN88] to be “free” from sexual harassment in low-wage employment, [FN89] to wear controversial clothing, [FN90] and, in keeping with the publicity-prone times, to be free from their parents' attempts at celebrity. [FN91]

Within contemporary legal discourse, children are generally understood to have some rights in three specific contexts: criminal, welfare, and statutory delegations. On closer examination, these arguments in children's rights scholarship, which appear to articulate minors' “rights,” are more appropriately described as protections against harms or negative rights. With the exception of some historically controversial issues such as minors' access to abortions, [FN92] or rights associated with criminal prosecution, [FN93] most children's rights discourse aims to protect children from the negative reaches of others, including their parents, employers, the State, schools, and other institutions traditionally granted authority in children's lives. Susan Bandes tackles an aspect of this question in an important project on negative rights following DeShaney v. Winnebago Department of Social Services, [FN94] a U.S. Supreme Court case distinguishing the State's responsibility in child abuse cases. [FN95] According to Bandes, “the conventional wisdom distinguishes between negative rights to be free from governmental interference and positive rights to *523 have government do or provide various things.” [FN96] Bandes critiques the conventional wisdom, describing it in the following terms: “individuals have no right to have government do anything at all; it must only refrain from harming or coercing them.” [FN97]

For example, Justice Rehnquist's majority opinion in DeShaney v. Winnebago Department of Social Services rejected the due process claim brought on behalf of a minor who suffered irreversible brain injury resulting from chronic child abuse, which a local social service agency failed to prevent. [FN98] The § 1983 lawsuit claimed that the agency's failure to intervene and protect Joshua DeShaney from his father's abuse, which it knew about or should have known about, violated the child's right to liberty without due process of law. [FN99] The 6-3 majority opinion clarifies the Supreme Court's conception of affirmative duties, thereby distinguishing positive from negative rights generally, and specifically, in this case, involving minors. [FN100] Bandes describes the conventional wisdom as resting “on the efficacy of the distinction between government action and inaction.” [FN101]

This view that the government is not obligated to act in matters of child safety or to intervene between private parties in a non-negligent manner could also be interpreted as the absence of a right to which the State is obligated to respond. Thus, the traditional view conceptualizes government along the following lines: it “has no obligation to act, except, in
limited circumstances, to ensure that no harm is caused by its previous actions.” [FN102] Accordingly, as Rehnquist clarifies in DeShaney, the U.S. Supreme Court interprets the substantive component of the Due Process Clause as not requiring the State to protect the life, liberty, and property of its citizens against invasions by private actors.” [FN103] Explicitly, then, the Rehnquist majority leaves us to understand that even in cases of child abuse, minors do not have a constitutional right to state protection against their parents. In a footnote, the Court declined to consider whether ‘child protection statutes gave [the child] an ‘entitlement’ to receive protective services in accordance with the terms of the statute, an entitlement which would enjoy due process protection . . . .” [FN104]

An important distinction between DeShaney (and similar cases), [FN105] and minors' rights to specific reproductive services as articulated in this Article, is the difference between being acted upon--a right of protection to be free from other's harmful behaviors, including the State--and the entitlement or right to carry out a specific act or medical decision. DeShaney and similar cases focus on the former, while this project considers the latter. Notice, however, that courts are not particularly compelled to assert that an entitlement exists in cases where a perceived “right” to state services, such as social services or police protection, is at stake. [FN106] Such is the state of the law for both adults and also minors-children possess no greater rights than their parents. Thus, any notion that a developed jurisprudence on children's rights exists within the American judicial system is misinformed.

The rich scholarly legacy of DeShaney focuses primarily on two issues: the nuances of that specific case and deconstructing “negative” rights; neither issue addresses children's affirmative rights. Noticeably, attention to affirmative rights of minors is left out. Likewise, much of the current “children's rights” discourse does not address the affirmative acts and interests of minors. We agree with Lee Teitelbaum's forceful work on this important point: traditional “rights” frameworks do not map easily on the activities and personhood of children. [FN107]

1. The Criminal Context

The criminal law context provides a clear example of how traditional “rights” do not easily map onto the lives and realities of children. In a persuasive treatment on children and the criminal law, Emily Buss contends that due process procedures created to protect constitutional interests and secure full, unburdened participation in criminal adjudications for adults are actually a “poor fit” for children in criminal proceedings. [FN108] Buss makes a compelling point: traditional legal regimes designed for adults do not always provide the protections or privileges children seek. [FN109]

Buss's observation is particularly enlightening because the criminal law context happens to be where children's rights are most rigorously guarded, protected, and promoted. The criminal law offers a unique, but not universal, lens through which to study “children's rights,” in part because of what is at stake in those cases. In re Gault provides an important example. In that case, the Supreme Court found that under the Fourteenth Amendment to the United States Constitution, minors accused of delinquency in criminal proceedings must be afforded similar, and in some cases the same, rights as adults. [FN110] By this, the majority explained that the Constitution guaranteed procedural due process to juveniles, including the right to counsel, [FN111] appropriately timed notification of charges, [FN112] confrontation of witnesses in the absence of a valid confession, [FN113] and privilege against self-incrimination. [FN114] Uniquely, then, the rights articulated in In re Gault (and similar criminal cases) are not predicated on parental consent, participation or acquiescence, child capacity, or promoting basic child welfare, but on a shifting judiciary possibly responding to exogenous social movements and cultural changes. [FN115]

In a later case examining the legal interests of minors, Justice Sandra Day O'Connor provided a tailored explication to distinguish why children's liberty interests arise in criminal law contexts. [FN116] O'Connor's concurrence in Reno v.
Flores is notable for its judicial insights. She distinguishes tough criminal cases from equally grievous civil cases in which minors' quality of life and even life or death may be implicated, but in which courts do not recognize a liberty interest. She explained that precedent “makes clear that children have a protected liberty interest in ‘freedom from institutional restraints.”” [FN117] O'Connor acknowledged that, “it may seem odd that institutional placement” even in a relatively open detention center, “where *526 conditions are decent and humane . . . implicates the Due Process Clause.” [FN118] The answer, she suggested, is quite simple. Childhood is a vulnerable time in the developmental stage, and the risk of erroneous institutionalization could irreparably cause “scars for the rest of their lives.” [FN119] This interest--to avoid erroneous incarceration--is far more global than to the individual; it implicates strong societal interests. [FN120]

2. Welfare Rights

The evolution of “positive” rights for children can be traced to the judiciary--in part as a response to child abuse and neglect, and as a means to set meaningful legal and social standards in the treatment of children. Thus, children are recognized to have positive welfare rights to those things that are necessary to sustain life in a broad sense. [FN121] With limited exception, P&Gs are presumed to be responsible for the provision of such rights, including the right to food, shelter, safety, clothing, and education. [FN122] Courts will also find a due process right against the State in specific circumstances involving child welfare or education. [FN123] Courts also make clear that children's welfare rights do not exist in isolation. Indeed, parental duties reside in intimate association and entanglement with the welfare rights of children. [FN124] But for parental duties, would children's welfare rights exist? Maybe not. At least one way of viewing children's welfare rights is that they are not independent of parental responsibilities.

*527 3. Statutory Rights

Statutory rule making is another domain in which children's interests, privileges, and “rights” are articulated and ensconced within the law. At the federal and state levels, children's rights discourse expands beyond general welfare norms and criminal law protections, granting minors the legal “right” to participate in certain activities, including those that are inherently dangerous, and those that expose adolescents and others to serious risk. In an attempt to properly calibrate minors' capacity in association with the statutory right, legislatures set age limits: twenty-one years for purchasing alcohol; eighteen years for voting or purchasing of tobacco; sixteen years for seeking employment (with exceptions), marriage, or eligibility for the death penalty; and fourteen to sixteen years for obtaining a permit to drive, or accessing reproductive care and certain mental health services without parental consent. [FN125]

But juvenile statutory rights are not absolute, nor do they function without restrictions by age (to access the right) or parental supervision (to delegate the right). [FN126] The provision of statutory rights remains predicated on some level of parental or paternalistic oversight. In most instances, parental oversight is not simply expected, but required. Thus, while it could be argued that statutory rights reflect legislatures' recognition of the developing capacities of young people, that reasoning fails to capture important nuances. Legislatures engage in a measure of balancing, using parental oversight, supervision, and support as tipping points in the filtering of rights to minors. [FN127] In delegating statutory rights, legislatures have done nothing less than preserve and perhaps promote parental veto power. As Teitelbaum notes, “all seventeen-year-olds are not treated equally.” [FN128] Nor are all seventeen-year-olds of equal maturity, experience, and cognitive ability, and that is often why children are treated differently or afforded privileges unequally, even within families, because of demonstrable maturity, capacity, and ability to accept responsibility. As Teitelbaum summarizes:

*528 Some seventeen-year-olds who wish to marry will be allowed to do so by their parents, others will not. Whether they will be allowed to do so depends entirely on the private views of their parents rather than any public judgment about capacity. There is, moreover, no assurance that parents will act in a consistent fashion regarding
that decision or that they will employ any consistent criterion in making that decision. Most particularly, there is no requirement that parental judgments be made solely on the basis of assessments of the child's relative maturity. [FN129]

To better understand the unequal grant of statutory rights to children, including the potential for inconsistent application, consider that some parents will grant permission for “rights” to be accessed and exercised (such as driving a car, marriage before the age of majority, or working) and others will not. Some rights may filter through the socio-economic status of the child: poverty may render meaningless a “right to drive” if a family cannot afford the luxury of owning an automobile. Or, a “right” to work may be crucial to parents hoping to spread the costs associated with raising children, buying groceries, or paying rent. Metaphorically, statutory rights are railroad tracks without the trains, or doors without locks; unlocking the door aids our perception that a door will open. But, in reality, simply unlocking a door does not guarantee that it will open or that other mechanisms will not block its opening. Full, meaningful access to and participation in the rights are contingent on interaction and association with others; in these examples, parents are the gatekeepers. And as parents' views differ on issues ranging from curfew to premarital sex, from underage drinking to even computer access, assumptions that children have qualitatively equal access to statutory rights is inaccurate.

4. Minor Consent Statutes and Informed Consent

Consent statutes mark a fourth domain in which the interests of minors have expanded. These laws relate to children's authority (granted by state-enacted legislation) to consent to medical treatments. Lost from that debate are definitional matters, which we will clear up before proceeding. Minor consent statutes are predicated on the assumption that adolescents possess the capacity to make informed choices about their health care, [FN130] and therefore have not only the capability, but also the capacity, to provide medical professionals with an informed consent.

Our working definition of “informed consent” for this project is borrowed from Thomas Grisso and Linda Vierling. Grisso and Vierling distinguish the right to know about a medical treatment or participate in that treatment from the right of contract or veto power. [FN131] Informed consent necessitates that an individual give authorization “knowingly, intelligently, and voluntarily.” [FN132] According to the authors, “knowing can be defined operationally as the match between the information given to [a person] and [that person’s] own paraphrase of [the information].” [FN133] Intelligence, on the other hand, “focuses upon the competence of the [individual] to arrive at the consent decision rationally, not on others' opinions concerning the advisability of the patient's decision itself.” [FN134] Here, the reference is to an individual's cognitive ability in assimilation, processing, and application of information toward a decision about treatment or care. [FN135] Grisso and Vierling offer a worthy list of considerations relevant to minors' capacity to give informed consent:

One's attention to the task, ability to delay response in the process of reflecting on the issues, ability to think in a sufficiently differentiated manner (cognitive complexity) to weigh more than one treatment alternative and set of risks simultaneously, ability to abstract or hypothesize as yet nonexistent risks and alternatives, and ability to employ inductive and deductive forms of reasoning. [FN136]

Informed consent serves as the basis for all medical decision-making, but it is often in contention. For example, some scholars debate whether there can ever be full, informed consent, as risks to medical treatments can never be fully known. [FN137] We do not take up that question, but rest our definition of informed consent on Grisso and Vierling's conceptualization as we turn to the matter of minor consent statutes.

Minor consent statutes vary by state, but generally grant legal authority to minors to participate in medical decision-making through the informed consent process. [FN138] Minor consent statutes authorize minors to consent to medical treatments, and generally fall within two categories. The first type is prophylactic, granting minors--based on status-
-near absolute authority to consent to a broad range of medical treatments. [FN139] By example, in California, “minors authorized to give legal consent to medical treatments” under these statutes include:

a) Married (or divorced) minors (Family Code §§ 7002 and 7050 (e)(1));

b) Minors on active duty with the U.S. Armed Forces (Family Code §§ 7002 and 7050 (e)(1));

c) Minors emancipated by a court order (Family Code § 7120); and

d) Self-sufficient minors (minors fifteen years or older living away from home and managing their own financial affairs (Family Code § 6922)). [FN140]

Notwithstanding this broad, encompassing rule and the appearance of an absolute right, California law grants physicians authority, “with or without the consent of [a] ‘self-sufficient’ minor,” to “advise the minor’s parent or guardian of the treatment given or needed” if the physician has reason to know the whereabouts of the minor’s parent or guardian. [FN141] Other states engage similar protocols or constraints. [FN142] This raises a number of important questions, including whether the scope of a right is diminished by disclosure to a parent or guardian of the use of the right, and whether the ability to meaningfully engage in a right might be compromised by intimate disclosure. Are minors as likely to access the medical treatments enunciated within the scope of medical consent laws if disclosure to parents is likely or certain to occur? How should minors’ privacy interests be balanced against a parental notification regime? What are the values preserved and the risks presented when minors’ medical consent also includes the assent or acknowledgement of parents? The emotional and psychological dilemmas inherent in such scenarios further underscore the need for a sustained review and dialogue about these matters.

The second, and perhaps better known, type of minor consent laws authorizes specific health care decision-making. Expressly, minor consent legislation may grant minors the authority to consent to select narrow medical treatments involving pregnancy, contraception, abortion, contagious diseases, and sexually transmitted diseases. [FN143] Despite the narrowed authority to consent defined by this category, it attracts the most significant scrutiny, criticism, and controversy. Unlike the broader health care consent statutes like the one in place in California, which give the appearance that minors are the final arbiters of their health, these rules vest minors with full and often exclusive discretion in charting their medical decision-making. [FN144] In fact, in 1997, the California Supreme Court rejected parental disclosure in cases of abortion, opining that minors’ right to privacy, guaranteed by the state constitution, was at stake. [FN145] California voters, in semblance of agreement with the court, have “rejected two (2) subsequent state propositions that would have required parental notification related to abortion.” [FN146]

Significant difference of opinion remains as to whether either of these types of minor consent statutes explicitly grants rights to children. For example, Michelle Oberman argues that legislators are balancing interests when they enact medical consent statutes. [FN147] According to Oberman:

Minor treatment statutes reflect public consensus that ensuring minors’ access to the given treatment outweighs parental interests in controlling the care a child receives. The focus of such exceptions rests not on an assessment of maturity, but on a calculus that grants minors autonomy only when the treatment is relatively low risk, and when denying access may cause the minor (or the public at large) to suffer permanent harm. [FN148]

As we interpret Oberman’s arguments, they are not about the explicit content of minor consent statutes, which facially express intent to grant minors the ability to respond to important, sensitive medical demands. We do not take up that debate here, although as noted earlier, the quality of a right or unfettered access to a right may be burdened or diminished by intimate public disclosure. [FN149]
An important factor to consider, and the point that we argue deserves further unpacking and scrutiny, concerns a scholarly failure to acknowledge that competing social interests, and not exclusively minors’ interests, may drive the creation of minor consent statutes. The point is a subtle but important one to make. That is to say, legislators respond to the demands of their voting constituents, lobbyists, and sophisticated interest groups that can afford to establish a strong presence near their legislative offices and convey special interests through mechanisms to which even the lay public do not have access. Minors are at times the beneficiaries of broader health, financial, legal, and political interests.

Thus, granting rights to minors might be less about children's interests than about a societal interest in reducing the spread of communicable diseases. In the case of pregnancy and reproductive health care matters, the societal interest might be fidelity to the Constitution and the preservation of its capacity to address situations and status rather than the individual. In other words, when the California Supreme Court in American Academy of Pediatrics v. Lungren refused to establish a parental consent threshold for minors’ access to an abortion, its decision was as much about redressing social externalities as it was about protecting minors' intimate interests. [FN150]

C. Whose Right?

If we look closely, it appears that judicial and legislative efforts to extend the rights or interests of children are not about protecting the rights of children as individuals, but rather are guided by some other set of interests. So what can we glean and learn from judicial and legislative actions to expand the legal interests of minors? First, preserving and promoting family relationships matter to both courts and legislatures. Neither judges nor legislators have an interest in promoting the rights of children above those of their parents, nor placing the interests of children and parents in competition or contention. Second, in matters of criminal law, that which might be confused as a vigorous defense of children's rights could be explained by courts’ interest in and fidelity to preserving the integrity of the Constitution. That is, when courts appear to actively advance the rights of minors, including expanding the rights to representation, jury trials, and the like, child advocacy may not be their objective or principal focus. Rather, the courts' primary consideration might be the integrity of the law. Third, statutory privileges granted to children cannot be viewed as “full spectrum” rights as they are often predicated on the consent of parents. As such, informed consent of children may be its own fiction, with consent actually serving the purpose of assent. Fourth, and most ironically, neither courts nor legislatures have seriously taken up measuring capacity as a means to evaluate granting rights and privileges. Finally, glaringly missing from the language and discourse of children's rights, statutory rights appendices, and judicial opinions, is a sustained, thoughtful analysis about capacity and how to measure when children have the maturity to “handle” or assume the risks and duties of rights.

III. Adolescence, Separate from Childhood

Symbolic or key socialization characteristics capture the American cultural conception of what it means to be an adolescent: responsiveness to peer attitudes, moodiness, irritability, self-doubt, and perceptions of invincibility. [FN151] Those sensitive to the needs and demands of youth could dismiss these social observations and attitudes about adolescents as stereotypes and folklore, stressing that they fail to capture the full spectrum of adolescents. Such critiques would be correct. Interestingly however, social and medical descriptions of adolescence map closely with stereotypes about youth; the difference is that scientific literature explains them. This Section briefly explicates the medical contours of adolescence, advancing a key objective in this project, which is to better integrate medicine and law to understand adolescents as a population and to achieve healthier outcomes for youths.

In a collection of writings on adolescence, Jean Piaget identifies four separate and increasingly advanced stages of
mental awareness and psychological understanding that youth traverse on their way to heightened insight and judgment. [FN152] Piaget points out that the period of adolescence includes formal stages of cognitive development. The scale of development begins in early life, and adolescence is marked by the third and fourth stages of cognitive development. [FN153] The scale of adolescent development is chronicled by years: concrete operational development (seven to eleven years old) and formal, operational development (beginning at age eleven to fifteen years, and continuing into adulthood). [FN154]

According to Piaget, the progression from concrete operational development to formal operational thought is signaled by an adolescent transition from an inability to solve problems using abstract concepts and a lack of understanding of hypothetical risk, to an ability to process information through a framework of future orientation. [FN155] The scope of adolescent developments during this age period also includes recognition of the theoretical and potential impact of behavioral tasks and threats. [FN156]

The drive to medically understand youth development predates contemporary scholarship. With the publication of Adolescence: Its Psychology and Its Relation to Physiology, Anthropology, Sociology, Sex, Crime, Religion and Education in 1904, [FN157] G. Stanley Hall “introduced Americans to the idea that adolescence should be considered a distinct developmental category,” separate from childhood. [FN158] With this, the twentieth century concept of adolescence was established. To be clear, adolescence was not conceived of as a “vaguely defined time of gradual change.” [FN159] Rather, it captured a period of dynamic change in a youth's biological and emotional processes. [FN160] Major developmental tasks are identified within the period of adolescence, including “achieving independence” from P&Gs, “adopting peer codes and lifestyles, assigning increased importance to body image and acceptance of one's body,” and “establishing sexual, ego, vocational, and moral identities.” [FN161]

According to decades of medical studies, the rebellious posture often used to describe adolescence represents a normal sign of adaptive or adapting maturity within the individual, a way of enabling a young person to meet future demands and social challenges. [FN162] Researchers contend that common threads binding adolescents together also facilitate their description as a separate group, deserving unique appraisal and treatment in both social and legal contexts. [FN163] This point is particularly salient as it provides added justification for the law's treatment of youth in special private and public law contexts. The point we make here is that law should be driven by more than a hunch, and when available, medical science should guide legal scholars, legislators, and judges in their understanding of this cohort which may illuminate important values, such as giving greater sufficiency and weight to their decision-making or assessments. Turning to science--and deservedly with a keen eye [FN164]--might also inform us about when judges make poor or less informed decisions. [FN165]

Researchers illume several important common experiential values threading the biological and psychological experiences of youths together. These common, generalizable experiences relate to several principal medical concepts. [FN166] First, adolescence marks a time in which links with traditions are severed, and discontinuity with other generations (older and younger) manifests. [FN167] Second, during adolescence, peer group relationships assume greater relevance and value; they are prized over all other associations. [FN168] Third, symbols or hallmarks of the group gain universal acceptance, readily apparent in the language, dress, music, and visual art forms. [FN169] Fourth, researchers observe a prevalence of attitudes that stress an antipathy between self and adults. [FN170] Fifth, adolescents develop a critical and questioning posture toward the established social system, including their parents. [FN171] Mindful of overgeneralizations and the pitfalls of conflation, our intention is not to overstate youth development. Rather, from this starting point, we can advance the central debates in this Article and come to a more informed understanding about youth development and important capacities: moral, social, and intellectual.
To explicate, in the 1950s, J. Roswell Gallagher became the first physician to argue that adolescents have health care needs separate from both adults and children. [FN172] Gallagher is most noted as the “father” of the patient-physician relationship. He is also known as the key figure in advancing a different conception of youths, one in which adolescents were seen separately from their P&Gs and were considered capable of responding to their individual health care needs. [FN173] Treating the adolescent patient as an independent decision-maker, however, redefined the relationship between parents, children, and physicians, and promoted what is now standard: evaluating the best interest of the patient. [FN174] This medical movement was not in isolation, however, as the legal interests of children were evolving within the context of the law. [FN175]

IV. Capacity, Access, and Health Care Decision-Making

In the first half of this Article, we made the case that in the context of adolescent decision-making, the consideration of their rights deserves a more nuanced treatment in legal scholarship than it enjoys today. Rights in the abstract or rights that are conditioned on others’ assent may undermine the legitimacy and access to those rights legislatively enacted or judicially granted. We noted several distinct categories of “youth rights,” and expressed doubt that what appears to be a right actually functions as a right in many instances involving youth. Equally, the exceptions may not be in explicit service to youths. The driving force behind such rulemaking, we argue, may be steered by two factors: a fidelity to law (i.e. Constitutional guarantees, particularly in the criminal law domain, cannot become hostage to or diluted by racial animus, age discrimination, or other biases that prevent the full power of the law to be realized) and a concern for public health and safety.

We take up the latter of these issues in the second half of this Article to evaluate whether granting minors, in limited access, the “right” to utilize assisted reproductive technologies will cause negative externalities, which should be avoided. Part IV (A) examines minor consent statutes and (B) specifically considers rethinking minors' capacities.

*A. Minor Consent Statutes

The most politically charged health service delivered to adolescents is reproductive health care. Reproductive health care debates often pit private interests against broader social goals in what could be described as misaligned contestation. These issues become heightened in political milieus where politics on abortion become a litmus test for fidelity to political parties in electoral campaigns, a sign of progressive politics or archaic views, and a source of inflamed sensitivity within the broader society. Of course, these associations with abortion are reductive, and yet these are the cultural landmines that guard the gates of a more informed contemporary discourse on the reproductive health of women and adolescents.

In popular culture, political ideology on abortion supposedly tells us something critically important, something more than one's view on an incredibly sensitive, personal topic; instead in our cultural politics it serves as a crystal ball or window to the soul that illuminates moral values about the worthiness of a person. [FN176] But reproductive health care access and its menu of options are far more complicated and nuanced than that, and issues they raise deserve proper scrutiny untethered from the contentious debates on abortion politics.

The abortion debates are, however, given some discussion here to acknowledge the rocky landscape where reproductive health care is planted, and to further contextualize the milieu in which reproductive health care debates take place. For example, as we put forth this thought experiment about minors' access to ART, it should be acknowledged that some lawmakers fear that increasing access to services as innocuous as reproductive counseling will translate into an increase...
in sexual activity. [FN177] Despite such fears, the use of health clinics by adolescents seeking accurate information about pregnancy, contraception, and infection prevention has not been associated with a trend to earlier or increased sexual activity. [FN178] Nevertheless, from their inception, teen-friendly health clinics attracted strident criticism primarily on the grounds that reproductive health care for minors *538 interferes with parents' rights. [FN179] These matters are further complicated by statutory requirements that mandate parental notification from medical providers when teens seek certain types of reproductive health care or counseling. [FN180]

Currently, minor consent statutes operating in all fifty states grant adolescents the ability to consent to certain medical treatments. [FN181] Such statutes permit minors [FN182] to access select health services independent of a parent's consent or knowledge. [FN183] In addition to medical consent statutes, a few states have passed “mature minor” statutes that allow an unaccompanied adolescent who resides at home to consent to and receive health services upon a medical provider's assessment that the young person demonstrates the appropriate level of emotional and cognitive development to contemplate the risks and benefits of the medical procedure. [FN184] Services included under the umbrella of minor statutes are not uniform throughout all states, but most cover care for contraception, pregnancy, sexually transmitted infection, sexual assault, chemical dependency, mental health counseling, and medical emergencies. [FN185] In addition, federal legislation requires that all states providing family planning services via Title X of the Public Health Services Act ensure that reproductive health-related care is available to adolescents on a confidential basis. [FN186]

As stated earlier, minor consent statutes differ by state and also by scope. In narrow circumstances, for teens of a particular status, rights under the statutes might be expanded. For example, special designation may afford minors the ability to consent to an expanded level of health care. These include emancipated minors, particularly those adolescents serving in the armed forces, minors living away from home and responsibly managing their own finances, and in some states, teens who are married, pregnant, or *539 parents. [FN187] Across these spectra, in some states, teens are treated as having reached the age of majority (eighteen years) and are therefore granted the authority to consent to all health care services. [FN188]

B. Rethinking Minors' Capacity

Statutory regimes provide an important legal framework for understanding the contours of minors' health care rights. How rights become deployed and actualized in society is altogether a different matter. In her treatment of child-capacity norms, Tara Kuther advances an important finding: although the research is rare, empirical evidence indicates that the decision-making capacity of adolescents in certain instances may be similar to that of adults. [FN189] Indeed, some case law represents the judiciary's push in the same direction when confronted by the tough medical choices that some children must make.

In Younts v. St. Francis Hospital and School of Nursing, the Supreme Court of Kansas held that a minor could consent to surgical care for the injuries sustained during a visit with her mother at the hospital. [FN190] In that case, the court denied the girl and her mother's tort claim against the hospital and found that the plaintiff, who was seventeen years old at the time of the accident, possessed sufficient capacity and maturity to understand the nature and consequences of the surgical procedures required to repair her finger. [FN191]

Similarly, the Illinois Supreme Court struck down a lower court ruling that required a young Jehovah's Witness to submit to a blood transfusion. In In re E.G., the Illinois high court upheld a girl's refusal to submit to a physician-prescribed blood transfusion to treat acute nonlymphatic leukemia, on the grounds that a forced blood transfusion would violate her religious beliefs. [FN192] In reaching its holding, the Court acknowledged the State's interest in preserving life and its parens patriae authority to intervene in matters of public health and safety. [FN193] However, the Court affirmed
that a mature minor could exercise a right to consent to or refuse care despite the state’s interest in the sanctity of life, particularly where she grasped the consequences of accepting or rejecting treatment. [FN194]

*540 In re Chad Eric Swan involved a seventeen-year-old who suffered a head injury that caused him to exist in a persistent vegetative state. [FN195] The Supreme Court of Maine did not order the reinsertion of a feeding tube after evidence showed that Chad, prior to his injury, had verbally expressed to family and others that he would not want to be kept alive by artificial means. [FN196] This case, as well as the cases noted above, reflect the courts’ efforts to consider the capacity of minors in difficult medical decision-making circumstances.

Despite these and other similar cases, state laws granting minors the authority to consent to medical treatments can best be described as a patchwork system, and courts are inclined to defer such matters to the legislature so long as important constitutional rights are not at stake. [FN197] Nor is guidance from premier national medical organizations clear on these matters.

The American Medical Association (“AMA”) asserts that medical providers have an ethical duty to promote the autonomy of the minor patient. AMA guidance makes clear that, when a minor requests “contraceptive services, pregnancy-related care . . . or treatment for sexually transmitted disease, drug and alcohol abuse or mental illness, physicians must recognize that requiring parental involvement may be counterproductive to the health of the patient.” [FN198] And in instances where confidentiality is breached, AMA guidance provides that the reasons for the breach must be made known to the minor patient prior to outside disclosure. [FN199] As an organization, the AMA advocates for wider adoption and recognition of these approaches, also asserting a boldly affirmative stance on the importance of minors providing informed consent for medical, psychiatric, and surgical care. [FN200] In recognizing the importance of confidential care as requisite for improving the health of adolescents, the AMA works to guard against allowing parental consent or notification to become a barrier to the provision of health services. [FN201]

By contrast, the American Academy of Pediatrics (“AAP”) takes a decidedly more conservative and formalist approach to adolescent decision-making.*541 making than the AMA. [FN202] The AAP supports strong parental involvement in adolescent health care decision-making. In its policy statement on informed consent, the AAP’s Committee on Bioethics maintains that “[o]nly patients who have appropriate decisional capacity and legal empowerment can give their informed consent to medical care.” [FN203] For all other patients, “parents or other surrogates provide informed permission for diagnosis and treatment of children with the assent of the child whenever appropriate.” [FN204]

The AAP’s approach is not surprising, particularly if parents, rather than their children, are understood to be the consumers of pediatric medical services, even where they are not the patients. Parents are long-term, loyal consumers of pediatric services, generally establishing relationships at the birth of their child(ren) and continuing the relationship through adolescence. Indeed, the AAP reinforces the importance of parental involvement and consent even in clinical examples where the Academy directs physicians to obtain informed consent from an adolescent patient and concedes there is no additional requirement to obtain parental permission. [FN205] Such cases include:

(1) performance of a pelvic examination in a 16-year-old, (2) diagnostic evaluation of recurrent headache in an 18-year-old, (3) request for oral contraceptives for fertility control in a 17-year-old, (4) proposed long-term oral antibiotics administration for severe acne in a 15-year-old, and (5) surgical intervention for a bone tumor in a 19-year-old. [FN206]

The debate within the medical community regarding how best to interpret the law regarding a minor’s capacity and ability to consent in medical cases is captured by the vastly different perspectives of the AMA and AAP on this point. However, the problem is cyclical; physicians rely on legal signals from courts and judges on these matters, and judges
and legislators look to the medical profession for empirical guidance. [FN207] In neither of these realms are clear, consistent signals sent. Even if the law permits minors to access particular health care options without parental notification or consent, those options will appear more illusory than real if medical services legal rules are ignored or subordinate to medical custom. In cases where parents and children might conflict on the best course of treatment for the child, traditionally the weight of determination has been granted to a minor's parent or legal guardian. [FN208] Thus, despite the existence of statutory medical consent statutes in each state, and a smattering of cases that grant judicial weight and authority to minors' autonomous, health care decision-making, U.S. legal custom remains predicated on the assumption that minors lack the capacity to make autonomous decisions about medical treatment and intervention. [FN209] This is largely justified, according to some scholars, by judges' and legislators' fidelity to the best interest of the child standard. [FN210]

However, as Kuther argues, best interest standards are frequently vulnerable to subjective interpretations. [FN211] This may be especially true during the period of adolescence, where increasing self-interest and independence is common. [FN212] Further, as some scholars note, in the context of reproductive health care, strict adherence to an age of majority standard is arbitrary and problematic, precisely because it fails to take into account experience, maturity, and life circumstance. [FN213] Thus, locating a balance between parental autonomy, child capacity, and protecting the public health proves challenging in the context of providing health services and intervention. [FN214]

V. Minors' Access to ART: A Thought Experiment

Assisted reproductive technology is a multi-billion-dollar revenue generating industry. [FN215] The demands and conflicts in the field outpace the creation of laws to handle its thorniest aspects. Indeed, there is only one federal law, the Fertility Clinic Success Rate and Certification Act (“FCSCA”), [FN216] which governs this institution, and the FCSCA is most concerned with ART “success rates.” [FN217] Most of the current discussion surrounding the use of assisted reproductive technology references adult women who have delayed childbearing and are experiencing ovarian dysfunction due to the cumulative environmental exposure that comes with age. [FN218] However, the causes of infertility are multiple; some are endogenous and detected during adolescence, and some are a resulting side effect of life-saving treatment administered during adolescence. [FN219]

In Part V, we turn to teen reproduction. Subpart A briefly addresses foundational issues, including our shared views regarding the urgency of developing effective, efficient frameworks to address the pitfalls of teen pregnancy. Ironically, youth represent a category of biologically capable females least likely to require or seek assisted reproductive technologies; fertility declines as women age. [FN220] Teens and women in their early twenties represent the most fertile cohort of women. [FN221] However, those most inclined to utilize ART are professional, middle-class, middle-aged women. [FN222] Perhaps because of this visible demand cohort for ART services, the scholarly literature in this domain ignores why and if younger women may be drawn to the technology. Subpart B takes up that question.

A. Traditional Teen Pregnancy

Adolescent pregnancy and assisted reproduction represent two controversial and usually non-overlapping points of medical, legal, and social interest. Thus far, most academic medical literature addressing reproductive health care in the context of adolescence operates from a disease-prevention framework. In the U.S., much attention is given to reviewing age-appropriate practical aspects of harm reduction for the prevention of pregnancy and transmission of sexually transmitted infections. [FN223] A review of the most recent statistics regarding adolescent reproductive health provides validation for this focus of concern.
Rates for unintended pregnancy, birth, sexually transmitted infection, and pregnancy termination for U.S. teens are higher than in any other western industrialized nation. [FN224] And, despite steady declines in U.S. teen pregnancy and birth rates over the last three decades, declines halted from 2005 to 2007 and small, unanticipated increases in the rates were noted. [FN225] These data reaffirm the political and social urgency to address teen pregnancy in the United States, particularly in light of unsettling empirical data on the quality of life for teen mothers and their children.

From a macro perspective, unintended adolescent pregnancy and childbearing results in substantial social and economic costs to society, [FN226] including: (1) more than 9 billion dollars annually in tax money devoted to health care and foster care for babies born to teen moms, [FN227] (2) increased incarceration and detainment of children of teen parents, [FN228] (3) lost tax income due to lower educational attainment of adolescent mothers, [FN229] (4) lost tax revenue due to greater likelihood of high school dropout for children born to teen moms, [FN230] (5) higher unemployment rates of children born to teen moms, [FN231] and (6) secondary effects stemming from repetition of a cycle of teenage parenting. [FN232] These sobering statistics provide justification for a critical and sustained focus on teen pregnancy prevention, especially among U.S. adolescents.

B. ART Use in the Adolescent Context: The Science of Reproduction

This project puts forth a challenge tailored to adolescent rights, interests, and privileges. We asked whether adolescents enjoy “rights” in the same manner of adults, generally free from the burdens of third-party consent and absent public disclosures if they exercise their rights. These particular questions help to drill down beneath the generic language of rights to study the substance of a right or when rights possess real meaning. Our answers, revealed in earlier sections of the Article, suggest that the notion of children’s rights might be more illusory than real in most contexts and there are reasonable justifications for this. Reproduction, however, offers a unique lens through which to think about adolescent rights, particularly because of the context in which the point is studied. In instances where teens make reproductive health care decisions—even though there may be a societal interest in that teen being an informed, independent decision-maker—the authority to make those types of medical decisions is generally permissible.

Who benefits from, and who might be harmed, by adolescent access to ART? There are three relevant medical scenarios for which the right to consent might be evaluated and addressed herein: (1) adolescents suffering from cancer who will require surgery, chemotherapy, and/or radiation therapy, rendering them sterile during the process of treatment, or youth facing impending loss of fertility due to other medical conditions or illness; (2) adolescents as gamete donors for ailing relatives who wish to parent; and (3) minors living separately and financially solvent from P&Gs in a marriage relationship.

1. Contextual Relevance for Minors’ Access: Threatened Sterility During Adolescence

It is estimated that one in every 1,000 adults is a survivor of childhood cancer. [FN233] According to Lauren Neergaard, a health care reporter for the Associated Press, “about 10 percent of the 1.5 million people diagnosed with cancer [in 2010] were younger than 45, more than 15,000 of them under 20.” [FN234] While the harmful reproductive effects of toxic exposures from cancer treatments may be lower in younger children, overall, it is estimated that the probability of having a child after surviving cancer as a child, adolescent, or young adult is reduced by approximately one-half. [FN235] According to Dr. Teresa Woodruff of Northwestern University's Oncofertility Consortium, for girls the problem is compounded by “the prospect of menopause in their 20s or 30s.” [FN236] For some parents, saving their child's life through cancer treatments comes at a very difficult cost: their child's fertility. In an effort to spare their children from the high probability of infertility due to radiation exposure, a group of par-
ents have enrolled their children and even babies in a research trial to store stem cells that for boys will, they hope, produce sperm. For girls, a similar experiment, banking ovarian tissues, might lead to future reproductive possibilities. [FN237]

Despite personal concerns about risk of cancer in offspring, [FN238] among cancer survivors, there is preference for opportunity for genetically linked procreation. [FN239] Not unsurprisingly, Dr. Kim Nagel and colleagues assert that “[a]n important quality of life issue among the increasing number of cancer survivors is the ability to one day have their own family.” [FN240] In addition to cancer and cancer treatment, multiple other medical conditions during adolescence threaten fertility, including ovarian or testicular torsion in an adolescent with a solitary ovary or testis, and genetic conditions such as Turner’s syndrome, resulting in impending premature ovarian failure in females. [FN241] The use of ART in these settings of threatened sterility might facilitate the potential of genetic procreation in the future.

Options for ART, [FN242] which might prove relevant for this population, include semen, sperm, and oocyte cryopreservation, hormonal supplement during toxic medical treatment, and ovarian tissue banking. [FN243] For males, “[d]epending on the number and quality of cryopreserved sperm, [future] conception can be attempted by thawing the sample and using it for intrauterine insemination (IUI). Alternatively, with compromised seminal quality . . . more advanced techniques such as in vitro fertilization (IVF) with or without intracytoplasmic sperm injection” may be attempted. [FN244]

In the context of cancer treatment, research has shown that adolescents (and P&Gs) are interested in exploring options to preserve fertility. [FN245] In one study focusing on adolescent females (those receiving cancer therapy and those who had completed a course of therapy) and their P&Gs, Karen Burns and others found that adolescents and their parents were interested in participation in research procedures for preservation of fertility. [FN246] The same study revealed that both young and older adolescents (ten to fourteen years versus fifteen to twenty-one years) had prior knowledge of infertility, spent time thinking about the future, and were engaged enough to contemplate decisions that would have important impact on their adulthood. [FN247]

The challenge for legislators and judges is that biotechnological advancements often outpace the development of legislation, leaving judges and juries ill-equipped to insightfully and appropriately respond to trend-setting technological advancements, which change the culture of medicine and its delivery. These issues are all the more relevant when conflicts of interests may arise between parents and children, doctors and parents, and doctors and adolescent patients. Our goal, as stated ante is to illuminate a very likely reproductive future, and contemplate the role of law in that not too distant future by examining the “right” to assisted reproductive technology services for minors through the filters of autonomy and capacity.

2. The Adolescent as a Gamete Donor

In Black Markets: the Supply and Demand of Body Parts, the compelling and distressful narrative of organ donation is laid bare. [FN248] This story is more than just adults who are struggling to preserve their health. Young people require organs too, and their siblings are more likely to step in as donors than any other group. [FN249] In adult and adolescent transplants, siblings comprise the largest donor pool in the United States, followed by offspring. [FN250] The importance of family involvement cannot be understated as currently the demand for organs drastically outpaces supply.

Organ failure and organ transplantation are increasingly important matters for our society. Both at the adult and child levels, siblings occupy the largest population of direct organ donors in the United States. [FN251] Perhaps the most visible of examples is that of fertile couples who decide to have another child in hopes of providing a genetic match for a child who is suffering from a devastating illness that may be tempered by hematopoietic stem cell therapy, or donation of
other human leukocyte antigen-matched tissue. [FN252] Over the past fifty years, parents have called upon their children to provide organs and other biological tissues to siblings, ranging from kidneys to bone marrow. [FN253]

The extension of a “right” of donation to include an adolescent's ability to donate reproductive tissue that also potentiates life would seem plausible. *549 One could envision an older female sibling who is suffering from infertility and desires to have a child that is a genetic relative. In the absence of adult relatives who are available and willing to donate, an adolescent sibling who is able to donate eggs for the process of assisted procreation presents a powerful opportunity. Biologically, what is provided in this context serves a very different purpose than that of a kidney. Yet, the substantive question, easing someone else's pain through altruistic biologic donation, is the same. Both processes involve general anesthesia and present similar risks.

Conceptualizing capacity and autonomy in the reproductive sphere could add benefit to the broader contexts of organ and tissue donation, where children's autonomy is not well defined. Traditionally, courts defer to parents and engage in a weak best interest or substituted judgment inquiry to determine a child's willingness to donate. Neither test advances a focus on capacity, involving maturity, experience, intellectual, and emotional capacity, which are among the factors that we believe relevant to the assignment of adolescent “rights.” Historically, courts inquire into whether the child providing the organ or bone marrow would be psychologically benefitted by saving the life of her sibling. We reject that test based on its limited value and the potential for serious externalities to arise. The better option, we believe is to make a dual inquiry into adolescent capacity and autonomy.

3. Adolescents in a Marriage Relationship

The decision to parent is personal and intimate. Despite current U.S. trends that view marriage as an institution into which individuals enter during later life, there remain some communities for which marriage is sanctioned and encouraged during the teenage years. [FN254] In these communities, building a family carries as much, if not more interest, than the career one will craft, or the type of post-graduate education one will pursue. [FN255] For these families, relationships and building families are the priorities of life. For some feminists, adolescent marriage is unthinkable and unsettling. In many ways, the social expectations for women have shifted during the last four to five decades, because it was not that long ago that marriage and family building served as the (perceived) primary contribution of women to society. [FN256] But with these shifts, there remain strong cultural and community norms in favor of family building, which cannot be fully replaced by what feminism has to offer.

As in the prior examples above, the question posed here is whether adolescent marital use of ART is a category in which the language of adolescent*550 rights is appropriate or whether adolescent use of ART can be justified. In the context of marriage, a couple's decision to begin infertility treatment is protected by a right of privacy. Should that also apply to teens? Minor consent statutes do not address this issue, although many provide an age exemption for married minors to access medical and reproductive services. Reconciling statutory provisions for married minors within the broader realm of reproductive medicine and services could bring greater coherence to reproductive policy.

C. Why Focusing on Capacity Makes Sense

Earlier in this Article, we articulated why child-rights are not absolute. Moving the conversation of adolescent rights to measuring capacity would be a far better approach to granting rights both generally and in the specific area of ART usage. In the realm of ART, shifting the focus to capacity might open the door for some adolescent users and close the door for some others. Why might society desire to shift from arbitrary age rules associated with adolescent rights to a more substantive model? This subsection offers a few thoughts. First, we should want adolescents to demonstrate appropriate
ability to reason abstractly and to consider the future. Second, adolescents should understand cause-and-effect relationships. Third, adolescents should have the capacity to weigh risks and benefits of treatment versus no treatment. [FN257]

What does a focus on capacity achieve? The focus on capacity offers relief from the very important reality that contributed to the crafting of minor consent statutes; for many reasons, there are conditions for which a minor may not be able to engage P&Gs in decision-making, and penalizing the adolescent for this may not only compromise health, but also bring about other social harms.

In considering the case for minors' access to ART, it is necessary to advance the debate about teenage sex and reproduction beyond traditional notions of adolescent behavior and reproduction. Traditionally, the public conceives of teenage reproduction as something that affects young, vulnerable persons who naively engage in “adult” sexual behavior, somewhat if not fully unaware of the life consequences of their actions. [FN258] Routinely, teen pregnancy and sex are painted as “low-income” or racialized, focusing on racial minorities. [FN259] Through this lens, teen sex could be likened to the pull *551 of a roulette wheel--a high risk, low intelligence activity, with generally little benefit other than thrill seeking or a death wish.

We take a different approach to analyze the appropriateness of teenage access to ART, and rights more generally. As a medical and social matter, ART does not involve sex, and therefore neatly bypasses some of the concerns about teen reproduction, which are located in the sexual act.

For us, the more salient points in evaluating teen capacity include the measurement of adolescent capacity, and the use of adolescent capacity as a vehicle to inform the courts. By focusing on these points, a different role for capacity is defined, one which does not perpetuate conceptions of powerlessness, [FN260] nor simply rely on the importance of context and intimacy in relationships. [FN261] Instead, we suggest that adolescent rights might better be based on capacity. This should include establishing requisite knowledge, reasoning capability, and future orientation as a means to safely access a right to consent to assisted reproduction, which is a unique and specialized intervention. By arguing for measuring capacity as the most effective gateway to adolescents' rights to ART, we urge a more nuanced definition of the best interest standard.

Focusing specifically on adolescents' capacity for general health care decision-making, Dan Brock distinguishes between three broad categories: “(1) capacities for communication and understanding of information; (2) capacities for reasoning and deliberation; [and] (3) capacity to have and apply a set of values for conception of the good.” [FN262] Extending these guiding principles and the framework for informed consent set forth by Grisso and Vierling to the landscape for ART, we shape a few clear ideas about what minors' capacity might look like in this context. These ideas include: (1) an understanding of the nature of the condition necessitating usage of ART (i.e., reasonable understanding of germane medical terminology); (2) consideration and understanding of the consequences of ART and the responsibility for creating the potential for human life versus the consequences of no treatment and alternative options for parenting that do not involve manipulation of genetic material (i.e., adoption); (3) demonstration of a firm grasp of personal goals and values, including future interests, thus revealing the ability to envision oneself in the future; (4) an understanding of the risks and benefits of ART intervention versus no intervention (e.g., in the case of a married couple, greater risk of preterm birth given teenage pregnancy and the additional risk of preterm birth associated with ART); and (5) arrival at a decision*552 without the experience or perception of undue influence from external sources.

VI. Conclusion

Whether minors should have access to ART services pushes the envelope of children's rights and how we perceive
who should have primary or exclusive access to the technology. Bounded in those spheres are fixed, but perhaps inaccurate, notions about adolescents, adults, sex, and assisted reproduction. Unlike a project focusing on teen access to abortion or even contraception, this project makes a query about access to technology. Indeed, this is a project that has little to do with sex, as ART allows for postponed child rearing, and is facilitated without sexual intercourse.

The question of adolescent access to ART, nonetheless, may strike the inattentive reader as controversial scholarship or over-imaginative, impractical, dangerous work. On both points, this Article pushes back, urging a more engaged inquiry generally about the nature of child-rights, and more specifically, interrogates what we predict will be reasonable adolescent inquiries about the use of ART.

There is sufficient theoretical and empirical evidence to support an argument for a minors’ ability to make informed health care decisions. Furthermore, given advances in medical therapies, and expanding familial and social roles for adolescents, granting minors’ access to ART is not irrelevant. As such, we considered three categories of health need or concern in which minors’ capacity should be evaluated to determine whether they could have a “right of access” to ART. For example, (1) adolescents as cancer survivors or youths facing impending loss of fertility due to other medical conditions or illness; (2) adolescents as altruistic donors for ailing relatives who wish to parent; and (3) adolescents living separately and financially solvent from P&Gs in a marriage relationship. Rather than flat denial of these reproductive services to adolescents in those categories, we argue for greater nuanced and substantive inquiry.

[FN1]. Everett Fraser Professor of Law and Professor of Medicine and Public Health, University of Minnesota. I am grateful to the staff at the Harvard Journal of Law and Gender for inviting me to contribute to the journal. My deepest gratitude to Eliza Presson and Eleanor Simon for their graciousness, intellectual curiosity, and commitment to crafting a space for daring scholarship on issues defining and redefining women and girls. I am indebted to Nicole Elsasser, my dedicated and talented research assistant. I benefited from my co-author, Dr. Naomi Duke, and her on-the-ground interactions with teens at the medical centers that she services. I am grateful to her. This project reflects a culmination of prior and ongoing conversations with dynamic colleagues working on matters of reproduction, family, and the law. I am grateful to June Carbone, Mary Anne Case, Martha Nussbaum, Patricia Williams, Carol Sanger, Naomi Cahn, Glenn Cohen, Dorothy Roberts, Mary Simon, Susan Bandes, and Martha West.

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[FN2]. By interdisciplinary, this Article calls for resisting a purely doctrinal or medical examination of this topic. Rather, we call for a methodology that engages law, medicine, psychology, and culture to fully situate the thought experiment proposed by this article.

[FN3]. By capability we mean an examination of the extent of a minor’s abilities. By capacity, we refer to a minor’s cognitive and emotional power to fully understand or comprehend. In this context, we treat capacity as a matrix for evaluating minors’ wherewithal to understand the burdens, benefits, and nuances of reproductive decision-making.

[FN4]. Purposely, the analysis in this project moves beyond the recurrent refrain that contends that minor consent statutes serve as a means to usurp parental rights. This critique does not take up that important but polarized discourse.

[FN5]. Biotechnological advancements in the past two decades have transformed options for new and prospective parents. Options previously unavailable to their parents now present realistic possibilities for new parents, including umbil-


[FN7] Id.

[FN8] Cryopreservation technologies promise benefits for parents and their children. But these technologies also hold significant promise for private industry, including corporations that advertise, promote, and service cryopreservation products. See Cryo-Cell Reports Financial Results for Fiscal Year 2010, India Pharma News, Mar. 9, 2011, available at Factiva, Doc. No. ATPHAM0020110317e7390005m (“During the third quarter of fiscal year 2010, Cryo-Cell announced that S-Evans Biosciences (SEB), the Company’s exclusive Celle(SM) menstrual stem cell technology license partner in China has opened a new state-of-the-art laboratory operation and research & development (R&D) facility located in a Hi-Tech park designated to become an epicenter for stem cell and genomics R&D, cellular therapies and stem cell cryopreservation services. The exclusive Celle(SM) technology license agreement with SEB in China and Thailand is expected to provide Cryo-Cell with future royalty fees from the processing and annual storage of menstrual stem cells. Currently, SEB is conducting three pre-clinical studies for heart disease, type I diabetes and liver disease utilizing menstrual stem cells prepared in SEB and recently reported that the preliminary data are encouraging.”).


[FN10] To be clear, the purpose of this project is not to promote adolescent pregnancy or childbearing. To the contrary, a well developed literature and decades of government-sponsored studies paint a compelling portrait of the negative economic, physical, and emotional effects teenage pregnancy presents for young women. Cyclical, intergenerational poverty may result from teenage pregnancy, along with higher incidences of dropout access and poor health outcomes for the babies that result. Such empirical literature disproves any theories that teenage pregnancy should be treated on balance and as an equal to adult pregnancy.

[FN11] See, e.g., Ark. Code Ann. § 20-9-602 (2005) (specifying that any minor may consent to unspecified medical services if married, emancipated, incarcerated, or sufficiently intelligent to understand consequences of consent); Cal. Fam. Code § 6922 (West 2004) (noting that a minor may consent to unspecified health care if age fifteen years or older and lives apart from parents, and manages her own finances); Del. Code. Ann. tit. 13, § 707 (2009) (allowing that minors eighteen years or above may consent to unspecified medical services). In each of the foregoing examples, however, special exceptions are provided in the case of reproductive medicine wherein younger minors are able to seek reproductive


[FN15]. See Joseph W. Ozmer II, Note, Who's Raising the Kids: The Exclusion of Parental Authority in Condom Distribution at Public Schools, 30 Ga. L. Rev. 887, 909-11 (1996) (discussing concerns about parental inability to “opt out” of laws allowing condom distribution in public schools); Stephanie A. Zavala, Note, Defending Parental Involvement and the Presumption of Immaturity in Minors' Decisions to Abort, 72 S. Cal. L. Rev. 1725, 1745-48 (1999) (arguing that parental involvement in minors' abortion decisions is in minors' best interests); see also Nicole Phillis, When Sixteen Ain't So Sweet: Rethinking the Regulation of Adolescent Sexuality, 17 Mich. J. Gender & L. 271 (2011). Phillis argues that inconsistencies between age of consent requirements in statutory rape laws, which confer “consent-giving capacity” and enable adolescent sexual maturity, and parental involvement requirements for abortion services, which protect against minor immaturity, encourage impulsive adolescent sexual behaviors. Id. at 277-83, 290.

[FN16]. See Darryn Cathryn Beckstrom, Balancing Civic Values and Parents' Free Exercise Rights, 45 Gonz. L. Rev. 149, 161 (2010) (arguing that the state has expertise in the area of child abuse and should intervene rather than defer to parents when necessary to protect children).

[FN17]. See id.


[FN19]. Id. (noting a 1799 quote by British moralist Hannah More that suggested discourse about both women's and children's rights was an outgrowth of the revolutionary era); see also Barbara Bennett Woodhouse, The Courage of Innocence: Children as Heroes in the Struggle for Justice, 2009 U. Ill. L. Rev. 1567, 1569 (2009) (noting children's involvement in furthering civil rights, social justice movements, and their own “constitutional and human rights”).
The subordination of women and children dates back to antiquity, where “[p]arents, and especially fathers, made an initial decision whether their offspring would survive at all.” Margaret F. Brinig, The Effect of Transactions Costs on the Market for Babies, 18 Seton Hall Legis. J. 553, 560-61 (1994). Historically, although both parents held the discretion to abuse a child, since it was fathers who held as property all that was within their land and household, the right to discipline, punish, and even sacrifice children logically fell to them. See Hillary B. Farber, The Role of the Parent/Guardian in Juvenile Custodial Interrogations: Friend or Foe?, 41 Am. Crim. L. Rev 1277, 1279 (2004) (noting that presumptions about parents’ inclusion in juvenile custodial interrogations originate “in family law jurisprudence, where it is assumed that minor children are the property of their parents and that parents act in the best interests of their children”); Brian D. Gallagher, A Brief Legal History of Institutionalized Child Abuse, 17 B.C. Third World L.J. 1, 4-5 (1997) (grounding, in part, a historical analysis of child abuse by fathers in Biblical teachings, including Lot's offer to sacrifice his daughters, Jephthah's offering of his daughter as a “holocaust,” and others).

We do not address children as indentured servants or property of the state, which was common during the antebellum period. Children were involuntarily conscripted from poor houses and off the streets to be shipped to the new colonies in the United States. See Mary Ann Mason, From Father's Property to Children's Rights: The History of Child Custody in the United States 2 (1994) (quoting a seventeenth-century colonial law):

“If any of them shall be found obstinate to resist or otherwise to disobey such directions as shall be given in this behalf, we do likewise hereby authorize such as shall have the charge of this service to imprison, punish, and dispose of any those children ... and so ship them out for Virginia with as much expedition as may stand with conveniency.

The vast and elegant literature concerning the lives of women from the late-seventeenth century through the feminist movements that marked the mid-twentieth century reveals strict codes of conduct and social expectations for women that were woven into the law, thereby affecting the legal access and legal standing of women in civil and criminal matters. Legally, women were considered the “property” of their husbands, denied the opportunity to vote, and in some instances, denied the ownership of their property as husbands served as the masters of wives and all things belonging to their wives. See Margaret Valentine Turano, Jane Austen, Charlotte Brontë, and the Marital Property Law, 21 Harv. Women's L.J. 179 (1998) (examining Jane Austen's Emma and Charlotte Bronte's Jane Eyre for insights into the social and legal theories underlying coverture).

See, e.g., Joan Perkins, Victorian Women (1993). Perkins paints a gloomy, but undeniably accurate, portrait of life for women and girls in Victorian-era England. She notes that the majority of English girls were deprived the advantages of formal schooling for most of the nineteenth century. Id. at 27. State-supported education did not come into being until the late 1800s, and parents routinely paid for the private schooling of their sons and not their daughters. Id. at 27, 31-32. For those working class girls able to access schooling, much of what they were taught had less to do with intellectual matters than preparation for domestic service in the homes of their husbands and fathers. Id. at 49.

36 Ala. 466 (Ala. 1860).

Id. at 473.

Id. at 473-74 (citing James Clancy, A Treatise of the Rights, Duties, and Liabilities of Husband and Wife, at Law and In Equity 1 (1828)).

Villaret v. Villaret, 169 F.2d 677, 677-78 (D.C. Cir. 1948) (citation omitted) (“Criticism of the rule has been voiced, ... however ... it continues to be the almost unanimous judicial opinion that an unemancipated child may not maintain an action against a parent for a personal tort.”).

That husbands were exempt from prosecution for raping their wives further illustrates the deeply subordinate position of wives. See, e.g., Miss. Code Ann. § 97-3-99 (2010) (“A person is not guilty of any offense under Sections 97-3-95 through 97-3-103 if the alleged victim is that person's legal spouse and at the time of the alleged offense such person and the alleged victim are not separated and living apart ....”). In Davis v. Mississippi, a husband challenged his conviction of aiding and abetting in the gruesome rape of his wife. 611 So. 2d 906 (Miss. 1992). His defense, that he could not be prosecuted (and therefore convicted) if he raped his wife, was supported by the majority: “Davis is, of course, correct that if he had himself solely perpetrated this atrocity, then under Miss. Code Ann. § 97-3-99 he was immune from prosecution.” Id. at 912.

Sally F. Goldfarb, Violence Against Women and the Persistence of Privacy, 61 Ohio St. L.J. 1, 5 (2000). Privacy provides an important lens through which to evaluate the evolution of state protection of women's interests. Judicial deference to husbands was often justified on the basis that family matters deserve the protection of privacy, and therefore the state abjured intervention except in limited cases. Id. at 20-21. More recently, courts and scholars have taken to “privacy” as a means to exalt the independence and rights of women independent of their spouses and the State. These competing notions--within the feminist contexts--are not fully resolved in the literature. Indeed, an argument can be made that privacy is an evolving standard of justice, and that less State intervention is an important liberty interest. Of course, it must be recognized that such arguments were typically used to silence the interests of women within the broader domestic context.

By extension, women's reproductive decision-making also became subordinate to the desires of their husbands.


See Jill Elaine Hasday, Contest and Consent: A Legal History of Marital Rape, 88 Cal. L. Rev. 1375, 1381 (2000).

Connecticut v. Paolella, 554 A.2d 702 (Conn. 1989) (holding that under Connecticut law, a finding by the trier of fact that the “alleged offender and the victim were married” qualifies as an “acquittal,” exonerating “the alleged offender, regardless of the proof of forcible sexual intercourse”).

Quoting the trial court, which explained, “[t]he basis of the ruling as I indicated is the opinion of the Court that the spousal exemption is valid and the evidence indicates clearly ... that these parties were still legally married on that day, and it is for that reason I am granting the Judgment of Acquittal as to these two counts”).

Marital sexual assault exemption statutes draw arbitrary and irrational distinctions between actors for committing the same types of acts, in similar ways. Courts have responded, however, that promoting family harmony prevails over consideration of the individual. See e.g., Colorado v. Brown, 632 P.2d 1025 (Colo. 1981). In that case, the defendant, convicted of rape, unsuccessfully challenged the District Court judgment and the constitutionality of the marital sexual assault exception judgment by the District Court.

Id. at 1027.
[FN40]. See, e.g., Anonymous, 89 So. 462, 464 (Ala. 1921).

[FN41]. 74 Mass. 489, 491 (Mass. 1857).

[FN42]. Id.


[FN44]. Id. at 84-85 (“In the present case, notwithstanding the evidence regarding the same surname, not having been married to defendant, not having been outside the county, and living at defendant's home, a marriage between Vickie and someone other than the defendant might have existed. There was not sufficient proof of the non-marriage of Vickie to establish the nonmarriage element of the corpus delicti, and there was not a proper foundation for receiving the alleged confession in evidence.”).

[FN45]. Id. at 82-83. The father's written, but later retracted, confession provided a disturbing narrative to the trial:

The first act of sexual intercourse I had with Vickie was in the first part of May, 1953. It was in the morning of a weekday. I don't remember the exact day, but it was in the morning. My wife had gone to work and Vickie got in bed with me. We are a very close family, and the children often got in bed with me. I was fondling her and she asked me what I was doing. Then I asked her didn't she want me to do that. She said she didn't know. Then I went ahead and had an act of sexual intercourse. I don't think that I got more than about one-quarter of an inch of my penis in her that time. The second and third acts were complete, and I experienced an orgasm on all three. It is possible that her child is mine but I'm not sure. Signed, Arvie D. Henry. 3:50, 1/28/54. Newton detectives, Officer Brantley and Hannibal.

Id.

[FN46]. Hasday, supra note 34, at 1381.


[FN49]. Id.; see also Colo. Rev. Stat. Ann. § 18-3-409 (West 1973) (“(1) The criminal sexual assault offenses of this part 4 shall not apply to acts between persons who are married, either statutorily, putatively, or by common law.”); Conn. Gen. Stat. Ann. § 53a-65(2) (exempting marital rape from prosecution by limiting the definition of “sexual intercourse” to “persons not married to each other”) (West 1958); Miss. Code Ann. § 97-3-99 (West 1972) (“A person is not guilty of any offense under sections 97-3-95 through 97-3-103 if the alleged victim is that person's legal spouse and at the time of the alleged offense such person and the alleged victim are not separated and living apart.”); Mont. Code Ann. § 45-5-503 (1981) (“Sexual intercourse without consent. (1) A person who knowingly has sexual intercourse without consent with a person of the opposite sex not his spouse commits the offense of sexual intercourse without consent.”) (emphasis added); Okla. Stat. tit. 21, § 1111 (1951) (defining rape as “an act of sexual intercourse accomplished with a female, not the wife of the perpetrator ...”).


[FN51]. Striking images of duties reversed in this realm are informative. For example, images of the Victorian nurse as a heroic, powerful, and healthy woman standing in contrast to sickly male patients portrayed a notable gender role reversal.
in the mid-nineteenth century. See, e.g., Catherine Judd, Bedside Seductions: Nursing and the Victorian Imagination, 1830-1880 6 (1998) (comparing the Victorian nurse to class, gender, and sexuality issues associated with “the fallen woman”).

[FN52]. See 2 William Blackstone, Commentaries *442-45 (discussing the “chief legal effects of marriage during coverture”).

[FN53]. See id.

[FN54]. Id. at *442.

[FN55]. For example, in the United States, propertied men who were considered mentally ill were given jury trials to preserve and promote due process prior to a civil incarceration. See, e.g., Mark E. Neely, Jr. & R. Gerald McMurtry, The Insanity File: The Case of Mary Todd Lincoln 19 (1993). However, women and girls could be committed to mental health facilities with barely more than a husband or father's complaint and a third party affirmation. Id.

[FN56]. See Dorothea L. Dix, To The Honorable The Legislature of The State of New York, in On Behalf of the Insane Poor 1, 47 (1971).

[FN57]. See Brindley v. Brindley, 25 So. 751, 752 (Ala. 1899) (holding that the duty to provide marital support “is not absolute. [The husband] is bound to support her at the common home, and not under another's roof .... Hence, if she abandons her home without cause, the right to support from her husband at once ceases”).

[FN58]. Id.


[FN60]. Turano, supra note 22, at 183.

[FN61]. 70 N.C. 60, 61 (N.C. 1874). Note, however, that North Carolina was the last state to modify its marital rape exemption statute.

[FN62]. Id. at 61-62.

[FN63]. Abbott v. Abbott, 67 Me. 304 (Me. 1877).

[FN64]. Id. at 306.

[FN65]. See generally Ralph Reisner & Christopher Slobogin, Law and the Mental Health System: Civil and Criminal Aspects 596-604 (2d ed. 1990) (noting the ease with which arbitrary confinement could take place).

[FN66]. Tamara Myers, The Voluntary Delinquent: Parents, Daughters, and the Montreal Juvenile Delinquents' Court in 1918, 80 Canadian Historical Rev. 242, 242 (1999) ("[H]undreds of delinquent daughters were brought before Montreal's Juvenile Delinquents' Court, which opened in 1912. Their 'crimes' consisted primarily of defying parental authority over contributions to the family economy and housework, and their seemingly precocious attitude towards sexuality.").

[FN67]. See Peter De Cruz, Comparative Healthcare Law 117 (2001) ( "[H]istorically, children have been regarded as coming within the category of those who are legally incompetent to give consent, being unable, at least in the early years of their life, to decide on what medical treatment they should have ...."); Daphne Blunt Bugental & Joan E. Grusec, So-


[FN69]. See Villaret v. Villaret, 169 F.2d 677, 677-78 (D.C. Cir. 1948) (citations omitted); Mary Ann Mason, supra note 68, at 6 (stating that parental common law rights suggest to some legal historians that that law treated children as property).

[FN70]. Hewellette v. George, 9 So. 885, 887 (Miss. 1891) (holding that the doctrine of parental immunity does not apply in automobile accident cases, where a minor is injured as a result of his or her parent's negligent operation of the motor vehicle), abrogated by Glaskox ex rel Denton v. Glaskox, 614 So. 2d 906 (Miss. 1992).

[FN71]. 79 P. 788, 788 (Wa. 1905) (“The rule of law prohibiting suits between parent and child is based upon the interest that society has in preserving harmony in the domestic relations, an interest which has been manifested since the earliest organization of civilized government, an interest inspired by the universally recognized fact that the maintenance of harmonious and proper family relations is conducive to good citizenship, and therefore works to the welfare of the state.”); see also Child Abuse: A Global View 243-44 (Beth M. Schwartz-Kenney, Michelle McCauley, & Michelle A. Epstein eds., 2001) (describing societal responses to child abuse in the Unites States in the nineteenth and early-twentieth centuries); Norrie Clevenger, Note, Statute of Limitations: Childhood Victims of Sexual Abuse Bringing Civil Actions Against Their Perpetrators After Attaining The Age of Majority, 30 J. Fam. L. 447 (1991) (summarizing recent cases involving childhood incest).

[FN72]. Roller, 79 P. at 789.

[FN73]. Id. at 788. Her father had already been convicted of rape by the time his daughter brought the tort action. Id.

[FN74]. Id. at 789.

[FN75]. Id.

[FN76]. Id.

[FN77]. See Mason, supra note 69, at 6 (noting history of parental common law rights with respect to their children); see also Michele Goodwin, A View From the Cradle: Tort Law and the Private Regulation of Assisted Reproduction, 59 Emory L.J. 1039, 1076-79 (2010) [hereinafter Goodwin, A View From the Cradle] (discussing the intra-familial immunity doctrine with respect to children).

[FN78]. See, e.g., Villaret v. Villaret, 169 F.2d 677, 679 (D.C. Cir. 1948) (dismissing a negligence action brought by a child against his mother).

[FN79]. See Goodwin, A View from the Cradle, supra note 77, at 1076 (“Permitting claims brought by children against their parents would turn social order on its head.”).

[FN80]. See id. at 1078-79.

[FN81]. Elizabeth Bartholet, Ratification by the United States of the Convention on the Rights of the Child: Pros and
Cons from a Child's Rights Perspective, 633 Annals 80, 86 (2011) (noting that by contrast, the “CRC makes it clear that children have affirmative rights, not just negative rights to keep the state from interfering in their autonomy”). Id. at 85.

[FN82]. Id. at 86.

[FN83]. Id.

[FN84]. See id; see also Roller v. Roller, 79 P. 788, 788 (Wash. 1905) (arguing that the public policy of family unity justifies parental immunity), distinguished in part by Borst v. Borst, 251 P.2d 149 (Wash. 1952) (holding that a minor child can sue his parent for a tort resulting in personal injuries, where the father, operating his business vehicle for business purposes ran over his child, on the grounds that at the time he hit his son, the relationship between the two of them was not that of father and child, but of driver and pedestrian).


[FN86]. See Jennifer Albright, Comment, Free Your Mind: The Right of Minors in New York to Choose Whether or Not to be Treated with Psychotropic Drugs, 16 Alb. L.J. Sci. & Tech. 169, 171 (2006) (arguing that more weight should be given to the preference of a child to receive psychotropic drugs).


[FN89]. See Jennifer Ann Drobac, I Can't to I Kant: The Sexual Harassment of Working Adolescents, Competing Theories, and Ethical Dilemmas, 70 Alb. L. Rev. 675 (2007) (formulating a framework to develop legal protections against sexual harassment and abuse against adolescents at work).


[FN93]. See Emily Buss, Constitutional Fidelity through Children's Rights, 2004 Sup. Ct. Rev. 355, 369 (arguing that procedures “developed to secure meaningful participation and accurate decision-making for adults in criminal court” are
a poor “constitutional fit” for children in juvenile court); Sandra M. Ko, Comment, Why Do They Continue to Get the Worst of Both Worlds? The Case for Providing Louisiana’s Juveniles with the Right to a Jury in Delinquency Adjudications, 12 Am. U. J. Gender Soc. Pol’y & L. 161, 163 (2004).


In short, the conventional wisdom rests on the efficacy of the distinction between government action and inaction. Government has no obligation to act, except, in limited circumstances, to ensure that no harm is caused by its previous actions. In order to make the distinction between action and inaction, it becomes crucial to determine what constitutes a governmental act, to distinguish the acts of government from those of private persons, and to delineate the circumstances in which the government has caused harm. Therefore, the distinction between action and inaction reappears in other forms: the public/private distinction; the penalty/subsidy distinction; and the rules of causation. Part II examines the application of the action/inaction distinction in its various forms, and seeks to demonstrate that it is unworkable and misguided.

Id. at 2278.

[FN96]. Id. at 2274.

[FN97]. Id.

[FN98]. DeShaney, 489 U.S. at 201-03.

[FN99]. Id. at 193.

[FN100]. Id. at 202 (“A State may ... impose such affirmative duties of care and protection .... [But because] the State has no constitutional duty to protect [the minor] against his father's violence, its failure to do so--though calamitous in hindsight--simply does not constitute a violation of the Due Process Clause.”) (emphasis added). Similarly in Jackson v. Byrne, the Seventh Circuit refused to recognize the positive right of two children to fire protection in a case where the children died in a conflagration when firefighters located directly across the street from the blaze did not respond. 738 F.2d 1443 (7th Cir. 1984).

[FN101]. Bandes, supra note 95, at 2278.

[FN102]. Id.

[FN103]. DeShaney, 489 U.S. at 195.

[FN104]. Id. at 195 n.2.

[FN105]. More recently in Town of Castle Rock v. Gonzales, the Supreme Court reversed a Tenth Circuit Court of Appeals decision, which found a property interest in the enforcement of a restraining order in a case where the plaintiff-mother claimed that the city violated the Fourteenth Amendment Due Process Clause when police officers failed to act on repeated reports that the children's father had kidnapped them, which resulted in the children's murders. 545 U.S. 748 (2005). According to Justice Scalia, Colorado law did not require enforcement of restraining orders; the police had discretion in their enforcement of the statute. Id. at 764-66; see also, Sacramento v. Lewis, 523 U.S. 833 (1998) (holding that a police officer's reckless conduct during a car chase, which led to the injury of respondent, did not give rise to liab-
ility for a due process right to life); Doe v. Milwaukee, 903 F.2d 499 (1990) (holding that minors and their guardians do not have a constitutionally protected property interest to have a department of social services investigate claims of child abuse).

[FN106]. See Gonzales, 545 U.S. at 764.


[FN109]. Id. at 363-64.

[FN110]. 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

[FN111]. Id. at 36-37.

[FN112]. Id. at 33.

[FN113]. Id. at 56.

[FN114]. Id. at 55.

[FN115]. In a later education case, Tinker v. Des Moines Independent Community School District, the Court achieved a similar tone despite apparent differences between the cases. In Tinker, several children were suspended because they wore black armbands to school in protest of the Vietnam War and in violation of school policy. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969). In both Tinker and Gault, the Court emphasized its interest in upholding constitutional principles, including balancing the rights of individuals against state interference. Id. at 513-14.


[FN117]. Id. at 317.

[FN118]. Id. at 318.

[FN119]. Id. (noting that our social norm should be children growing up in families rather than “governmental institutions”).

[FN120]. Id.; see also Addington v. Texas, 441 U.S. 418, 423 (1979) (noting that criminal standards of proof are higher than civil cases because of defendant’s interest in avoiding erroneous judgment); In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (emphasizing society’s interest in avoiding erroneous convictions).

[FN121]. Teitlebaum, supra note 107, at 178-79.


[FN123]. See, e.g., Jeremy H. by Hunter v. Mount Leb. Sch. Dist., 95 F.3d 272, 278 (3d Cir. 1996) (finding that IDEA sets forth a positive right to a ‘free appropriate public education’); White v. Rochford, 592 F.2d 381 (7th Cir. 1979)
(police officers violated due process when, after arresting the guardian of three young children, they abandoned the children on a busy stretch of highway at night); American Civil Liberties Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 439 F. Supp. 2d 1242 (S.D. Fla. 2006) (granting plaintiff’s motion for injunction to prevent the censoring of books on Cuba, finding a positive right for students to receive books and information), rev'd 557 F.3d 1177 (11th Cir. 2009).

[FN124]. See Teitelbaum, supra note 107, at 178 (suggesting that children's rights assume parental obligations).

[FN125]. Id. at 180-81.

[FN126]. Compare Colo. Rev. Stat. Ann. § 13-22-101(1)(d) (West 2005) (“[E]very person, otherwise competent, shall be deemed to be of full age at the age of eighteen years or older for the following specific purposes: ... To make decisions in regard to his own body and the body of his issue ... to the full extent allowed to any other adult person.”) with Colo. Rev. Stat. Ann. § 13-22-102 (West 2005) (granting physicians the right to treat minors for “addiction to or use of drugs” without parental consent). Without scientific data and social reports to inform us about the cognitive and social capacities of children, it is possible to overestimate the maturity of children to perform certain tasks without unnecessarily increasing risks to others. On the other hand, it could be that kids are better positioned to handle certain tasks more efficiently and effectively at an earlier age.

[FN127]. Teitelbaum, supra note 107, at 182.

[FN128]. Id.

[FN129]. Id. at 182-83.

[FN130]. See Tara L. Kuther, Medical Decision-Making and Minors: Issues of Consent and Assent, 38 Adolescence 343, 344 (2003) [hereinafter Kuther, Medical Decision-Making and Minors] (“Informed consent only can be given by those with legal entitlement and decisional capacity, otherwise a parent or guardian must provide permission.”) (emphasis added).


[FN132]. Id. at 415.

[FN133]. Id. at 416.

[FN134]. Id. at 418.

[FN135]. Id.

[FN136]. Id.


[FN138]. See, e.g., Cal. Fam. Code § 6925(a) (West 2004) (“A minor may consent to medical care related to the prevention or treatment of pregnancy,” subject to parental consent to obtain an abortion or be sterilized); 57 Op. Cal. Atty. Gen. 28 (1974) (concluding a minor may obtain an abortion, under statute, “without parental consent as long as the minor has sufficient maturity to give an informed consent”).

Under this type of consent regime, minors are granted full authority to consent to medical treatments with the exception of those treatments that are highly invasive or pose irreversible risks. See Minor Consent to Treatment, California Medical Association Foundation, http://www.thecmafoundation.org/projects/HPV/ProviderResources_Minor.aspx (last visited Feb. 26, 2011).

The California Medical Association warns, however, that “a physician should be cautious in contact[ing] the minor’s parent or guardian, since disclosure of a minor’s medical information may constitute an unlawful invasion of the minor’s right of privacy.” Id.

See, e.g., Kan. Stat. Ann. § 38-123 (West 2007) (“The consent of a parent or guardian of an unmarried pregnant minor shall not be necessary in order to authorize hospital, medical and surgical care related to her pregnancy, where no parent or guardian is available.”) (emphasis added).

Minors would only need to be capable of giving informed consent. See, e.g., supra notes 11-13

The case we build here is not to suggest that some medical disclosures are not in society's interest in some circumstances. Tracking incest or sexual violence against girls may shift the balance between respect for a minor's privacy and the paternalistic, societal goal of eliminating or combating pedophilia, incest, rape, and sexual abuse.

Lungren, 940 P.2d at 832 (Kennard, J., concurring) (“[T]he benevolent appearance of parental involvement laws is deceiving; the laws have serious adverse effects and yield few benefits for children or society.”).


See Jean Piaget, The Moral Judgment of the Child 16 (Marjorie Gabain trans. 1932) (“From the point of view of the practice or application of rules four successive stages can be distinguished.”).

See id. at 32-41.


See id. at 130-51.

See Don H. Hockenbury & Sandra E. Hockenbury, Psychology 394 (4th ed. 2006) (“[T]he young person becomes capable of applying logical thinking to hypothetical situations ....”).


[FN159]. Id.

[FN160]. Id.


[FN163]. Cf. Roper v. Simmons, 543 U.S. 551, 572-73 (2005) (holding that the Constitution forbids the death penalty for offenders under the age of eighteen: “The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability”).

[FN164]. We also acknowledge the ways in which judges and legislators selectively adopt medical science to promote negative social platforms and agendas, such as eugenics, to perpetuate stereotypic and medically unfounded assertions about the intellectual deficiencies of some racial minorities, or grant the unjustified elevation of other racial groups as intellectually and morally superior formal legal weight. It was thought crime could be cured through science: sterilization, lobotomy, or trephined. See, e.g., Buck v. Bell, 274 U.S. 200, 207-08 (1926) (holding that state-imposed sterilization of the mentally ill was not unconstitutional); see also Martin S. Pernick, The Black Stork: Eugenics and the Death of “Defective” Babies in American Medicine and Motion Pictures Since 1915, 83 (1996) (“In 1908 a Dr. Cronin reportedly cured delinquent New York public school students by removing their adenoids. In 1914 a Philadelphia court ordered a juvenile offender to be trephined to cure his criminal behavior. The following year, a Brooklyn judge, overriding parental opposition, ordered a nine-year-old's tonsils removed as a cure for truancy.”); Harriet A. Washington, Medical Apartheid (2006) (documenting in urgent detail the manner in which scientists, doctors, and government officials have historically colluded in exploiting African Americans as research subjects). Important historical landmines as described above deserve continued attention from scholars, and are addressed in the author’s prior literature. The point to be emphasized here is that medical science can be a useful tool to help us understand youth development, but we encourage mindful, vigorous interrogation of science as should be expected in all intellectual discourses.

[FN165]. See Skinner v. Oklahoma, 316 U.S. 535, 545 (1941) (Stone, J., concurring) (“Science has found and the law has recognized that there are certain types of mental deficiency associated with delinquency which are inheritable. But the State does not contend--nor can there be any pretense-- that either common knowledge or experience, or scientific investigation, has given assurance that the criminal tendencies of any class of habitual offenders are universally or even generally inheritable.”); Lois A. Weithorn, Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates, 40 Stan. L. Rev. 773, 773-74 (1988) (concluding that institutionalization has become a more prevalent treatment for vulnerable youths).

[FN167]. Id. at 40.

[FN168]. Id.

[FN169]. Id.

[FN170]. Id.

[FN171]. Id.


[FN173]. Id. at 100.

[FN174]. Id.

[FN175]. Id. at 156.

[FN176]. See Elizabeth Reilly, The “Jurisprudence of Doubt”: How the Premises of the Supreme Court's Abortion Jurisprudence Undermine Procreative Liberty, 14 J.L. & Pol. 757, 758-59 (1998) (“The political process cannot provide for constructive confrontation of the issues of procreation and abortion. The failure of politics and public discourse is due in part to unstated negative assumptions about the moral, social and political value of procreative liberty [and] about women and their moral capacity to make decisions ....”).


[FN179]. See Prescott, supra note 172, at 100.

[FN180]. E.g., Md. Code Ann., Health-Gen. § 20-103 (LexisNexis 2009) (requiring a physician to notify minor's parent before performing an abortion); see also 750 Ill. Comp. Stat. Ann. 70/5 (West 2010) (“Parental consultation is usually in the best interest of the minor and is desirable since the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related.”). See generally James A. Morone et al., Back to School: A Health Care Strategy for Youth, 20 Health Affairs 122 (2001) (outlining debate regarding minors’ access to care in the school setting).


[FN183]. E.g., supra notes 12-13; Morone, supra note 180.

[FN184]. Lerand, supra note 181, at 377.

[FN185]. Id.

[FN186]. Id.

[FN187]. See, e.g., Md. Code Ann., Health-Gen. § 20-103 (LexisNexis 2019) (creating exception to parental notice requirement if unmarried minor does not live with a parent or guardian and reasonable effort was made to locate parent).


[FN189]. Kuther, Medical Decision-Making and Minors, supra note 130, at 349-50 (citing studies comparing the decision-making competencies of adolescents and adults, specifically with respect to evaluation of risk and consequences).


[FN191]. Id.


[FN193]. Id. at 327.

[FN194]. Id. at 328.

[FN195]. 569 A.2d 1202, 1203 (Me. 1990).

[FN196]. Id. at 1205.

[FN197]. Cf. Kuther, Medical Decision-Making and Minors, supra note 130, at 344-46 (revealing the complexity of informed consent in the context of pediatrics and suggesting that state legislation has become the primary vehicle for providing guidance in this area).


[FN199]. Id. Breach of confidentiality is medically appropriate in cases in which abuse/neglect of a patient is discovered, or in cases in which the patient presents a danger to self or others (i.e., suicidal or homicidal threat); cf. Committee on Bioethics, Informed Consent, supra note 188, at 315.


[FN202]. See Comm. on Bioethics, Informed Consent, supra note 188.
[FN203]. Id. at 314.

[FN204]. Id.

[FN205]. Id. at 317 (encouraging doctors to obtain informed consent from adolescent patients who have “decision-making capacity and the legal authority” to make medical decisions and asserts no additional parental permission is required in those circumstances).

[FN206]. Id.

[FN207]. Compare Roper v. Simmons, 543 U.S. 551, 573-74 (2005) (relying on data from the American Psychiatric Association in discussion about whether a juvenile offender exhibits mere “transient immaturity” or “irreparable corruption”) with Kuther, Medical Decision-Making and Minors, supra note 130, at 344-46 (suggesting that health care providers look to state legislatures for guidance regarding minors' capacity to give informed consent).

[FN208]. See, e.g., 750 Ill. Comp. Stat. Ann. 70/5 (West 2010) (asserting that parental consultation provides the wisdom that “immature minors often lack” when it comes to abortion).

[FN209]. Sari Keanne Kives & Deborah Robertson, Adolescent Consent in Reproductive and Sexual Health Decision-Making: Should There Be an Arbitrary Age of Consent or Should It Be Based on ‘Evolving Capacities of the Child’?, 21 J. Pediatric & Adolescent Gynecology 47, 49-50 (2008). Resonant with this assumption is the premise that parents and guardians are “entitled to provide permission because they have legal responsibility and, in the absence of abuse or neglect, are [presumed] to act in the best interests of the child.” Kuther, Medical Decision-Making and Minors, supra note 130, at 344.

[FN210]. See, e.g., Mary Ann McCabe, Involving Children and Adolescents in Medical Decision Making: Developmental and Clinical Considerations, 21 J. Pediatric Psychol. 505, 507 (1996) (“[W]hen children were given protection by the Constitution, parents still maintained a right for family autonomy. The prevailing spirit ... is that parents are the most motivated and capable people to act in their children's best interests ....”).

[FN211]. Tara L. Kuther, Competency to Provide Informed Consent in Older Adulthood, 20 Gerontology & Geriatrics Educ. 15, 18-19 (1999) (suggesting that those in the legal system may evaluate competence based on values instead of functional ability).

[FN212]. Radzik, supra note 161, at 53.

[FN213]. See Kives & Robertson, supra note 209, at 49.

[FN214]. Kuther, Medical Decision-Making and Minors, supra note 130, at 353 (noting that physicians are given a tremendous amount of responsibility to determine whether a minor is capable of providing consent).


[FN221]. See id.

[FN222]. Cf. Vaclav Insler & Bruno Lunenfeld, Efficient Classification of Infertility, in The Art & Science of Assisted Reproductive Techniques (ART) 15, 16 (Gautam N. Allahbadia & Rita Basuray Das eds., 2003) (noting the trend for women to delay pregnancy to pursue their careers and that the percentage of IVF patients over forty “increases constantly”).


[FN226]. The measured impact of unplanned pregnancy and childbirth on teens and their offspring remains even when taking into account factors that predispose an adolescent to become pregnant, such as being raised in poverty, having parents with low educational attainment, growing up in a single-parent household, and having a poor connection to and performance in school. Singh & Darroch, supra note 224, at 22.


[FN228]. Id. at 16.

[FN229]. Id. at 3.


[FN231]. Id. at 328-30.
[FN232]. Id. at 17.


[FN235]. Knopman et al., supra note 233, at 492-93. Because oocytes are arrested in a primordial stage and spermatogenesis is limited prior to puberty, sensitivity to toxic exposures--such as that of cancer chemotherapy and radiation--may be lessened in the pre-adolescent stage of development. Id. at 490-91.

[FN236]. Neergaard, supra note 234.

[FN237]. Id.

[FN238]. Knopman et al., supra note 233, at 493-94. Among those experiencing remission or cure of their cancer, fertility preservation techniques and/or subsequent pregnancy resulting from ART has not been found to increase the risk of recurrent cancer, and, outside of heritable genetic syndromes, cancer in the resulting offspring. Id. at 494-95; see also Mary E. Fallat & John Hutter, Preservation of Fertility in Pediatric and Adolescent Patients with Cancer, 121 Pediatrics e1461, e1466 (2008) (finding no increased risk of recurrent malignancy in relationship to ART procedures for cancer survivors).

[FN239]. See Leslie R. Schover et al., Having Children After Cancer: A Pilot Survey of Survivors' Attitudes and Experiences, 86 Cancer 697, 702 (1999) ( "Despite concerns about health risks to offspring, few [cancer patients planning to have children] were ready to consider parenting a nonbiologic child as an alternative.").

[FN240]. Kim Nagel et al., Collaborative Multidisciplinary Approach to Fertility Issues Among Adolescent and Young Adult Cancer Patients, 15 Int'l J. Nursing. Prac. 311, 315 (2009). Perhaps reassuringly, for the emerging practice models addressing infertility treatment for minors, conversations centered on adolescent reproductive technology for the cancer survivor call for shared work among multidisciplinary teams of oncologists, nurses in both specialties of oncology and infertility, social workers, reproductive endocrinology and infertility specialists, andrologists, and embryologists. Id at 312. This is unlike the predominant descriptions of business models used when referring to adult focused reproductive technologies. See Thomas H. Murphy, Money Back Guaranties for IVF: An Ethical Critique, 25 J.L. Med. & Ethics 292 (1997).


[FN242]. There are risks associated with the use of ART, such as harm from ovarian stimulation or injury to organs during gamete retrieval. However, in the adolescent population, there are fewer congenital anomalies resulting from offspring produced by the eggs preserved from younger women as compared to what the CDC reports for women accessing ART after reaching the threshold of advanced maternal age (thirty-five years or older). See, e.g., Centers for Disease
Control, 2006 Assisted Reproductive Technology (ART) Report: Section 5--ART Trends, 1996-2006 (2009), http://www.cdc.gov/ART/ART2006/section5.htm; Cheryl Wetzstein, American Women Giving Birth Later; College, Careers Defer Motherhood, Wash. Times, Dec. 12, 2002, at PA08 (reporting that in the last three decades, from 1970 to 2000, the average age for American women to have their first birth has increased from twenty-two to twenty-five); Johannes L.H. Evers, Female Subfertility, 360 Lancet 151 (2002) (noting that the two main factors that determine subfertility is the duration of childlessness and the age of the woman).


[FN244]. Nagel et al., supra note 240, at 313.

[FN245]. Burns et al., supra note 243, at 354; see also Knopman et al., supra note 233, at 496 (documenting importance assigned to fertility preservation among young cancer survivors).

[FN246]. Burns et al., supra note 243, at 354.

[FN247]. Id. at 353. Gamete disposition in the event of death or decision not to parent is an important consideration. However, planning ahead of time would facilitate communication of disposition wishes, such as donation to other infertile individuals versus gifting to medical research versus simple, regulated disposal of the genetic material.


[FN249]. Id. at 62, 71-72.

[FN250]. Id.


[FN253]. Goodwin, supra note 248, at 66-71 (discussing Curran v. Bosze, an Illinois Supreme Court case involving a father's demand that his estranged girlfriend surrender their twins for blood tests and possible bone marrow extraction to save the life of his son, their half-brother).


[FN257]. See Kuther, Medical Decision-Making and Minors, supra note 130, at 353-55 (suggesting that physicians should be attentive and respective of minors' wishes in evolving legal and ethical arenas).
[FN258]. See 750 Ill. Comp. Stat. Ann. 70/5 (West 2010) (“[I]mmature minors often lack the ability to make fully in-
formed choices that consider both the immediate and long-range consequences [of abortion].”).

[FN259]. See, e.g., June Carbone, Age Matters: Class, Family Formation, and Inequality, 48 Santa Clara L. Rev. 901,
944 n.193 (2008) (contrasting the “overall” unintended pregnancy rate with statistics for poor black and Latina women
specifically).


that the state should not intrude “into the autonomy and privacy of relationship” in the absence of an immediate visible
danger).

[FN262]. Dan W. Brock, Children’s Competence for Health Care Decisionmaking, in Children and Health Care 181, 184

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A HITCHHIKER'S GUIDE TO ART: IMPLEMENTING SELF-GOVERNED PERSONALLY RESPONSIBLE DECISION-MAKING IN THE CONTEXT OF ARTIFICIAL REPRODUCTIVE TECHNOLOGY

Lynne Marie Kohm [FNa1]

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I. Introduction [FN1]

Hitching a ride on an artificial reproductive technology vehicle [FN2] to undergo a rendition of alien or reproductive technology [FN3] propels a couple into a place of moral dilemma they never imagined. [FN4] There, they must find the “answer to the Ultimate Question of Life, the Universe, and Everything.” [FN5] That is the story of Ohio residents Mr. and Mrs. Sean Savage and their family. [FN6]

*414 Sean and Carolyn Savage were pursuing artificial reproductive techniques (ART) when the clinic informed them that, due to clinic error, Carolyn was pregnant with another family's child. [FN7] Shannon and Paul Morell are the genetic parents of the baby Carolyn Savage carried. [FN8] There was no hitchhiking away from this dilemma. Instead, each individual [FN9] and each family [FN10] was forced to make incredibly difficult choices. [FN11] In the end, each decision was not based on any state statutory code, case law, or right to damages relating to the cruel dilemma. Rather, the Savages and the Morells made decisions from self-governance and personal responsibility that placed the life of an unborn child above their own preferences. [FN12]

*415 These families are living paradigms of personal autonomy sacrificed for a child's best interests. [FN13] This story is one example of the profound impact artificial reproduction is having on families. [FN14] Artificial reproductive techniques have also had an incredible impact on many other families that have not incurred such devastating news from their ART experience. Those effects range from continuing disappointment to being blessed with children, with those children in turn being blessed with life and with families who love and treasure them. [FN15]

The impact that artificial reproduction has had on families is difficult to overstate. The ART process impacts individuals, creates new lives, establishes and constructs families, tests marriages, [FN16] and sometimes causes divorce. [FN17] Also, children who are the result of the ART process *416 would not otherwise exist, and thus, are greatly impacted. [FN18] Lastly, ART also impacts the child's siblings, friends, future spouses, and future children. For each of these sets of people, there are personal, emotional, social, financial, and physical concerns. [FN19] Yes, artificial reproduction has indeed impacted families.

Artificial reproduction has also impacted family law. The magnitude of the legal scenarios is nearly as vast in scope as one's imagination, even an imagination like Douglas Adams'. [FN20] Some states have a variety of regulations on ART, [FN21] while others have none. [FN22] Any experienced lawyer knows that when a client
finally includes an attorney after reaching the stage of desperation in any legal matter, the law and all its incidents are not easily sorted out thereafter. [FN23]

This article presents the three major areas of concern regarding the impact of ART on families-marriage, divorce, and children-and argues for a self-governed personally responsible decision-making paradigm that thrives in the face of minimal state regulation in every aspect of family law related to artificial reproduction. Part II considers the impact ART has had on marriage. It sets out the issues surrounding marital status and procreation generally and how ART has contributed to confusion regarding the role of procreation in society and procreation's connection to marriage. *417 Part III considers how ART impacts divorce; namely in the distribution of frozen embryos as marital property. Part IV then considers how ART has impacted children. The impact on children ranges from affording them life to causing a host of problems regarding their identity and future relationships. Finally, Part V discusses and analyzes the case of Carolyn and Sean Savage, first in the context of standard state statutory construction for ART and then in the context of their self-governed, rather than state regulated, decisions. Lastly, the article offers a plan of action to those building a family using ART.

What the Savages and the Morells have done is a remarkable model of self-governed personally responsible decision-making. [FN24] This article suggests that men and women desiring to be parents who choose responsible decision-making based on life affirming and family affirming choices foster the best interests of marriage, children, families, and ART itself. [FN25] It presents a guide to understanding the issues involved in self-governed personally responsible decision-making. [FN26]

II. Impact of ART on Marriage

Family life has become somewhat confused in American culture and the foundation of that confusion is marriage. Common wisdom has been that marriage is about love, sex, and children, but people marrying for those reasons often lack the commitment to the marriage necessary for its longevity. [FN27] Procreation has been effectively removed from marital sex, [FN28] from non-marital sex generally, [FN29] and even from pregnancy. [FN30] The effectiveness of artificial reproductive techniques has removed sex from procreation. [FN31] This largely unregulated fertility industry has been taken advantage of by some donors without much ethical thought [FN32] and by some partners without thought of the future consequences. [FN33]

At the same time, unmarried births globally appear to be skyrocketing as at least one study indicates that some teen girls actively plan to become single mothers. [FN34] Those same young mothers, who seem quite happily unmarried as parents, [FN35] expect to be married and divorced several times. [FN36] *419 In a surprising proposal to curb non-marital births, one commentator suggested the need for public admission that sex is procreative, allowing education and culture to “put the baby back into sex.” [FN37]

Furthermore, women and children seem to have become commodities. [FN38] In a recent review of a surrogacy case gone awry, A.G.R. v. S.H. & D.R.H., [FN39] one commentator remarked,

As bizarre as all of this is and sounds, the threat of gestational surrogacy is very real. It is an attempt to exploit women, reduce them to an inanimate object, and make children the equivalent of a commodity. Gestational surrogacy is a threat to the family and the dignity of human life. It denigrates women, their roles as mothers, and the mother-child relationship. This evil is only in its infancy and can be defeated, not only in court but also through legislation. [FN40]

*420 The threat of creating a commodity in women is even stronger in impoverished cultures where women
will act as surrogates for a host of economic reasons. [FN41]

There is certainly no direct link between these social phenomena and the rise of ART; [FN42] but nonetheless, the timing is somewhat curious. Married couples using ART allow medical technicians to build their families, [FN43] and the Vatican has suggested that such use of ART in a marital setting conflicts with religious teachings. [FN44] Simultaneously, unmarried same sex couples have been major beneficiaries of the ART phenomenon as well [FN45] but not without conflicts. [FN46] In his article, Professor Herbie *421 DiFonzo rightly suggested that the evolution of baby making and developing technology have made the legal questions more complicated. [FN47]

Possibly because of the pace of the ART industry, the impact on families resulting from these points of separation and reattachment between reproduction and sexuality has not been adequately assessed. The New York Times noted that twenty-first century babies are begotten by “building a baby, with few ground rules.” [FN48] Marriage is simply not needed for procreation. [FN49] Indeed, frequently test tubes and Petri dishes replace romance. [FN50]

Regardless of the issues just discussed, artificial reproduction has created great opportunities for building families and can be great for marriage. [FN51] In fact, embryo adoption has provided married couples like Jeff and Maria Lancaster with what they have long hoped for a family. [FN52] “The family is a flexible institution by nature and will continue to accommodate changes in human reproduction”; yet, unity of the marital partners and their communication regarding reproductive issues are often *422 basic elements of such success. [FN53] In fact, ART could possibly strengthen marriages if the couples' communication is enhanced by the choices presented for family building using ART, even if those choices involve potential marital property concerns. [FN54]

When mistakes are made, however, they can be devastating to people and difficult on marriages. In Del Zio v. Presbyterian Hospital, [FN55] the hospital supervisor interrupted a doctor's use of in vitro fertilization (IVF), thereby, destroying Mrs. Del Zio's “last chance to become pregnant.” [FN56] In a cause of action for conversion of property, the jury found for the hospital, and in the second cause of action for intentional infliction of emotional distress, the jury awarded $3 in damages to the husband and $50,000 to the wife, in light of the fact that their last chance to become biological parents had been taken from them. [FN57] Meanwhile, unbeknownst to the sequestered jury, across the sea in the United Kingdom Louise Brown was being born, the first child of ART. [FN58]

In another New York case, Perry Rogers v. Fasano, [FN59] a newborn conceived through IVF was a different race than either of the intended parents. [FN60] A clinic mistake led to the Fasano family having another couple's embryos implanted; and thus, their child was actually the genetic child of another family. [FN61] Upon this discovery, the genetic family sued for visitation with the child, but the court denied visitation based on its finding that the genetic parents failed to take timely action regarding their parental rights after being notified of the clinical mistake. [FN62]

*423 Mistakes can be damaging to marriages and can put tremendous stress on the partners. [FN63] This is important in light of the fact that social science continues to find that marriage is essential to family stability. [FN64] ART has clearly had a profound impact on marriage. The Savages [FN65] and the Morells [FN66] are still married, and the record has not been searched for a Del Zio or Fasano dissolution. Regardless, case law provides other examples of divorce resulting when ART goes poorly, as well as the inverse: ART going bad as a result of divorce.
III. Impact of ART on Divorce

As might be imagined, the intense emotional strain involved in infertility can cause divorce rates to be high among couples who struggle with infertility. [FN67] Courts have struggled with distributing embryos as marital property in divorce or providing for their custody, along with honoring contracts between the parties regarding ART or upholding liberty interests. [FN68] A line of cases highlights these dilemmas.

The first of these cases is Davis v. Davis, [FN69] where the highest court of Tennessee overturned the trial court’s finding that frozen embryos are children deserving of protection, holding instead that the results of ART between Junior Davis and Mary Sue Davis were neither persons nor property “but occupy an interim category that entitles them to special respect because of their potential for human life.” [FN70] In Davis, privacy in the right not to procreate prevailed where no previous agreement existed. [FN71] The court awarded the embryos to Junior Davis, which he immediately discarded. [FN72] When there is no written agreement, fundamental privacy rights prevail over the future of any embryos, at least in Tennessee. [FN73]

In Kass v. Kass, [FN74] New York’s highest court held that the ART contract between parties should be upheld. [FN75] Where the contract between the parties provided that the embryos be destroyed, the court ruled that there was no infringement on any fundamental right of privacy or liberty interest in the right to not procreate. [FN76] A written contract will be upheld if it does not violate fundamental privacy rights, at least in New York. [FN77]

In A.Z. v. B.Z., [FN78] the highest court in Massachusetts held that an ART contract to give custody of the parties’ embryos to the wife for gestation and birth after dissolution could not be upheld because it would result in an infringement of the fundamental right of privacy and the right to not procreate. [FN79] A valid written contract will not be upheld if it infringes on fundamental privacy rights, at least in Massachusetts. [FN80]

Lastly, in In re Marriage of Dahl, [FN81] a more recent case from Oregon’s Intermediate Court of Appeals, the court upheld a contract for embryo distribution upon divorce. [FN82] Citing the three varying state court opinions in Davis, Kass, and A.Z., the Oregon court held that the contractual right to dispose of frozen embryos essentially amounted to personal property subject to court disposition upon dissolution. [FN83] The result was that the embryos were distributed to the wife for destruction over the husband’s strong life-affirming objections. [FN84] A written contract for embryo destruction will be upheld even over objections to that destruction by one of the intended parents in a divorce, at least in Oregon. [FN85]

Reproductive property distribution in divorce has changed divorce dramatically. [FN86] Even if the gametic stored material has not yet been used in ART, the disposition of that material can, nonetheless, be a divorce concern. [FN87] These cases and those like them have indeed had a strong impact on families and family law, determining contract reliance at the least. [FN88] Scholars have argued that courts ought to enforce agreements between spouses regarding distribution of the embryos. [FN89] This notion fosters personal responsibility for contractual obligations.

State statutes can foster this notion of personal responsibility and offer some clarity in the context of divorce decisions regarding ART material and embryos. For example, Louisiana law forbids the intentional destruction of a cryopreserved IVF embryo and declares that disputes between parties should be resolved in the “best interest” of the embryo, further requiring unwanted embryos to be made available for adoptive implantation. [FN90] It seems that Louisiana desired to further stabilize this sense of parental responsibility for ART embryos recently, as a new statutory code indicates:
If the in vitro fertilization patients renounce, by notarial act, their parental rights for in utero implantation, then the in vitro fertilized human ovum shall be available for adoptive implantation in accordance with written procedures of the facility where it is housed or stored. The *426 in vitro fertilization patients may renounce their parental rights in favor of another married couple, but only if the other couple is willing and able to receive the in vitro fertilized ovum. [FN91]

This type of statutory framework serves to preserve embryos through an option for a future adoption by virtue of embryo donation. [FN92] It also appears to buttress personal and parental responsibility in favor of the child. [FN93] Even this brief review of the law regarding embryo disposition reveals that ART has indeed impacted divorce dramatically.

IV. Impact of ART on Children

Children of ART have completely different concerns than their natural parents, genetic parents, gestational parents, or adoptive parents. However, that does not mean the children are abnormal in any other way. [FN94] A recent study of IVF adults revealed that “[t]hey’re pretty much the same as people conceived the old-fashioned way.” [FN95] Identity exploration is among the first issues young adults of IVF may wish to investigate, not having the benefit of knowing the identity or anything else about their genetic parent(s). [FN96] In fact, as Professor Naomi Cahn suggested in her article, because children will be inquisitive about the donor and about any possible half-siblings, they may sense a loss of identity, and the family may experience more *427 keenly the need to create a sense of unity in the midst of the child’s quest for “missing parts of their identity.” [FN97]

Vast confusion over children as part of a “market” has led law schools to host conferences that deal with such concerns, such as the one hosted with the Center for Biotechnology, Law and Ethics at Cumberland School of Law at Samford University in Alabama on February 14, 2008. [FN98] The law is in flux, potentially changing and expanding the family institution with the needs of donor families. [FN99] Furthermore, the future of the child is in flux as well. When IVF results in more than one baby implanting, parents can make a choice to selectively reduce the pregnancy, [FN100] to abort, [FN101] or to bring an action for wrongful birth. [FN102]

Beyond children questioning their identity, ART can also impact a child’s relationship with his parents. Complications in parental relationships abound for children of ART, particularly when children have numerous adults involved in their conception, birth, and growth. Consider the three surviving children of Michael Jackson, who are each the product *428 of ART, even though Jackson was married at the time of the birth of two of the children: (1) Michael Joseph Jackson Jr., age 12, donor sperm and donor egg, legal mother: Debbie Rowe; (2) Paris Michael Katherine Jackson, age 11, donor sperm and donor egg, legal mother: Debbie Rowe; and (3) Prince Michael Jackson II, age 7, donor sperm, mother: unidentified surrogate. [FN103] Children like the Jacksons have a cemented social identity but have little understanding of their own genetic identity. [FN104] The legal implications of better understanding children’s capacities and participation in their own welfare are becoming increasingly relevant around the world. [FN105] The future of children like the Jacksons and other IVF babies, however, is much more secure than that of frozen embryos who may never become children. [FN106]

Children are not the only ones impacted by ART. Family and non-family siblings of ART children must deal with the possibility of accidental incest that could result from the inadvertent consanguinity between ART children. [FN107] Professor Cahn examined and argued for limiting the number of offspring for an individual donor [FN108] and protecting ART children with a Donor Sibling Registry. [FN109] Protecting ART children from such accidental incest seems at least reasonable, but there is currently no legitimate way to rule out sexual inter-
course between adult siblings (or *429 half-siblings), though, they may be unaware of their genetic familial connection. [FN110]

The value and worth of human life is a major conundrum. [FN111] The loss of a child through divorce, destruction, or clinical accident, whose birth was expected and relied upon, has not yet been explored in the ART context but could very well deserve wrongful death consideration, even as loss of society for the child and the parents. Worth of human life has been considered in the wrongful death context regarding marriage [FN112] but not yet in the context of ART. That matter would be a worthy discussion, as is the personal regulation of one's involvement in the ART process, even in the face of a mistake.

V. Regulation or Self-Governance?

The Savage's reality changes the rules completely. [FN113] The Savages and the Morells found themselves in an unintended surrogacy agreement without the benefit of a contract, a statute, or case law. [FN114] The response by these two families to this incredible mistake, however, illuminates the fact that laws fall short of the most appropriate remedy. [FN115] Rather, personally responsible decision-making on the part of all four individuals seems to rise above the moral morass and the legal abyss, [FN116] paving the way for the *430 best interest of the child to take precedence over the personal autonomy of each of the adult parents involved.

Their case and their subsequent reactions indicate that when parents act with personal and parental responsibility, statutes and rulings are apparently unnecessary. Their actions indicate that when Carolyn and Sean Savage were advised of their rights as surrogate parents, they chose to put those rights aside in favor of the best interests of the child Carolyn was carrying by mistake. [FN117] Their self-sacrificial self-governance brought about the best possible outcome for all involved in this nightmarish mistake. [FN118] Family law code may not only be insufficient, but it may even be harmful to the most responsible parenting. [FN119] It is both insightful and instructive to consider the wisdom of the decisions of these four adults, as compared to a purely legal decision a family court judge would make applying the law to this situation.

A. Ohio ART and Surrogacy

The Savages reside in Ohio. [FN120] There is no codification of surrogacy provisions in Ohio law, and there is no pending legislation on surrogacy or ART in Ohio. [FN121] Although there are no citations of either state or federal cases in Ohio that refer to these statutes in the past couple of years, some potentially relevant Ohio law can be found at § 3111 of the Ohio Revised Code. [FN122] For example, the paternal presumption [FN123] finds Sean Savage, by virtue of his marriage to Carolyn, as the legal father of the Morell child his wife Carolyn carries. [FN124] On the other hand, if Sean did not consent to the *431 pregnancy, he may rebut that presumption through genetic testing of the child. [FN125] The Savage's situation would obviously afford clear and convincing evidence that the child was not genetically related to Sean, which would lead to an assumed lack of consent to the embryo donation from another family. [FN126] There have been efforts to amend Ohio Revised Code § 3111.03, but to date, none have become law. [FN127]

Ohio does have statutory law on non-spousal artificial insemination (AI) for the purpose of impregnating a woman so that she can bear a child that she intends to raise as her own. [FN128] “These sections do not deal with the artificial insemination of a wife with the semen of her husband or with surrogate motherhood,” [FN129] and they do not consider the mistaken artificial insemination of a woman with another couples' embryo. [FN130]
Ohio also has statutory law that requires the written consent of both the husband and the wife [FN131] and additional law that holds that a woman who receives AI shall be treated and regarded as the natural mother of the child. [FN132] That law may be applied satisfactorily in the case of an embryo donation, [FN133] but it finds Carolyn Savage as the only legal mother of the Morrell child she carries. [FN134] Indeed, as the gestational mother, she and her husband Sean are considered the only parents of the AI Morrell child under Ohio law. [FN135]

*432 Regardless of the law, from Carolyn's actions it appears she saw herself not as the legal mother but as the accidental surrogate who carried a child intended for another family because of a clinical mistake. She had no intention to abort that child, [FN136] though, that would have been her legal right [FN137] as the child's carrier. [FN138]

One might wonder why it was in the best interest of the child for the Savages to relinquish a baby born from a desired pregnancy, because many people do not think biology determines families (adoption, for example, is a wonderful way to build a family with parents who very much want children). [FN139] Thus, it is easy to ask why the Savages did not keep the child Carolyn carried as their own. It is clear that Carolyn Savage had a bond with the baby to whom she gave birth, and that her family developed a bond with the baby during her pregnancy. Though not genetic, it is undeniably a flesh and blood bond. But, even though this was a wanted child and a bond was formed, in the eyes of Carolyn Savage, it was another woman's child. [FN140] So although she and her husband wanted a child of their own, they made a decision not based on their own interests or bonds, however strong and meritorious they may be, but based on what they thought would be the best interests of the child. [FN141]

*433 While it is important to consider Carolyn's legal rights, one must also address Sean's legal rights. Under additional Ohio law, Sean would be treated as the child's natural father if he consented to the AI. [FN142] Thus, further complication results from the need to determine if Sean indeed consented to his wife's AI of another couple's embryo. It could be strongly asserted that his consent to his wife's AI applied only to the use of his embryos. In an ensuing analysis, Sean would have every right to disagree with his wife's intention to carry the child to term, which indeed would put stress on the Savage's marriage, if not push them to divorce. But Sean's decision to stand together with his wife and act in a manner consistent with the best interests of the child is a serious example of personal responsibility above and beyond the provisions of Ohio law.

On the other hand, Ohio law does provide that a “court, upon its own motion, may order and, upon the motion of any party to the action, shall order the child’s mother, the child, the alleged father, and any other defendant in the action to submit to genetic tests.” [FN143] While Ohio statutes do not provide for the circumstances in which the Savages find themselves nor do they encourage family stability necessarily, they do provide for judicial intervention to accomplish those objectives. [FN144] Here, the Savages are moving forward in that fashion without the assistance of statutory regulation. [FN145]

Would the result be different in an application of statutory family law that does cover surrogacy arrangements? A review of state regulations regarding surrogacy, such as the code in Virginia, [FN146] is instructive here.

B. Might a More Detailed Surrogacy Law Be More Helpful?

The Virginia Code includes in-depth ART regulation and focuses on surrogacy law, which might be inform-
ative and more instructive in ART dilemmas. [FN147]

Virginia law defines assisted conception as “pregnancy resulting from any intervening medical technology” and includes numerous procedures, *434 which assist conception. [FN148] Because medical technology drastically alters the concept of “conception,” the Virginia Code defines the terms of one's “parentage” through assisted reproduction. [FN149] In order to fully answer the question of parentage, however, the facts must be placed in the correct context, and Virginia, like many states, generally follows the “intended parent” rationale. [FN150] Thus, Virginia law provides for surrogacy contracts between parties using ART, and notably, Virginia sanctions surrogacy contracts that allow a surrogate and her husband to relinquish all rights and duties as a parent of the child conceived through assisted conception to allow the intended parents to become the parents of the child. [FN151]

Virginia law further distinguishes between surrogacy contracts that the court approved and those that the court did not approve. [FN152] When a court approves a surrogacy contract, the process and the outcome are more secure. [FN153] For example, before performing the AI, the intended parents, the surrogate, and the surrogate's husband must join in a petition to the circuit court where one of the parties resides. [FN154] Each party must sign and acknowledge the contract before the court, a copy of which must be attached to the petition, and the court will then promptly appoint a guardian ad litem to represent the interests of any resulting child and appoint counsel to represent the surrogate. [FN155] All hearings are conducted in camera, the records are kept confidential, and at the hearing, the court enters an approval and authorization for performance of the assisted conception for a period of twelve months. [FN156] When birth occurs through an approved surrogacy contract, the intended parents are the parents of the child unless the court vacates the order. [FN157] Virginia law also provides for termination of the surrogacy contract, allowing the court leave to terminate the agreement for cause by giving a written notice of termination to all *435 parties prior to the use of assisted conception. [FN158] Furthermore, within 180 days of the performance of assisted conception, a genetic parent surrogate may terminate the agreement. [FN159]

A surrogacy contract in Virginia that is not approved by a family court is less predictable and less secure but is nonetheless valid if it meets the requisite criteria. [FN160] Also, birth through a surrogacy contract not approved has a different parental outcome than that of an approved surrogacy contract, as the law states that “[t]he gestational mother is the child's mother unless the intended mother is a genetic parent, in which case the genetic mother is the [child's] mother.” [FN161] If one of the intended parents is a genetic parent, then the intended father is the child’s father. [FN162] However, much like Ohio law, if the surrogate is married, her husband is a party to the surrogacy, and if the surrogate exercises her right to retain custody, then the surrogate and her husband are the parents. [FN163] Here, the Savages have the right to retain custody of the Morell child Carolyn carries; however, the Virginia Code offers some remedy to the Morells, because they might assert that they were the intended parents of the embryo Carolyn carries. [FN164]

The enforceability of a surrogacy contract is an important consideration. In Virginia, if a surrogacy contract has not been subject to prior court approval, the contract is only enforceable if: (1) the surrogate, the husband of the surrogate (if any), and the intended parents are parties to the contract; [FN165] (2) the contract is in writing, signed by the parties, and *436 acknowledged before an officer of the court; [FN166] and (3) the surrogate consents to the relinquishment of her parental rights within 180 days following the birth of the child. [FN167] Furthermore, the contract must (1) not provide compensation, [FN168] (2) include a provision that the intended parents are the parents of the child only when the surrogate relinquishes her parental rights, [FN169] (3) include a statement that the parties “have read and understand the contract, know their rights and responsibilities, and have
entered into it knowingly and voluntarily. [FN170] and (4) include a guarantee that the intended parties will pay reasonable medical costs. [FN171]

Virginia law provides that in all other cases, the gestational mother is consistently the child's legal parent, [FN172] and the gestational mother's husband is the child's father. [FN173] A donor is not the parent of a child conceived through assisted conception unless the donor is the husband of the gestational mother. [FN174] Virginia has no code or case law on distribution or adoption of embryos. [FN175] Though it is more detailed than most state codes on ART, it does not provide the answers that families need.

C. Parentage Laws

Issues of parentage must be resolved as this new technology is utilized. While surrogacy law may provide some parentage answers, some scholars suggest that parentage issues must be addressed much more formally with respect to other forms of ART. [FN176] Professor Naomi Cahn, for example, has *437 noted in depth the lack of regulation of ART. [FN177] What has often been referred to as the “gamete industry”-a multi-billion dollar business in the United States-is operating under a relative dearth of regulation, which is of great concern chiefly because family law differs across states. [FN178] Everything from the liability of fertility clinics to the rights of donors, donor children, and hopeful couples is unregulated. [FN179] This causes Professor Cahn and others to exhort legal and policy-making communities to cease applying piecemeal laws. Rather, lawmakers ought to create laws that sustain the fertility industry, while at the same time protecting the interests of donors, recipients, and the children that result from successful transfers. [FN180]

Government interference through the creation of new laws can bring new conundrums. [FN181] This article strongly suggests, in contrast to being forced to follow a judicial ruling or awaiting federal intervention, that the exercise of genuine personal responsibility in self-governance may lead to the right conclusion more appropriately and allow the decision-maker to own the liberty to do so.

*438 D. The Savage Decision

Good-intentioned and fairly well set forth state codes are often inadequate at best when prescribed upon reality, [FN182] particularly when compared to a self-governed personally responsible decision-making paradigm. The circumstances in which the Savages and the Morells found themselves serve to prove this point precisely.

Under Virginia law, a judge would likely rule that Carolyn and Sean Savage may keep the child as their own, as the surrogate and her husband. [FN183] The Morell's child would never be in the Morell family; and thus, the Morells would never have any right to meet or get to know their own genetic child. One could argue that a detailed surrogacy code like that of Virginia magnifies the injustice of the clinic mistake. [FN184]

Under Ohio law, the result is less clear, but equally nightmarish, because the Savages could choose to (1) legally abort, [FN185] (2) keep the child as their own, regardless of their knowledge of his genetic core, [FN186] or (3) engage in surrogacy litigation or a custody battle with the Morells. [FN187] Neither Ohio nor Virginia law would have assisted these families in arriving at the point where their own responsible decisions have brought them today. [FN188]

Carolyn and Sean Savage, by self-governance, chose self-sacrificial life for the Morell child Carolyn carried to the great detriment of their own desires. [FN189] They made a decision in favor of the child's genetic family,
rather than their own family, even though they initially pursued ART to build their own family. [FN190] In the face of such disappointed hopes and *439 horrendously difficult circumstances, they made a choice not in their own favor but in favor of what was best for the child Carolyn carried because of a clinical mistake. [FN191] Paul and Shannon Morell agreed to parent the child Carolyn Savage carried. [FN192]

Self-governance with personal and parental responsibility, as evidenced by the thoughtful and sacrificial decision-making of Sean and Carolyn Savage, provides the best outcome for marriages. It also promotes the best conclusion to avert divorce. Most importantly, it protects and provides the best outcome for the ART child. So what would be the strategy toward self-governed personally responsible decision-making in ART? The Hitchiker's Guide to an ART plan of action for any participant might look something like this:

1. When considering ART, parents view each fertilized egg that results in an embryo as a child from the point of fertilization. All embryos created are entitled to life, a discernable identity, and a future, each protected from experimentation, destruction, research, or selective pregnancy reduction. Parents understand their child's life is at stake in all their decisions.

2. Adults utilizing ART in any form view themselves as parents from the outset, particularly understanding that parental rights, obligations, and responsibilities for the best interests of the child embryo take effect upon fertilization of each embryo and continue at all times thereafter (unless consent for termination of those rights and duties is given). All fertilized eggs are afforded protection by their parents to provide for the best interests of the ART child.

3. Parents place their own personal autonomy aside to protect the ART child in every circumstance, even that of mistake, error, or wrongful pregnancy. Mothers forgo the right to abort, and fathers forgo the right to disclaim their children. Parents begin to act in the best interests of the *440 child from the outset of their choice to utilize ART.

4. Married parents place their partner and their partner's health in carrying out the best interests of the child above their own interests.

5. Married parents place their marriage above their own personal interests. When ART mistakes or errors happen, couples stand together above all else, placing the interests of the spouse above their own.

6. Together, parents place the interests of the ART child, whatever the child's identity, above their own interests.

7. State law operates to encourage numbers one through six above as tenets of self-governance regarding personal and parental responsibility. [FN193] When adult participants do not govern themselves according to these standards protecting the best interests of the ART child, default rules may be implemented to reorder the process accordingly.

VI. Conclusion

Although the objective of the law is generally to restore what has been lost, reorganize what has been disarrayed, and make damaged parties as whole as possible, [FN194] it simply cannot accomplish those lofty objectives in the mistaken embryo insemination of Carolyn Savage. [FN195] Especially in relationships as critical as children and their family members, even the best-laid civil laws fall short. When personal and parental responsibility *441 rule the day, however, parents act selflessly, as the Savages have here, [FN196] providing what is best for a child regardless of the law and regardless of their own rights and privileges. Solomon's wisdom [FN197] is lived out in such circumstances when parents are willing to sacrifice their own interests for that of their child. [FN198]
The use of technology in family law and family life can be an incredible and beautiful gift, as ART can be a vehicle for a life-giving blessing. Corrupted by human nature or a doctor's mistake, however, it can be the impetus to strengthen or tear apart a marriage. A divorce could be averted or could result. A child could be born or aborted. A child could be placed and raised in an intact family or fought over for custody.

ART has indeed had a tremendous impact on families [FN199] and family law. [FN200] When it is utilized in an unselfish manner through personal and parental responsibility, the honor of its potential is evident. Self-government ruled the hearts and minds of Carolyn and Sean Savage, they *442 made difficult decisions, and the Morells were grateful. [FN201] Law can be helpful, but it should choose to “tread lightly.” [FN202]

When parents together determine the priceless value of the child before fertilization, they are demonstrating parental responsibility. Combined with personal responsibility, this provides for the best interests of the child. This kind of micro-community stability values every individual above self-and is in essence, family manifested.

If a couple such as Sean and Carolyn Savage were to find that their family dreams were demolished or destroyed [FN203] or if the child Carolyn was pregnant with was another couples' embryo, it is likely they might want to escape to another planet. Their ART clinic made a tremendous mistake while helping them search for the “answer to the Ultimate Question of Life, the Universe, and Everything”; [FN204] yet, the Savages were still able to find that the answer was in their own moral code of personal responsibility.

Carolyn and Sean Savage chose to understand ART toward self-governed personally responsible decision-making. In doing so, they placed the interests of the unborn Morell child above their own interests. Their case offers a plan of action to others who choose to build a family using ART. [FN205]

What the Savages and the Morells have done is a remarkable model of self-governed personally responsible decision-making. Men and women desiring to be parents who choose such responsible decision-making based on life affirming and family affirming choices foster the best interests of marriage, children, families, and ART itself.

[FNa1]. Copyright 2011, Lynne Marie Kohm. John Brown McCarty Professor of Family Law, Regent University School of Law, JD Syracuse University; BA Albany University. It was an honor to present parts of this article during the Sixth Annual Wells Conference on Adoption Law at Capital University sponsored by the National Center for Adoption Law and Policy. It is dedicated to the most difficult and excellent choices made by the Savage family, and to all the individuals and families that place the best interests of children above their own. I wish also to thank Linh Flores for her excellent research on this project.

[FN1]. This introduction is an adaption of the story in Douglas Adams, The Hitchhiker’s Guide to the Galaxy (Harmony Books ed., 1979). In the novel’s early chapters, the Earthling Arthur Dent watches local officials raze his house to build a highway bypass, discovers that his best friend is from another planet, and escapes with his friend just as the Earth is destroyed by hitching a ride aboard the very alien ship that is doing unto Earth as the town council had just undone to Arthur’s house. Throughout the novel, the titular Guide helps Arthur orient himself in his vertiginous and occasionally terrifying new surroundings.

[FN2]. See id. at 34. It might be a starship full of officious otherworldly bureaucrats or an ART clinic.

[FN3]. See id. at 64. Tortuously trite Vogon poetry or ovarian hyper-stimulation, take your pick.
[FN4]. See id. at 114. Magrathea, the galaxy's least-welcoming planet, might be less intimidating.

[FN5]. See id. at 172. Forty-two is the number from which all meaning can be derived; if only the answer was as simple as forty-two. See id. at 180.

[FN6]. Stephanie Smith, Fertility Clinic to Couple: You Got the Wrong Embryos, CNN.com (Sept. 22, 2009), http://articles.cnn.com/2009-09-22/health/wrong.embryo.family_1_fertility-clinic-embryos-savages?_s=PM:HEALTH (“In a tragic mix-up, the Savages say the fertility clinic where Carolyn underwent in vitro fertilization implanted another couple's embryos into Carolyn's uterus. In essence, she had become an unwitting surrogate for another family.”).


[FN8]. Mike Celizic, Genetic Parents of Embryo Felt 'Powerless:' Mix-Up Is a Terrible Thing that Has Happened to Two Good Families, TODAYshow.com (Sept. 23, 2009, 9:00 AM), http://today.msnbc.msn.com/id/32980984 [hereinafter Celizic, Genetic Parents].

[FN9]. Carolyn Savage had a legal right to choose an abortion. See Roe v. Wade, 410 U.S. 113, 166 (1973). Sean Savage had a right to disavow the child his wife carried, because it was not his child, or he could have exercised his legal right to fight for custody of the child. See Ohio Rev. Code Ann. § 3111.03 (West 2005 & Supp. 2010). Shannon Morell had a right to sue under the contract with the clinic. See Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993). But, Shannon had no right to her genetic child as it was carried in Carolyn's womb. See In re Baby M., 537 A.2d 1227, 1264 (N.J. 1988) (holding that there is no prohibition against a surrogate mother changing her mind and asserting her parental rights), superseded by statute, N.J. Stat. Ann. § 9:3-46. Paul Morell also could have asserted his right to his own genetic offspring, asked for judicial declaration of Carolyn Savage as his child's surrogate, and been joined in the action by his wife. See Johnson, 851 P.2d at 784.

[FN10]. Within each family, the marriages were handling the stress of the situation in ways none of us can ever adequately understand. See Celizic, Genetic Parents, supra note 8; Celizic, Hello and Goodbye, supra note 7; Smith, supra note 6.

[FN11]. Couples Make Best of Fertility Clinic's Error, L.A. Times, Sept. 27, 2009, at A11 (“Paul and Shannon Morell of suburban Detroit said in a statement that they would be 'eternally grateful’ to Carolyn Savage, of Sylvania, Ohio, for her decision to give birth to their child despite the clinic's mistake.”).

[FN12]. See id. The two couples knew nothing about each other. Shannon Morell feared that the pregnant woman would choose abortion, ending their chance to give their 2-year-old twin girls a sibling.

A few days passed before they learned that the Savages were not only willing to continue with the pregnancy but also to hand over the baby.

Id.

[FN13]. See id. (stating that the baby boy was born in Toledo and weighed five pounds, three ounces, and was

[FN14]. See Ohio Woman Implanted, supra note 13 (noting that the family was going through a very difficult time).


[FN20]. See Adams, supra note 1 (referring to his bizarre story).


[FN23]. I am reminded of the client who came into my law office with a mail order divorce kit, which he had been working on for two years to fill out, file, and complete his divorce. After a review of the papers during the initial consultation, I had to tell him that his efforts would require a great deal more legal work on my part to undo the errors, that the entire process would ultimately cost double what it would have cost originally, and the process would take twice as much time as it would have had he brought the matter to a lawyer at the outset.

[FN24]. See generally Fertility Clinic's Error, supra note 11, at A11.

[FN25]. See id.
[FN26]. See id.


[FN30]. Planned Parenthood v. Casey, 505 U.S. 833, 878-79 (1992) (recognizing a woman's pre-viability right to choose abortion without undue interference from the State); Roe v. Wade, 410 U.S. 113, 154 (1973) (finding a qualified right to privacy includes the abortion decision).


[FN32]. See, e.g., Jennifer Lahl, I'm the Only Daddy You Got! I'm the Paterfamilias!, The Center for Bioethics and Culture Network (Feb. 12, 2010), http://www.cbc-network.org/2010/02/im-the-only-daddy-you-got-im-the-paterfamilias/. In this article, a fifty-one-year-old man, making only $29,000 a year, donated his sperm, without giving much thought to his actions, two times each week for fourteen years “to make cash for medical school and to nurture his altruistic desires to help infertile women.” Id. The donor now wishes to allow the 400 or so resulting children access to his genetic information. Id.

[FN33]. See, e.g., Karmasu v. Karmasu, No. 2008 CA 00231, 2009 WL 3155062 (Ohio Ct. App. Sept. 30, 2009). Appellant husband unsuccessfully argued “that a risk of ‘accidental incest’ exists if he is not granted custody of the embryos because he ‘is a single male who openly has relationships with any woman at or above the age of eighteen.’” Id. at *2 (quoting portions of husband’s brief). The couple entered into a “cryopreservation agreement” with Reproductive Gynecology, Inc. in April of 2007 agreeing that in the event of marriage termination they would forgo all rights to their embryos in favor of the clinic. Id. at *1-2. Thereafter, they were married in June of 2007, separated in August of 2007, filed for divorce in September of 2007, and granted a divorce in September of 2008. Id. at *1.

[FN34]. See, e.g., Julie Henry, Modern Girls Put Children Before Marriage, Telegraph.Co.UK, http://www.telegraph.co.uk/education/educationnews/6359900/Modern-girls-put-children-before-marriage.html (last updated Oct. 18, 2009). “One finding suggested that some teenagers actively plan to become single mothers. Of the girls questioned who had left schools and were unemployed, almost half (45 %) expected to have a baby before they were 21.” Id.

[FN35]. Id. Where less than half of UK girls surveyed thought marriage should come before parenthood. Id.
[FN36]. Id. The chief researcher said the attitudes:
reflected those developing in society. ‘We don’t know if these girls are experiencing these things personally but they see it around them, whether it be couples who are not married or who are divorced’ . . . . ‘The findings from girls who were unemployed have real implications. Rather than early pregnancy being a mistake, it seems to be a pattern that they are expecting to follow. We need to work with youngsters to give them different horizons.’ Id.


[FN43]. See Robertson, supra note 31, at 911.


1995) (holding that two children, who resulted from donor insemination and born to one lesbian partner, are the children of the mother's partner as well, via step parent adoption); see also In re Jacob, 660 N.E.2d 397, 405 (N.Y. 1995) (holding that lesbian and unmarried heterosexual partners had standing to become adoptive parents despite family court adoption preference for married parents).

[FN46]. See, e.g., Nathan Koppel, Surrogacy Battles Expose Uneven Legal Landscape, Wall St. J., Jan. 15, 2010, A15 (discussing the conflicts between surrogate mothers and homosexual men who contract for their services to become parents). Possibly the most well known case along these lines is Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330, 332 (Va. Ct. App. 2006), where a natural mother fought to keep her IVF daughter from her Vermont civil union partner. See also Custody for Same-Sex Couple Upheld, The VLW Blog (Nov. 24, 2009), http://valawyersweekly.com/vlwblog/2009/11/24/custody-for-same-sex-couple-upheld/ (discussing where a male homosexual couple, who contributed sperm to artificially inseminate a Minnesota woman who agreed to be a surrogate for the men, was awarded primary custody when the surrogacy relationship broke down and the surrogate was awarded secondary custody); Caroline Overington, Gays Seek Access to Friend's Daughter, The Australian, Oct. 15, 2009, at 1. The child “was not conceived with sperm from either of the men. But her mother was, until last year, in a same-sex relationship with another woman who does have a child conceived with one of the men’s sperm.” Id.; see also Mike Dennison, Supreme Court Affirms Former Same-Sex Partner’s Rights as Parent, Billings Gazette (Oct. 6, 2009, 2:40 PM), http://billingsgazette.com/news/state-and-regional/montana/article_5c93a844-b2b8-11de-aa51-001cc4c002e0.html (noting the parental rights accorded to ex-same sex lovers who have a “parenting interest” even though that partner had no part in the adoption or artificial reproduction of the children).


[FN49]. See supra notes 28-30 and accompanying text.


[FN52]. Id.


[FN54]. See id. (“[I]f marriage means anything at all, doesn't it in fact mean that a person acquires some sort of ‘marital property’ interests in the reproductive cells of his or her spouse if they were produced and frozen during the period of marriage? The enigma is that all modern law has tended toward a view that the child-bearing decision is not a joint marital decision at all.”).

[FN56]. Id. at *4.

[FN57]. See id. at *11.


[FN60]. Id. at 22.

[FN61]. Id. at 21. This situation is eerily familiar to what the Savages are dealing with as presented herein. See Smith, supra note 6.

[FN62]. See Perry Rogers, 715 N.Y.S.2d at 27.

[FN63]. See Celizic, Hello and Goodbye, supra note 7; Celizic, Genetic Parents, supra note 8.


[FN65]. See Celizic, Hello and Goodbye, supra note 7.

[FN66]. See Celizic, Genetic Parents, supra note 8.

[FN67]. See Elizabeth Simpson, In-Vitro Babies. All Grown Up., The Virginian-Pilot, March 6, 2010, at 12 (“Parents were under added stress because of infertility issues.”).

[FN68]. See infra notes 70-84.

[FN69]. 842 S.W.2d 588 (Tenn. 1992).

[FN70]. Id. at 597.

[FN71]. Id. at 604.

[FN72]. See 7 Embryos in Custody Case Are Destroyed, N.Y. Times, June 16, 1993, at A18. Junior Davis is “very glad that the ordeal that took [four and a half] years of his life is over, and he looks forward to getting on with a normal life now.” Id.

[FN73]. See Davis, 842 S.W.2d at 604.


[FN75]. See id. at 182.

[FN76]. See id. at 179.
[FN77]. See id. at 179, 182.


[FN79]. Id. at 1059. “[A] consent form signed by the parties on the one hand and the clinic on the others, providing that, on the parties' separation, preembryos were to be given to the wife for implantation, was unenforceable.” Id. at 1056.

[FN80]. Id. at 1059.


[FN82]. Id. at 842.

[FN83]. Id. at 840.

[FN84]. Id. at 837, 842. Mr. Dahl asserted, unsuccessfully, that he did not understand the ramifications of the agreement when he signed it, arguing that if he had known that the terms of the agreement meant destruction of the embryos, he would have never agreed to such a position so opposed to his pro-life beliefs. Id. at 837.

[FN85]. See id. at 840.


[FN91]. Id. § 130.

[FN92]. See id.

[FN93]. See id. §§ 126, 130.

[FN94]. See Simpson, supra note 67, at 1. “Despite their unusual starts, the original ‘test tube babies' have grown into perfectly normal adults.” Id. Studies found that adult IVF children were “healthy and well adjusted,' with no unusual pattern of chronic disease.” Id. at 12. Most of the concerns surrounded birth risks. Id. “Researchers at the American Association for the Advancement of Science reported at a convention last month that some IVF babies face an increased risk of birth defects and low birth weight, which is associated with obesity, hypertension and Type 2 diabetes later in life.” Id. Some concerns were unexplainable concerns later in
life. Id. “There were, however, unusually high levels of depression and binge drinking among women and more attention-deficit disorders.” Id.

[FN95]. Id. (“Not startling news, but comforting to the growing number of parents who turn to assisted reproduction-and to the children coming behind this first generation of Petri dish babies.”).


[FN98]. The Baby Market, supra note 38.

[FN99]. Cahn, supra note 97, at 328-39 (offering this concept as part of her discussion on the meaning of families in light of ART, particularly with donor-conceived family networks).

[FN100]. See A.J. Antsaklis et al., Reduction of Multifetal Arrangements to Twins Does Not Increase Obstetric or Perinatal Risks, 14 Hum. Reprod. 1338, 1338 (1999), available at http://hum-rep.oxfordjournals.org/cgi/content/full/14/5/1338. Selective pregnancy reduction is the process whereby weaker growing fetus babies are aborted to provide the best environment for the stronger of the multiple fetuses. See id.


A Japanese woman was likely impregnated with the fertilized egg of another woman by accident during an in vitro procedure last year, hospital officials said Thursday. The woman, who is in her 20s, aborted the pregnancy when she was told of the potential mix-up at the government-run hospital in Kagawa prefecture, about 330 miles (530 kilometers) southwest of Tokyo. Id.


[FN104]. See Lloyd, supra note 103.


[FN109]. See Cahn, supra note 97, at 328.

[FN110]. See id.


[FN112]. See id. “Loss of society damages are noneconomic damages that are awarded to compensate a wrongful death plaintiff for the loss of the decedent's love, companionship, comfort, care, assistance, protection, affection, society, and moral support.” Id. (citing Krouse v. Graham, 562 P.2d 1022, 1024-25 (Cal. 1972)).

[FN113]. See Celizic, Hello and Goodbye, supra note 7 (“It is supposed to [be] the happiest news a couple can get, especially a couple who have difficulty conceiving and carrying babies. The in vitro fertilization procedure had been a success: Carolyn Savage was pregnant. . . . And then came the horrible news: It wasn't her baby. The fertility clinic they had used had made an all but inconceivable mistake and had implanted another couple's embryos into Carolyn. ‘They delivered the worst news of our life,’ Sean Savage told TODAY'S Meredith Vieira Monday from the family's Sylvania, Ohio, home.”).

[FN114]. See id.; Celizic, Genetic Parents, supra note 8.

[FN115]. See Celizic, Hello and Goodbye, supra note 7.

[FN116]. See Smith, supra note 6. This is most interesting though scholars continue to plead for more family law around the globe and across borders. See Ann Laquer Estin, Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States, 62 Fla. L. Rev. 47, 48 (2010).


[FN120]. See Celizic, Genetic Parents, supra note 8.

[FN121]. Richard E. Dobbins, Ohio Surrogacy Law, Surrogacy.com (June 2000), ht-


[FN123]. Id. § 3111.03(A).

[FN124]. Id. § 3111.03(A)(1).

[FN125]. Id. § 3111.03(B).

[FN126]. Id.


[FN129]. Id. § 3111.89.

[FN130]. See id. §§ 3111.88-3111.96 (demonstrating that the statutes here address only intentional, consensual insemination of a woman with the semen from a man who is not her husband for the purposes of raising the child as her own).

[FN131]. Id. § 3111.91.

[FN132]. Id. § 3111.97(a).


[FN135]. Id.


[FN137]. Roe v. Wade, 410 U.S. 113, 154 (1973) (holding that a woman has a qualified right to choose an abortion).


433-34, 441, 446-47, 468-70 (2004) (discussing the need to reexamine the Court's definition of family, examining where the Court's focused on the function rather than the form of family, and generally advocating for a broader definition of family focused on kinship rather than just biology); Roberts, supra note 58, at 252-53 (discussing the limits of paternal biology on legal parentage); Elizabeth A. Embrey, Note, In Re Bonfield: Are We There Yet? The Ohio Supreme Court's Journey Establishing Adoption and Custody Laws in Ohio, 32 Cap. U. L. Rev. 207, 212 (2003) (determining parentage as a function of adoption in addition to biology); Carrie L. Wambaugh, Comment, Biology Is Important, but Does Not Necessarily Always Constitute a “Family”: A Brief Survey of the Uniform Adoption Act, 32 Akron L. Rev. 791, 792 (1999) (discussing the effects of biology on the legal definition of family).

[FN140]. See Celizic, Hello and Goodbye, supra note 7.

[FN141]. See id.

[FN142]. See Ohio Rev. Code Ann. § 3111.97(B) (West 2005 & Supp. 2010); see also id. § 3111.03 (outlining the presumptions of the father child relationship that apply to § 3111.97(B)).

[FN143]. Id. § 3111.09(A)(1).

[FN144]. See id.


[FN147]. See id.

[FN148]. Id. § 20-156.

[FN149]. Id. § 20-158.

[FN150]. Id. § 20-156. The intended parent rationale originated from Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993) (ruling that the parties who intended to be the child's parents by express agreement with the surrogate were indeed the legal parents). This has come to be the rule followed in many jurisdictions. See DiFonzo & Stern, supra note 47, at 394-95.


[FN152]. Id. § 20-159(B).

[FN153]. See id. § 20-160.

[FN154]. Id. § 20-160(A).

[FN155]. Id.

[FN156]. Id. § 20-160(A)-(B).
[FN157]. Id. § 20-158(D) (providing for this remedy if the court deems it appropriate).

[FN158]. Id. § 20-161(A).

[FN159]. Id. § 20-161(B).

[FN160]. Id. § 20-162. After getting a surrogacy contract approved pursuant to § 20-162, the intended parents are the parents of the child and the surrogate and her husband are not parents. Id. § 20-158(E).

[FN161]. Id. § 20-158(E)(1).

[FN162]. Id. § 20-158(E)(2).

[FN163]. Id.; see also Ohio Rev. Code Ann. § 3111.95 (West 2005 & Supp. 2010) (“If a married woman is the subject of a non-spousal artificial insemination and if her husband consented to the artificial insemination, the husband shall be treated in law and regarded as the natural father of the child . . . .”). Furthermore, if none of the intended parents are genetic parents, the surrogate mother is the mother and her husband is the father if he is a party to the contract. The intended parents may obtain parental rights by adoption. Va. Code Ann. § 20-158(E)(3).

[FN164]. See id. § 20-158(E)(4).


[FN166]. Id. § 20-162(A)(2).

[FN167]. Id. § 20-162(A)(3).

[FN168]. Id. § 20-162(A). If compensation is provided, the contract is void and unenforceable. Id.

[FN169]. Id. § 20-162(B)(1).

[FN170]. Id. § 20-162(B)(2).

[FN171]. Id. § 20-162(B)(3).

[FN172]. Id. § 20-158(A)(1).

[FN173]. Id. § 20-162(A)(2). This is true even in the event of an annulment obtained after assisted conception, unless the putative husband commences a divorce within two years after he discovers or should have discovered the child's birth and in which it is determined that he did not consent to the conception. Id.

[FN174]. Id. § 20-158(A)(3).


[FN176]. See Naomi Cahn, Test Tube Families: Why the Fertility Market Needs Legal Regulation 21 (2009); see also Anderson, supra note 133, at 615 (discussing the need for more regulation of ART).
[FN177]. Cahn, supra note 176, at 44.

[FN178]. See id. at 192.

[FN179]. See id. at 44.

[FN180]. Id. at 235. Indeed, Professor Cahn makes a vivid argument for a uniform federal legal code by describing the case involving triplets of a gestational carrier where an Ohio couple, James Flynn and Eileen Donich, sued their gestational carrier, Pennsylvania resident Danielle Bimber, when she refused to give up her triplets. Id. at 104-07. The case was tried in both states, J.F. v. D.B., 848 N.E.2d 873 (Ohio Ct. App. 2006), and Flynn v. Bimber, No. 15160-2003, 2005 WL 1349640 (Pa. Ct. Com. Pl. Jan. 7, 2005), and ultimately decided in favor of Flynn—the biological father, but not Donich, who was accorded no standing by the court. Flynn, 2005 WL 1349640, at *263, *268. Professor Cahn argues that a uniform federal law is needed particularly to deal with interstate conflicts. See Cahn, supra note 176, at 189.

[FN181]. Hilary White, “Right” of Couples to IVF Trumps Children’s Right to a Normal Family-European Court of Human Rights, LifeSiteNews.com (Apr. 7, 2010), http://www.lifesitenews.com/ldn/2010/apr/10040704.html. For example, Austria’s Artificial Procreation Act was codified to “protect children from some of the strange family relations suffered by many IVF children created in countries that allow gamete donation from unrelated third parties” and was “intended to protect women from exploitation.” Id. The European Court of Human Rights ruled the law to be discriminatory and in violation of the European Convention on Human Rights as not formulated “in a coherent manner” proffering that there were no “‘insurmountable obstacles’ to bringing such relationships into the ‘general framework of family law.’” Id.

[FN182]. “The law is only a shadow of the good things that are coming—not the realities themselves.” Hebrews 10:1 (New International Version).

[FN183]. See Va. Code Ann. § 20-162 (2008 & Supp. 2010). However, this outcome is not guaranteed, as the Morells could argue that they were the intended parents of the embryo. See id. § 20-158(E)(4).

[FN184]. See Va. Code Ann. § 20-158 (2008) (“[Donor parent] is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother.”).


[FN186]. See Ohio Rev. Code Ann. § 3111.95 (West 2005 & Supp. 2010) (providing that the woman who gives birth will be the natural mother, and if the husband consented to the artificial insemination, the husband will be the natural father of the child).


[FN189]. See Reindl, supra note 7.

[FN190]. Id.

[FN192]. See id.

[FN193]. The notion that law should be used to shape character is not a new one. J. Budziszewski points out that laws can be used to “make men good.” J. Budziszewski, Written on the Heart 45 (1997). Of this notion he writes, “The arm of the law reaches only my outward deeds, but virtue is the inward disposition that gives rise to them.” Id. Then relying on Aristotle he explains, “Having virtue is not the same as doing outward deeds; nevertheless we acquire virtue by doing outward deeds.” Id.


[FN195]. See Celizic, Hello and Goodbye, supra note 7 (noting that after ten years of trying and finally becoming pregnant, but with the wrong embryo, the couple was forced to use a surrogate to carry a child to term once they completed this pregnancy).

[FN196]. This type of “virtue jurisprudence” is also often associated with Aristotle and Thomas Aquinas, and forms the root of Christian theology and is sometimes referred to as “The Unity of the Virtues.” See Budziszewski, supra note 193, at 31. Sean and Carolyn Savage noted that their faith informed their choices. See David Gardner, Pregnant Mother Forced to Give Up IVF Baby After Doctors Gave Her Wrong Embryo, Daily Mail Online (United Kingdom), http://www.dailymail.co.uk/news/wrldnews/article-1215090/ (last updated Sept. 22, 2009). “The couple decided not to have an abortion because of their religious beliefs, and have met the other couple and arranged a handover.” Id. “Because of her Catholic religious beliefs, Savage, a 40-year-old mother of two from Sylvania, Ohio, agreed not to abort and to give the baby back to its biological mother.” Susan Donaldson James, Embryo Mix-Up Woman Gives Birth, Faces Heartbreak Ahead, ABCNews.com (Sept. 28, 2009), http://abcnews.go.com/Health/MindMoodNews/unintended-surrogate-mom-wrong-embryo-faces-heartbreak-birth/story?id=8675885.

[FN197]. See 1 Kings 3:16-28. Solomon's wise ruling, in brief: Two prostitutes lived together; each recently had a baby. Id. One killed her baby in the middle of the night and switched it with the other's living child. Id. Waking, the other knew the dead child was not hers. Id. The prostitutes went before the king to resolve the ensuing dispute. Id. He candidly recommended cutting the baby in half. Id. The false mother was nonplussed by this heinous suggestion, but the true mother pled desperately that her son be given over to her unscrupulous housemate, rather than be cut in two. Id. Solomon now knew the true mother from the false, and ordered her reunited with her son. Id.

[FN198]. See id.

[FN199]. See supra Parts II-IV.

[FN200]. See supra Parts V.A-V.B.

[FN201]. See James, supra note 196 (“The Morells told The Associated Press that Savage was a ‘guardian angel’ and they would be ‘eternally grateful.’”). Id.

[FN202]. See generally Patterson, supra note 119 (advocating for less government intrusion in family law from the federal arena).

[FN203]. See Adams, supra note 1.
[FN204]. Adams, supra note 1, at 172.

[FN205]. See supra Part V.D.
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INTRODUCTION

AN INTEGRAL AND SOLIDARY HUMANISM

a. At the dawn of the Third Millennium
b. The significance of this document
c. At the service of the full truth about man
d. In the sign of solidarity, respect and love

PART ONE

CHAPTER ONE

GOD'S PLAN OF LOVE FOR HUMANITY

I. GOD'S LIBERATING ACTION IN THE HISTORY OF ISRAEL
   a. God's gratuitous presence
   b. The principle of creation and God's gratuitous action

II. JESUS CHRIST, THE FULFILMENT OF THE FATHER'S PLAN OF LOVE
   a. In Jesus Christ the decisive event of the history of God with mankind is fulfilled
   b. The revelation of Trinitarian love
his life or to remove social factors that cause his indigence. It is undoubtedly an act of love, the work of mercy by which one responds here and now to a real and impelling need of one's neighbour, but it is an equally indispensable act of love to strive to organize and structure society so that one's neighbour will not find himself in poverty, above all when this becomes a situation within which an immense number of people and entire populations must struggle, and when it takes on the proportions of a true worldwide social issue.

PART TWO

“...the Church's social teaching is itself a valid instrument of evangelization. As such, it proclaims God and his mystery of salvation in Christ to every human being, and for that very reason reveals man to himself. In this light, and only in this light, does it concern itself with everything else: the human rights of the individual, and in particular of the ‘working class', the family and education, the duties of the State, the ordering of national and international society, economic life, culture, war and peace, and respect for life from the moment of conception until death”.

(Centesimus Annus, 54)

CHAPTER FIVE

THE FAMILY, THE VITAL CELL OF SOCIETY

I. THE FAMILY, THE FIRST NATURAL SOCIETY

209. The importance and centrality of the family with regard to the person and society is repeatedly underlined by Sacred Scripture. “It is not good that the man should be alone” (Gen 2:18). From the texts that narrate the creation of man (cf. Gen 1:26-28, 2:7-24) there emerges how — in God's plan — the couple constitutes “the first form of communion between persons”[458]. Eve is created like Adam as the one who, in her otherness, completes him (cf. Gen 2:18) in order to form with him “one flesh” (Gen 2:24; cf. Mt 19:5-6)[459]. At the same time, both are involved in the work of procreation, which makes them co-workers with the Creator: “Be fruitful and multiply, and fill the earth” (Gen 1:28). The family is presented, in the Creator's plan, as “the primary place of ‘humanization' for the person and society” and the “cradle of life and love”[460].

210. It is in the family that one learns the love and faithfulness of the Lord, and the need to respond to these (cf. Ex 12:25-27, 13:8,14-15; Deut 6:20-25, 13:7-11; 1 Sam 3:13). It is in the family that children learn their first and most important lessons of practical wisdom, to which the virtues are connected (cf. Prov 1:8-9, 4:1-4, 6:20-21; Sir 3:1-16, 7:27-28). Because of all this, the Lord himself is the guarantor of the love and fidelity of married life (cf. Mal 2:14-15).

Jesus was born and lived in a concrete family, accepting all its characteristic features [461] and he conferred the highest dignity on the institution of marriage, making it a sacrament of
the new covenant (cf. Mt 19:3-9). It is in this new perspective that the couple finds the fullness of its dignity and the family its solid foundation.

**211.** Enlightened by the radiance of the biblical message, the Church considers the family as the first natural society, with underived rights that are proper to it, and places it at the centre of social life. Relegating the family “to a subordinate or secondary role, excluding it from its rightful position in society, would be to inflict grave harm on the authentic growth of society as a whole”[462]. The family, in fact, is born of the intimate communion of life and love founded on the marriage between one man and one woman[463]. It possesses its own specific and original social dimension, in that it is the principal place of interpersonal relationships, *the first and vital cell of society*[464]. The family is a divine institution that stands at the foundation of life of the human person as the prototype of every social order.

### a. Importance of the family for the person

**212.** The family has central importance in reference to the person. It is in this cradle of life and love that people are born and grow; when a child is conceived, society receives the gift of a new person who is called “from the innermost depths of self to communion with others and to the giving of self to others”[465]. It is in the family, therefore, that the mutual giving of self on the part of man and woman united in marriage creates an environment of life in which children “develop their potentialities, become aware of their dignity and prepare to face their unique and individual destiny”[466].

*In the climate of natural affection which unites the members of a family unit, persons are recognized and learn responsibility in the wholeness of their personhood. “The first and fundamental structure for ‘human ecology’ is the family, in which man receives his first formative ideas about truth and goodness, and learns what it means to love and to be loved, and thus what it actually means to be a person”*[467]. The obligations of its members, in fact, are not limited by the terms of a contract but derive from the very essence of the family, founded on the irrevocable marriage covenant and given structure in the relationships that arise within it following the generation or adoption of children.

### b. Importance of the family for society

**213.** The family, the natural community in which human social nature is experienced, makes a unique and irreplaceable contribution to the good of society. The family unit, in fact, is born from the communion of persons. “Communion’ has to do with the personal relationship between the ‘I’ and the ‘thou’. ‘Community’ on the other hand transcends this framework and moves towards a ‘society’, a ‘we’. The family, as a community of persons, is thus the first human ‘society’*[468].

*A society built on a family scale is the best guarantee against drifting off course into individualism or collectivism, because within the family the person is always at the centre of attention as an end and never as a means. It is patently clear that the good of persons and the proper functioning of society are closely connected “with the healthy state of conjugal and family life”*[469]. Without families that are strong in their communion and stable in their commitment peoples grow weak. In the family, moral values are taught starting from the very first years of life, the spiritual heritage of the religious community and the cultural legacy of the nation are transmitted. In the family one learns social responsibility and solidarity[470].

**214.** The priority of the family over society and over the State must be affirmed. The family in
fact, at least in its procreative function, is the condition itself for their existence. With regard
to other functions that benefit each of its members, it proceeds in importance and value the
functions that society and the State are called to perform[471]. The family possesses
inviolable rights and finds its legitimization in human nature and not in being recognized by
the State. The family, then, does not exist for society or the State, but society and the State
exist for the family.

Every social model that intends to serve the good of man must not overlook the centrality and
social responsibility of the family. In their relationship to the family, society and the State are
seriously obligated to observe the principle of subsidiarity. In virtue of this principle, public
authorities may not take away from the family tasks which it can accomplish well by itself or
in free association with other families; on the other hand, these same authorities have the duty
to sustain the family, ensuring that it has all the assistance that it needs to fulfil properly its
responsibilities[472].

II. MARRIAGE, THE FOUNDATION OF THE FAMILY

a. The value of marriage

215. The family has its foundation in the free choice of the spouses to unite themselves in
marriage, in respect for the meaning and values of this institution that does not depend on
man but on God himself: “For the good of the spouses and their offspring as well as of
society, this sacred bond no longer depends on human decision alone. For God himself is the
author of marriage and has endowed it with various benefits and purposes"[473]. Therefore,
the institution of marriage — “intimate partnership of life and love ... established by the
Creator and endowed by him with its own proper laws” [474] — is not the result of human
conventions or of legislative prescriptions but acquires its stability from divine disposition
[475]. It is an institution born, even in the eyes of society, “from the human act by which the
partners mutually surrender themselves to each other”[476], and is founded on the very nature
of that conjugal love which, as a total and exclusive gift of person to person, entails a
definitive commitment expressed by mutual, irrevocable and public consent[477]. This
commitment means that the relationships among family members are marked also by a sense
of justice and, therefore, by respect for mutual rights and duties.

216. No power can abolish the natural right to marriage or modify its traits and purpose.
Marriage in fact is endowed with its own proper, innate and permanent characteristics.
Notwithstanding the numerous changes that have taken place in the course of the centuries in
the various cultures and in different social structures and spiritual attitudes, in every culture
there exists a certain sense of the dignity of the marriage union, although this is not evident
everywhere with the same clarity[478]. This dignity must be respected in its specific
characteristics and must be safeguarded against any attempt to undermine it. Society cannot
freely legislate with regard to the marriage bond by which the two spouses promise each
other fidelity, assistance and acceptance of children, but it is authorized to regulate its civil
effects.

217. The characteristic traits of marriage are: totality, by which the spouses give themselves
to each other mutually in every aspect of their person, physical and spiritual; unity which
makes them “one flesh” (Gen 2:24); indissolubility and fidelity which the definitive mutual
giving of self requires; the fruitfulness to which this naturally opens itself[479]. God's wise
plan for marriage — a plan accessible to human reason notwithstanding the difficulties
arising from “hardness of heart” (cf. Mt 19:8; Mk 10:5) — cannot be evaluated exclusively in
light of the *de facto* behaviour and concrete situations that are at divergence with it. A radical
denial of God’s original plan is found in *polygamy*, “because it is contrary to the equal
personal dignity of men and women who in matrimony give themselves with a love that is
total and therefore unique and exclusive”[480].

218. *In its “objective” truth, marriage is ordered to the procreation and education of children*[481]. The marriage union, in fact, gives fullness of life to that sincere gift of self, the fruit of which is children, who in turn are a gift for the parents, for the whole family and all of society[482]. *Nonetheless, marriage was not instituted for the sole reason of procreation*[483]. Its indissoluble character and its value of communion remain even when children, although greatly desired, do not arrive to complete conjugal life. In this case, the spouses “can give expression to their generosity by adopting abandoned children or
performing demanding services for others”[484].

b. The sacrament of marriage

219. *By Christ’s institution, the baptized live the inherent human reality of marriage in the supernatural form of a sacrament, a sign and instrument of grace. The theme of the marriage covenant, as the meaningful expression of the communion of love between God and men and as the symbolic key to understanding the different stages of the great covenant between God and his people, is found throughout salvation history*[485]. At the centre of the revelation of the divine plan of love is the gift that God makes to humanity in his Son, Jesus Christ, “the Bridegroom who loves and gives himself as the Saviour of humanity, uniting it to himself as his body. He reveals the original truth of marriage, the truth of the ‘beginning’ (cf. *Gen* 2:24; *Mt* 19:5), and, freeing man from his hardness of heart, he makes man capable of realizing this truth in its entirety”[486]. It is in the spousal love of Christ for the Church, which shows its fullness in the offering made on the cross that the sacramentality of marriage originates. The grace of this sacrament conforms the love of the spouses to the love of Christ for the Church. Marriage, as a sacrament, is a covenant in love between a man and a woman[487].

220. *The sacrament of marriage takes up the human reality of conjugal love in all its implications* and “gives to Christian couples and parents a power and a commitment to live their vocation as lay people and therefore to ‘seek the kingdom of God by engaging in temporal affairs and by ordering them according to the plan of God’”[488]. Intimately united
to the Church by virtue of the sacrament that makes it a “domestic Church” or a “little Church”, the Christian family is called therefore “to be a sign of unity for the world and in this way to exercise its prophetic role by bearing witness to the Kingdom and peace of Christ, towards which the whole world is journeying”[489].

Conjugal charity, which flows from the very charity of Christ, offered through the sacrament, makes Christian spouses witnesses to a new social consciousness inspired by the Gospel and the Paschal Mystery. The natural dimension of their love is constantly purified, strengthened and elevated by sacramental grace. In this manner, besides offering each other mutual help on the path to holiness, Christian spouses become a sign and an instrument of Christ's love in the world. By their very lives they are called to bear witness to and proclaim the religious meaning of marriage, which modern society has ever greater difficulty recognizing, especially as it accepts relativistic perspectives of the natural foundation itself of the institution of marriage.

**III. THE SOCIAL SUBJECTIVITY OF THE FAMILY**
a. Love and the formation of a community of persons

221. The family is present as the place where communion — that communion so necessary for a society that is increasingly individualistic — is brought about. It is the place where an authentic community of persons develops and grows, thanks to the endless dynamism of love, which is the fundamental dimension of human experience and which finds in the family the privileged place for making itself known. “Love causes man to find fulfilment through the sincere gift of self. To love means to give and to receive something which can be neither bought nor sold, but only given freely and mutually.”

It is thanks to love, the essential reality for defining marriage and the family that every person — man and woman — is recognized, accepted and respected in his dignity. From love arise relationships lived in gratuitousness, which “by respecting and fostering personal dignity in each and every one as the only basis for value ... takes the form of heartfelt acceptance, encounter and dialogue, disinterested availability, generous service and deep solidarity.” The existence of families living this way exposes the failings and contradictions of a society that is for the most part, even if not exclusively, based on efficiency and functionality. By constructing daily a network of interpersonal relationships, both internal and external, the family is instead “the first and irreplaceable school of social life, and example and stimulus for the broader community relationships marked by respect, justice, dialogue and love.”

222. Love is also expressed in the generous attention shown to the elderly who live in families: their presence can take on great value. They are an example of connections between generations, a resource for the well-being of the family and of the whole of society: “Not only do they show that there are aspects of life — human, cultural, moral and social values — which cannot be judged in terms of economic efficiency, but they can also make an effective contribution in the workplace and in leadership roles. In short, it is not just a question of doing something for older people, but also of accepting them in a realistic way as partners in shared projects — at the level of thought, dialogue and action.” As the Sacred Scripture says: “They still bring forth fruit in old age” (Ps 92:15). The elderly constitute an important school of life, capable of transmitting values and traditions, and of fostering the growth of younger generations, who thus learn to seek not only their own good but also that of others. If the elderly are in situations where they experience suffering and dependence, not only do they need health care services and appropriate assistance, but — and above all — they need to be treated with love.

223. The human being is made for love and cannot live without love. When it is manifested as the total gift of two persons in their complementarities, love cannot be reduced to emotions or feelings, much less to mere sexual expression. In a society that tends more and more to relativize and trivialize the very experience of love and sexuality, exalting its fleeting aspects and obscuring its fundamental values, it is more urgent than ever to proclaim and bear witness that the truth of conjugal love and sexuality exist where there is a full and total gift of persons, with the characteristics of unity and fidelity. This truth, a source of joy, hope and life, remains impenetrable and unattainable as long as people close themselves off in relativism and scepticism.

224. Faced with theories that consider gender identity as merely the cultural and social product of the interaction between the community and the individual, independent of personal sexual identity without any reference to the true meaning of sexuality, the Church does not tire of repeating her teaching: “Everyone, man and woman, should acknowledge...
and accept his sexual identity. Physical, moral and spiritual *difference* and *complementarities* are oriented towards the goods of marriage and the flourishing of family life. The harmony of the couple and of society depends in part on the way in which the complementarities, needs and mutual support between the sexes are lived out”[496]. According to this perspective, it is obligatory that positive law *be conformed* to the natural law, according to which *sexual identity is indispensable*, because it is the objective condition for forming a couple in marriage.

**225. The nature of conjugal love requires the stability of the married relationship and its indissolubility.** The absence of these characteristics compromises the relationship of exclusive and total love that is proper to the marriage bond, bringing great pain to the children and damaging repercussions also on the fabric of society.

The stability and indissolubility of the marriage union must not be entrusted solely to the intention and effort of the individual persons involved. The responsibility for protecting and promoting the family as a fundamental natural institution, precisely in consideration of its vital and essential aspects, falls to the whole of society. The need to confer an institutional character on marriage, basing this on a public act that is socially and legally recognized, arises from the basic requirements of social nature.

*The introduction of divorce into civil legislation has fuelled a relativistic vision of the marriage bond* and is broadly manifested as it becomes “truly a plague on society”[497]. Couples who preserve and develop the value of indissolubility “in a humble and courageous manner ... perform the role committed to them of being in the world a ‘sign’ — a small and precious sign, sometimes also subjected to temptation, but always renewed — of the unfailing fidelity with which God and Jesus Christ love each and every human being”[498].

**226. The Church does not abandon those who have remarried after a divorce.** *She prays for them and encourages them in the difficulties that they encounter in the spiritual life, sustaining them in faith and in hope.* For their part, these persons, insofar as they are baptized, can and indeed must participate in the life of the Church. They are exhorted to listen to the Word of God, to attend the sacrifice of the Mass, to persevere in prayer, to perform acts of charity and take part in community projects for justice and peace, to raise their children in faith, and to nurture a spirit of penitence and works of penance in order to beseech, day after day, the grace of God.

Reconciliation in the sacrament of Penance — which opens the way to the sacrament of the Eucharist — can only be given to those who, after repenting, are sincerely disposed to a new form of life that is no longer in contradiction with the indissolubility of marriage[499].

Acting in this fashion, the Church professes her fidelity to Christ and to his truth; at the same time she shows a maternal spirit to her children, especially those who, through no fault of their own, have been abandoned by their legitimate spouse. With steadfast trust she believes that even those who have turned away from the Lord's commandment, and continue to live in that state, can obtain from God the grace of conversion and salvation, if they persevere in prayer, penance and charity[500].

**227. De facto unions, the number of which is progressively increasing, are based on a false conception of an individual's freedom to choose [501] and on a completely privatistic vision of marriage and family.** Marriage is not a simple agreement to live together but a relationship with a social dimension that is unique with regard to all other relationships, since the family
— attending as it does to caring for and educating children — is the principal instrument for making each person grow in an integral manner and integrating him positively into social life.

Making “de facto unions” legally equivalent to the family would discredit the model of the family, which cannot be brought about in a precarious relationship between persons [502] but only in a permanent union originating in marriage, that is, in a covenant between one man and one woman, founded on the mutual and free choice that entails full conjugal communion oriented towards procreation.

228. Connected with de facto unions is the particular problem concerning demands for the legal recognition of unions between homosexual persons, which is increasingly the topic of public debate. Only an anthropology corresponding to the full truth of the human person can give an appropriate response to this problem with its different aspects on both the societal and ecclesial levels[503]. The light of such anthropology reveals “how incongruous is the demand to accord ‘marital’ status to unions between persons of the same sex. It is opposed, first of all, by the objective impossibility of making the partnership fruitful through the transmission of life according to the plan inscribed by God in the very structure of the human being. Another obstacle is the absence of the conditions for that interpersonal complementarity between male and female willed by the Creator at both the physical-biological and the eminently psychological levels. It is only in the union of two sexually different persons that the individual can achieve perfection in a synthesis of unity and mutual psychophysical completion”[504].

Homosexual persons are to be fully respected in their human dignity [505] and encouraged to follow God's plan with particular attention in the exercise of chastity[506]. This duty calling for respect does not justify the legitimization of behaviour that is not consistent with moral law, even less does it justify the recognition of a right to marriage between persons of the same sex and its being considered equivalent to the family[507].

“If, from the legal standpoint, marriage between a man and a woman were to be considered just one possible form of marriage, the concept of marriage would undergo a radical transformation, with grave detriment to the common good. By putting homosexual unions on a legal plane analogous to that of marriage and the family, the State acts arbitrarily and in contradiction with its duties”[508].

229. The solidity of the family nucleus is a decisive resource for the quality of life in society, therefore the civil community cannot remain indifferent to the destabilizing tendencies that threaten its foundations at their very roots. Although legislation may sometimes tolerate morally unacceptable behaviour[509], it must never weaken the recognition of indissoluble monogamous marriage as the only authentic form of the family. It is therefore necessary that the public authorities “resist these tendencies which divide society and are harmful to the dignity, security and welfare of the citizens as individuals, and they must try to ensure that public opinion is not led to undervalue the institutional importance of marriage and the family”[510].

It is the task of the Christian community and of all who have the good of society at heart to reaffirm that “the family constitutes, much more than a mere juridical, social and economic unit, a community of love and solidarity, which is uniquely suited to teach and transmit cultural, ethical, social, spiritual and religious values, essential for the development and well-being of its own members and of society”[511].
b. The family is the sanctuary of life

230. *Conjugal love is by its nature open to the acceptance of life*[512]. The dignity of the human being, called to proclaim the goodness and fruitfulness that come from God, is eminently revealed in the task of procreation: “Human fatherhood and motherhood, while remaining biologically similar to that of other living beings in nature, contain in an essential and unique way a ‘likeness' to God which is the basis of the family as a community of human life, as a community of persons united in love (communio personarum)”[513].

Procreation expresses the social subjectivity of the family and sets in motion a dynamism of love and solidarity between the generations upon which society is founded. It is necessary to rediscover the social value of that *portion* of the common good inherent in each new human being. Every child “becomes a gift to its brothers, sisters, parents and entire family. *Its life becomes a gift for the very people who were givers of life* and who cannot help but feel its presence, its sharing in their life and its contribution to their common good and to that of the community of the family”[514].

231. *The family founded on marriage is truly the sanctuary of life*, “the place in which life — the gift of God — can be properly welcomed and protected against the many attacks to which it is exposed, and can develop in accordance with what constitutes authentic human growth”[515]. Its role in promoting and building the culture of life [516] against “the possibility of a destructive ‘anti-civilization', as so many present trends and situations confirm”[517], is decisive and irreplaceable.

Christian families have then, in virtue of the sacrament received, *a particular mission that makes them witnesses and proclaimers of the Gospel of life*. This is a commitment which in society takes on the value of true and courageous prophecy. It is for this reason that “serving the *Gospel of life ... means that the family, particularly through its membership in family associations, works to ensure that the laws and institutions of the State in no way violate the right to life, from conception to natural death, but rather protect and promote it”[518].

232. *The family contributes to the social good in an eminent fashion through responsible motherhood and fatherhood*, the spouses' special participation in God's work of creation [519]. The weight of this responsibility must not be used as a justification for being selfishly closed but must guide the decisions of the spouses in a generous acceptance of life. “In relation to physical, economic, psychological and social conditions, responsible parenthood is exercised both in the duly pondered and generous decision to have a large family, and in the decision, made for serious reasons and in respect of the moral law, to avoid for a time or even indeterminately a new birth”[520]. The motivations that should guide the couple in exercising responsible motherhood and fatherhood originate in the full recognition of their duties towards God, towards themselves, towards the family and towards society in a proper hierarchy of values.

233. *Concerning the “methods” for practising responsible procreation, the first to be rejected as morally illicit are sterilization and abortion*[521]. The latter in particular is a horrendous crime and constitutes a particularly serious moral disorder[522]; far from being a right, it is a sad phenomenon that contributes seriously to spreading a mentality against life, representing a dangerous threat to a just and democratic social coexistence[523].

Also to be rejected is recourse to contraceptive methods in their different forms[524]: this rejection is based on a correct and integral understanding of the person and human sexuality.
and represents a moral call to defend the true development of peoples[526]. On the 
other hand, the same reasons of an anthropological order justify recourse to periodic 
abstinence during times of the woman's fertility[527]. Rejecting contraception and using 
natural methods for regulating births means choosing to base interpersonal relations between 
the spouses on mutual respect and total acceptance, with positive consequences also for 
bringing about a more human order in society.

234. The judgment concerning the interval of time between births, and that regarding the number of children, belongs to the spouses alone. This is one of their inalienable rights, to be exercised before God with due consideration of their obligations towards themselves, their children already born, the family and society[528]. The intervention of public authorities within the limits of their competence to provide information and enact suitable measures in the area of demographics must be made in a way that fully respects the persons and the freedom of the couple. Such intervention may never become a substitute for their decisions [529]. All the more must various organizations active in this area refrain from doing the same.

All programmes of economic assistance aimed at financing campaigns of sterilization and contraception, as well as the subordination of economic assistance to such campaigns, are to be morally condemned as affronts to the dignity of the person and the family. The answer to questions connected with population growth must instead by sought in simultaneous respect both of sexual morals and of social ethics, promoting greater justice and authentic solidarity so that dignity is given to life in all circumstances, starting with economic, social and cultural conditions.

235. The desire to be a mother or a father does not justify any “right to children”, whereas the rights of the unborn child are evident. The unborn child must be guaranteed the best possible conditions of existence through the stability of a family founded on marriage, through the complementarities of the two persons, father and mother[530]. The rapid development of research and its technological application in the area of reproduction poses new and delicate questions that involve society and the norms that regulate human social life.

It must be repeated that the ethical unacceptability of all reproductive techniques — such as the donation of sperm or ova, surrogate motherhood, heterologous artificial fertilization — that make use of the uterus of another woman or of gametes of persons other than the married couple, injuring the right of the child to be born of one father and one mother who are father and mother both from a biological and from a legal point of view. Equally unacceptable are methods that separate the unitive act from the procreative act by making use of laboratory techniques, such as homologous artificial insemination or fertilization, such that the child comes about more as the result of an act of technology than as the natural fruit of a human act in which there is a full and total giving of the couple[531]. Avoiding recourse to different forms of so-called “assisted procreation” that replace the marriage act means respecting — both in the parents and in the children that they intend to generate — the integral dignity of the human person[532]. On the other hand, those methods that are meant to lend assistance to the conjugal act or to the attainment of its effects are legitimate[533].

236. An issue of particular social and cultural significance today, because of its many and serious moral implications, is human cloning. This term refers per se to the reproduction of a biological entity that is genetically identical to the originating organism. In thought and experimental practice it has taken on different meanings which in turn entail different procedures from the point of view of the techniques employed as well as of the goals sought.
The term can be used to refer to the simple laboratory replication of cells or of a portion of DNA. But specifically today it is used to refer to the reproduction of individuals at the embryonic stage with methods that are different from those of natural fertilization and in such a way that the new beings are genetically identical to the individual from which they originate. This type of cloning can have a reproductive purpose, that of producing human embryos, or a so-called therapeutic purpose, tending to use such embryos for scientific research or more specifically for the production of stem cells.

From an ethical point of view, the simple replication of normal cells or of a portion of DNA presents no particular ethical problem. Very different, however, is the Magisterium's judgment on cloning understood in the proper sense. Such cloning is contrary to the dignity of human procreation because it takes place in total absence of an act of personal love between spouses, being agamic and asexual reproduction[534]. In the second place, this type of reproduction represents a form of total domination over the reproduced individual on the part of the one reproducing it[535]. The fact that cloning is used to create embryos from which cells can be removed for therapeutic use does not attenuate its moral gravity, because in order that such cells may be removed the embryo must first be created and then destroyed[536].

237. Parents, as ministers of life, must never forget that the spiritual dimension of procreation is to be given greater consideration than any other aspect: “Fatherhood and motherhood represent a responsibility which is not simply physical but spiritual in nature; indeed, through these realities there passes the genealogy of the person, which has its eternal beginning in God and which must lead back to him”[537]. Welcoming human life in the unified aspects of its physical and spiritual dimensions, families contribute to the “communion of generations” and in this way provide essential and irreplaceable support for the development of society. For this reason, “the family has a right to assistance by society in the bearing and rearing of children. Those married couples who have a large family have a right to adequate aid and should not be subjected to discrimination”[538].

c. The task of educating

238. In the work of education, the family forms man in the fullness of his personal dignity according to all his dimensions, including the social dimension. The family, in fact, constitutes “a community of love and solidarity, which is uniquely suited to teach and transmit cultural, ethical, social, spiritual and religious values, essential for the development and well-being of its own members and of society”[539]. By exercising its mission to educate, the family contributes to the common good and constitutes the first school of social virtue, which all societies need[540]. In the family, persons are helped to grow in freedom and responsibility, indispensable prerequisites for any function in society. With education, certain fundamental values are communicated and assimilated[541].

239. The family has a completely original and irreplaceable role in raising children[542]. The parents' love, placing itself at the service of children to draw forth from them (“e-ducere”) the best that is in them, finds its fullest expression precisely in the task of educating. “As well as being a source, the parents' love is also the animating principle and therefore the norm inspiring and guiding all concrete educational activity, enriching it with the values of kindness, constancy, goodness, service, disinterestedness and self-sacrifice that are the most precious fruit of love”[543].

The right and duty of parents to educate their children is “essential, since it is connected with
the transmission of human life; it is original and primary with regard to the educational role of others, on account of the uniqueness of the loving relationship between parents and children; and it is irreplaceable and inalienable, and therefore incapable of being entirely delegated to others or usurped by others”[544]. Parents have the duty and right to impart a religious education and moral formation to their children[545], a right the State cannot annul but which it must respect and promote. This is a primary right that the family may not neglect or delegate.

240. Parents are the first educators, not the only educators, of their children. It belongs to them, therefore, to exercise with responsibility their educational activity in close and vigilant cooperation with civil and ecclesial agencies. “Man's community aspect itself — both civil and ecclesial — demands and leads to a broader and more articulated activity resulting from well-ordered collaboration between the various agents of education. All these agents are necessary, even though each can and should play its part in accordance with the special competence and contribution proper to itself”[546]. Parents have the right to choose the formative tools that respond to their convictions and to seek those means that will help them best to fulfil their duty as educators, in the spiritual and religious sphere also. Public authorities have the duty to guarantee this right and to ensure the concrete conditions necessary for it to be exercised[547]. In this context, cooperation between the family and scholastic institutions takes on primary importance.

241. Parents have the right to found and support educational institutions. Public authorities must see to it that “public subsidies are so allocated that parents are truly free to exercise this right without incurring unjust burdens. Parents should not have to sustain, directly or indirectly, extra charges which would deny or unjustly limit the exercise of this freedom”[548]. The refusal to provide public economic support to non-public schools that need assistance and that render a service to civil society is to be considered an injustice. “Whenever the State lays claim to an educational monopoly, it oversteps its rights and offends justice ... The State cannot without injustice merely tolerate so-called private schools. Such schools render a public service and therefore have a right to financial assistance”[549].

242. The family has the responsibility to provide an integral education. Indeed, all true education “is directed towards the formation of the human person in view of his final end and the good of that society to which he belongs and in the duties of which he will, as an adult, have a share”[550]. This integrality is ensured when children — with the witness of life and in words — are educated in dialogue, encounter, sociality, legality, solidarity and peace, through the cultivation of the fundamental virtues of justice and charity[551].

In the education of children, the role of the father and that of the mother are equally necessary.[552] The parents must therefore work together. They must exercise authority with respect and gentleness but also, when necessary, with firmness and vigor: it must be credible, consistent, and wise and always exercised with a view to children's integral good.

243. Parents have, then, a particular responsibility in the area of sexual education. It is of fundamental importance for the balanced growth of children that they are taught in an orderly and progressive manner the meaning of sexuality and that they learn to appreciate the human and moral values connected with it. “In view of the close links between the sexual dimension of the person and his or her ethical values, education must bring the children to a knowledge of and respect for moral norms as the necessary and highly valuable guarantee for responsible personal growth in human sexuality”[553]. Parents have the obligation to inquire about the methods used for sexual education in educational institutions in order to verify that
such an important and delicate topic is dealt with properly.

d. The dignity and rights of children

244. The Church's social doctrine constantly points out the need to respect the dignity of children. “In the family, which is a community of persons, special attention must be devoted to the children by developing a profound esteem for their personal dignity, and a great respect and generous concern for their rights. This is true for every child, but it becomes all the more urgent the smaller the child is and the more it is in need of everything, when it is sick, suffering or handicapped”[554].

The rights of children must be legally protected within juridical systems. In the first place, it is necessary that the social value of childhood be publicly recognized in all countries: “No country on earth, no political system can think of its own future otherwise than through the image of these new generations that will receive from their parents the manifold heritage of values, duties and aspirations of the nation to which they belong and of the whole human family”[555]. The first right of the child is to “be born in a real family”[556], a right that has not always been respected and that today is subject to new violations because of developments in genetic technology.

245. The situation of a vast number of the world's children is far from being satisfactory, due to the lack of favourable conditions for their integral development despite the existence of a specific international juridical instrument for protecting their rights[557], an instrument that is binding on practically all members of the international community. These are conditions connected with the lack of health care, or adequate food supply, little or no possibility of receiving a minimum of academic formation or inadequate shelter. Moreover, some serious problems remain unsolved: trafficking in children, child labour, the phenomenon of “street children”, the use of children in armed conflicts, child marriage, the use of children for commerce in pornographic material, also in the use of the most modern and sophisticated instruments of social communication. It is essential to engage in a battle, at the national and international levels, against the violations of the dignity of boys and girls caused by sexual exploitation, by those caught up in paedophilia, and by every kind of violence directed against these most defenceless of human creatures[558]. These are criminal acts that must be effectively fought with adequate preventive and penal measures by the determined action of the different authorities involved.

IV. THE FAMILY AS ACTIVE PARTICIPANT IN SOCIAL LIFE

a. Solidarity in the family

246. The social subjectivity of the family, both as a single unit and associated in a group, is expressed as well in the demonstrations of solidarity and sharing not only among families themselves but also in the various forms of participation in social and political life. This is what happens when the reality of the family is founded on love: being born in love and growing in love, solidarity belongs to the family as a constitutive and structural element.

This is a solidarity that can take on the features of service and attention to those who live in poverty and need, to orphans, the handicapped, the sick, the elderly, to those who are in mourning, to those with doubts, to those who live in loneliness or who have been abandoned. It is a solidarity that opens itself to acceptance, to guardianship, to adoption; it is able to bring every situation of distress to the attention of institutions so that, according to their
**257 BRAVE NEW EUGENICS: REGULATING ASSISTED REPRODUCTIVE TECHNOLOGIES IN THE NAME OF BETTER BABIES**

Kerry Lynn Macintosh [FNd1]

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Infertile men and women have been using assisted reproductive technologies (ART) to conceive children since the first “test-tube baby” was born in 1978. During the past decade, however, the federal government has begun to clamp down on ART, asserting safety concerns as grounds for banning novel technologies such as cloning, nuclear transfer, and ooplasm transfer.

Some scholars and policymakers now want to extend governmental regulation to include conventional ART such as in vitro fertilization (IVF) and intracytoplasmic sperm injection (ICSI). They claim children conceived through ART face an increased risk of birth defects and other health problems.

This Article examines the medical literature and exposes a key fact: the health problems observed in such children may be linked to the underlying characteristics of their infertile parents, rather than ART as such. Viewed in light of this literature, the demand for increased regulation amounts to an attempt to restrict the reproduction of disabled persons (the infertile) on the ground that their unhealthy offspring should never be born. But, this is the same rationale eugenicists once used to justify enacting the sterilization laws of the twentieth century.

This Article concludes society should reject this new form of eugenics. The fertile majority should not enact coercive laws and regulations that undermine reproductive autonomy, oppress the infertile minority, stigmatize children, and weaken our commitment to egalitarianism.

I. Introduction

Assisted reproductive technologies (ART) [FN1] have a compassionate purpose: to allow infertile men and women to

bypass their physical disabilities \*259 and conceive genetic offspring. \[FN2\] Since in vitro fertilization (IVF) was first introduced in 1978, more than three million children have been born worldwide through ART. \[FN3\]

There are storm clouds on the horizon, however. During the past twelve years or so, the federal government has begun to take a strong interest in ART. Asserting concerns for the safety of children, the Food and Drug Administration has reached beyond its statutory authority to stop novel technologies such as human reproductive cloning, nuclear transfer, and ooplasm transfer. \[FN4\]

This regulatory tempest now threatens to engulf standard technologies such as IVF. Legal academics and federal policymakers argue that children conceived with the aid of ART face higher rates of birth defects, low birth weight, and other health problems. Their recommendations include undertaking massive new studies of child health, creating new regulatory agencies, and limiting access to problematic technologies, all in the name of public health. \[FN5\]

However, the debate over the regulation of ART is incomplete in two significant ways. First, regulators and academics have only skinned the surface of a complex body of medical literature. ART may not be to blame for health problems observed in children. In fact, there are good reasons to believe these problems stem from underlying characteristics of infertility patients. \[FN6\]

Second, the debate has ignored the eugenic implications of governmental control over ART. When access to reproductive technologies is restricted, the consequences are dramatic: infertile men and women are rendered unable to procreate, and children who might otherwise have been born with health problems are never born at all. They are eliminated, along with their disabilities, ostensibly for their own good.

These twin deficiencies have skewed the debate. This Article seeks to correct them before regulators and legislators do anything more to restrict access to ART.

Part I describes infertility, ART, and concerns about the safety of children. Part II recounts the story of how the federal government has begun to seize control over the reproductive choices of infertile men and women from blocking access to specific technologies to demanding studies as a platform for further regulation.

This Article then shifts the paradigm in two ways. First, Part III evaluates the medical literature on the health of children conceived through ART. Reaching beyond the simple conclusion that the technologies themselves are to blame, it explains that infertile men and women have certain characteristics that could provide an alternative account for the health problems observed in offspring.

\*260 Second, Part IV uses this medical data to reevaluate demands for increased regulation of ART. If lawmakers and regulators accede to these demands, they will be restricting the reproduction of infertile men and women because they are prone to conceiving children with health problems. Drawing a historical analogy, Part IV explains how such action would be comparable in effect and purpose to the sterilization laws of the twentieth century. It argues against this new form of eugenics, reasoning that the fertile majority should not use democratic institutions to oppress the infertile minority and stigmatize them and their children. Nor should the state arrogate to itself the power to decide who is perfect enough to be born.

II. Infertility and Assisted Reproductive Technologies

This Part begins with a discussion of infertility and some of its causes. Next, it explains technologies used to treat infertility. It concludes by describing the existing regulatory regime and proposals for reform.
A. Infertility

Infertility is a common affliction in the United States. It affects about 7.3 million women and their partners, or around 12% of the reproductive population. [FN7]

Infertility has many causes, including obesity and venereal diseases that scar reproductive organs and pathways. [FN8] This article will focus on biological factors that not only make it hard for men and women to conceive, but also pose risks to the health of their children.

1. Chromosomal abnormalities

Human reproduction is inefficient. Up to 75% of all human embryos are lost. [FN9] Most fail to implant or miscarry before the prospective mother even realizes conception has occurred. [FN10] From 30-60% of these embryonic losses are due to chromosomal abnormalities. [FN11]

a. Aneuploidy

A human embryo is supposed to have two copies of each of the twenty-two autosomal chromosomes, plus two sex chromosomes (one X coupled with either one Y or another X). Through sperm and egg, father and mother each contribute one chromosome to each of the twenty-three pairs. [FN12]

However, sometimes a sperm or egg carries more (or less) than the standard single copy of a particular chromosome. An embryo made from that defective sperm or egg will be aneuploid—that is, have more (or less) than the standard two copies of that chromosome. [FN13] Such embryos either miscarry or produce abnormal offspring. For example, trisomy 21 (three copies of chromosome 21) ordinarily causes miscarriage but occasionally produces a child with Down syndrome. [FN14]

What causes these numerical errors? Age is one factor. [FN15] A woman is born with her eggs. As she ages, her eggs get older too. Older eggs are not as efficient at preparing for fertilization through meiosis (a process that involves recombination of genes). [FN16] The increase in aneuploid conceptions helps explain why pregnancy rates decline at age thirty-two and drop sharply at age thirty-seven. [FN17] Moreover, if an older woman does get pregnant, her child may be abnormal. Only 2% of clinically recognized pregnancies are trisomic in women under the age of twenty-five, but 35% of such pregnancies are trisomic in women over forty. [FN18]

However, not all women are created equal in this regard. Some start out with fewer eggs, and thus have fewer eggs in reserve (ovarian reserve). [FN19] Studies have found that women who produce trisomic fetuses have reduced ovarian reserve and reach menopause one year earlier on average than other women. [FN20] Thus, biological age may be more important than chronological age.

In addition, studies have shown that, regardless of age, infertile women are more likely to produce aneuploid eggs and embryos. [FN21] Some underlying characteristic of infertile women causes their eggs and embryos to be more prone to numerical errors than the eggs and embryos of fertile women. [FN22]

Men produce fresh sperm daily and the risk of chromosomal abnormalities does not rise as sharply with advancing age. [FN23] Studies have found only 1-2% aneuploid sperm in normal men. [FN24]

*262 However, infertile men with any type of sperm problem (e.g., little or no sperm in the ejaculate, motility defects, or abnormal shape) are two to ten times more likely than normal men to generate aneuploid sperm. [FN25]
Whatever genetic weakness causes a problem in creating normal sperm can also lead to aneuploidies. [FN26]

b. Translocations

Aneuploidies are not the only kind of chromosomal problem. Some men and women are carriers of structural chromosomal abnormalities. [FN27] The most common are translocations in which pieces of one chromosome are swapped with or stuck onto a chromosome of a different number. [FN28]

A carrier of a “balanced” translocation is healthy because he or she has the right number of genes even though pieces of his or her chromosomes are misplaced. [FN29] Balanced translocations include Robertsonian (e.g., chromosome 13 fuses to chromosome 14) and reciprocal (e.g., chromosome 14 exchanges parts with chromosome 15). [FN30]

Robertsonian translocations are rare, occurring in one out of 1000 newborns. [FN31] However, in men with low sperm count, the rate can rise to one or two out of 100. [FN32]

Reciprocal translocations occur in one out of 1000 newborns, but the average rate in infertile men runs higher, around seven in 1000. [FN33] Wives of men seeking fertility treatment have been found to harbor a similar seven in 1000 rate of reciprocal translocations. [FN34]

When these infertile carriers of balanced translocations reproduce, their sperm and eggs must undergo genetic recombination in preparation for fertilization. Some will receive the correct number of genes, while others will carry duplicated or deleted chunks of chromosome. Such defective sperm and eggs lead to abnormal embryos and miscarriages. On rare occasions, a fetus that carries surplus or missing genes survives and a child is born with serious birth defects. [FN35]

*263 2. Missing and mutated genes

More subtle chromosomal and genetic defects can also lead to infertility and abnormal offspring. For example, the Y chromosome is believed to carry many of the genes necessary to the production of healthy sperm. [FN36] Even in fertile men, the random process of genetic recombination always produces a few defective sperm that delete chunks of the Y chromosome. [FN37] Sons conceived with this sperm are likely to have poor-quality sperm of their own. [FN38] They, in turn, will transmit the Y chromosome deletion to their sons, and infertility along with it. [FN39]

The X chromosome may also carry genes related to sperm and egg production. [FN40] Deletions or mutations of genes on the X chromosome can lead to infertility and birth defects in offspring. [FN41]

And there is more to be learned. With the help of advanced technologies, scientists are working to identify other structural chromosomal defects and gene mutations that contribute to infertility. [FN42]

3. Epigenetic anomalies

DNA contains more than the genetic information in its nucleotide sequence. In its structure it holds epigenetic information that affects the expression of genes. [FN43]

Chemical markings known as “imprints” are particularly important. Recall that a mother (through her egg) and a father (through his sperm) each contribute one set of chromosomes to an embryo. [FN44] Thus, most genes occur in two copies and both are expressed. [FN45] However, imprints control expression of certain key developmental genes, so that only the maternal or paternal copy is active. [FN46] If anything is wrong with the imprints, gene expression will be abnormal and the embryo may not develop properly. [FN47]
Thus, there are two ways that epigenetic errors can cause problems. First, such errors may cause or contribute to infertility. [FN48] For example, imprinting errors have been found in the sperm of infertile men, especially those who suffer from low sperm count. [FN49]

Second, epigenetic errors in eggs and sperm may have health consequences for children. For example, Japanese researchers examined miscarried embryos conceived through ART. [FN50] Seventeen out of seventy-eight samples (21.8%) had imprinting errors affecting genes necessary for the proper development of the embryo. [FN51] But, in seven of seventeen affected samples (41%), the same imprinting error was present in the sperm of the father, indicating that the epigenetic flaw had been transmitted. [FN52]

Other researchers have suggested that infertile men and women might be genetically predisposed to produce gametes and embryos that are unstable at the epigenetic level. [FN53] Environmental influences in the womb or elsewhere could lead to loss of epigenetic regulation and alteration of the developmental trajectory of the embryo. [FN54] This would not only make it harder to conceive, but also increase the risk of health problems in offspring. [FN55]

B. Assisted Reproductive Technologies

1. IVF and ICSI

Some infertile men and women who suffer from chromosomal, genetic, and epigenetic problems will turn to in vitro fertilization (IVF). In the standard IVF protocol, the prospective mother takes one kind of drug (gonadotropin releasing hormone agonist) to suppress her natural cycle and another (gonadotropin) to stimulate the production of multiple eggs. [FN56] Following administration of a third drug (human chorionic gonadotropin) to mature the eggs, a doctor aspirates the eggs using a needle inserted into the ovaries through the vaginal wall. [FN57] The eggs are taken to the lab and mixed with a sperm sample obtained from the intended father. [FN58] After conception, embryos are cultured for three to five days and then transferred back into the uterus of the intended mother, who takes progesterone supplements to ensure that the uterine lining is receptive. [FN59]

Infertile men whose sperm are few in number, malformed, or incapable of penetrating an egg can still participate in IVF with the aid of intracytoplasmic sperm injection (ICSI). [FN60] Lab technicians equipped with microscopes and tiny glass needles seize individual sperm and inject them directly into eggs to achieve fertilization. [FN61] Pioneered in Belgium in 1991, ICSI has overcome most male-factor infertility. [FN62] Even when men have no sperm in their ejaculate, a few sperm can often be recovered from the epididymis or the testes. [FN63]

2. Safety Concerns

Since IVF and ICSI were invented, authorities have regulated with a light hand and primarily for the benefit of the men and women who use the technologies. Federal law is minimal. Congress has granted would-be parents access to fertility clinic success rates, [FN64] and the Food and Drug Administration (FDA) approves drugs, devices, and biological products that are used in fertility treatments. [FN65] FDA regulations also protect patients who undergo ART against transmission of communicable diseases. [FN66]

States impose somewhat more control. As part of their general oversight of medical practice, they license doctors, discipline them, and subject them to liability in tort if they fail to provide informed consent or exercise reasonable care. [FN67] Some states have laws that are specific to ART, but most of these simply address whether insurers must cover infertility treatment. [FN68]
Private voluntary associations also play a role in regulating ART. The American Society for Reproductive Medicine (ASRM) [FN69] publishes guidelines and statements on the medical practice and ethics of ART. It can expel members for noncompliance, but does not have the power to impose other penalties. [FN70] ASRM has a sister organization, the Society for Assisted Reproductive Technology (SART). SART member clinics must comply with ASRM guidelines and have their embryo labs inspected and certified. [FN71]

Some lawyers and legal academics disdain this minimalist regime and view the field of assisted reproduction as a dangerously unregulated “Wild West.” [FN72] As Professor John Robertson notes, “[i]t has been a standard refrain in discussions of ART to bemoan the lack of regulation, and even call for a centralized system of regulatory control.” [FN73]

Critics have concerns about the welfare of children conceived through ART. Sometimes they focus on the manner in which assisted reproduction is practiced. For example, when a doctor transfers multiple embryos in a single IVF cycle, [FN74] the patient may end up carrying twins or higher-order multiples. [FN75] The babies may be born prematurely, at low birth weight, or with disabilities. [FN76] The recent birth of octuplets spurred calls for legislation to limit the number of *267 embryos transferred in a single IVF cycle. [FN77]

More relevant here, however, are claims that IVF and ICSI are inherently unsafe for children. To establish this point, critics often cite two scientific studies published together in the New England Journal of Medicine in 2002.

In the first, Michele Hansen and her research team reviewed data from fertility clinics in Western Australia and found a 9% rate of major birth defects in infants born after IVF and an 8.6% rate of major birth defects in infants born after ICSI. [FN78] This compared unfavorably with a control group of spontaneously conceived infants, who had a 4.2% rate of major birth defects. [FN79]

The second study came from the Centers for Disease Control and Prevention (CDC). Laura Schieve and her research team found that singletons conceived through ART were 2.6 times more likely than spontaneously conceived infants to have a low birth weight (2500 grams or less) even when born at term (thirty-seven weeks gestation), and 1.4 times more likely to have a low birth weight when born preterm. [FN80] Curious about the cause, the team conducted analyses in which the sample was limited to singletons conceived with donor gametes, carried by surrogates, or born from pregnancies that did not begin as multiple gestations. [FN81] The risk of low birth weight remained elevated, at least for infants born at term. [FN82] The researchers inferred ART might cause low birth weight. [FN83]

Fertility doctors promptly criticized the Hansen and Schieve studies, suggesting that the poor outcomes observed could be due to infertility-related *268 conditions rather than ART as such. [FN84] In support, they noted that preterm singletons born to surrogates did not have an increased risk of low birth weight in the Schieve study. [FN85] If the goal was to see if IVF and ICSI led to bad outcomes, the appropriate control population was not babies in general (most of whom are born to healthy, fertile men and women), but rather babies born to infertile men and women who conceived through methods other than IVF and ICSI. [FN86]

Despite this key methodological weakness, the Hansen and Schieve studies grabbed attention. The media reported them as bad news on “test-tube babies” [FN87] and legal academics called for increased regulation.

For example, Professor Lars Noah argued in 2003 that the FDA should withdraw fertility drugs from the market (thus relegating patients to IVF performed with the single egg produced by a natural menstrual cycle). [FN88] In 2004, Professor Jennifer Rosato cited the studies in support of her claim that IVF and ICSI place the safety of children at risk. [FN89] In addition to increased state regulation, she recommended creation of a new federal agency that would consider
safety and ethical concerns and ban or limit technologies considered harmful to children, such as ICSI. [FN90] Similarly, in 2006, Professor Michael Malinowski urged that the United States adopt a comprehensive national licensing requirement for assisted reproduction services and create a new federal agency to oversee IVF and ICSI. [FN91]

III. The Trend Towards Increased Regulation

Academic calls for increased regulation coincide with an emerging federal trend. This Part documents how the FDA has used safety concerns to justify bans on reproductive cloning and cutting-edge ART such as nuclear transfer and ooplasm transfer. There are also signs that lawmakers and regulators may soon attempt to restrict access to conventional ART such as *269 IVF and ICSI.

A. The Food and Drug Administration

1. Reproductive Cloning and Nuclear Transfer: Public Hysteria and Public Health

In February 1997, Ian Wilmut announced he had cloned a lamb (Dolly) from the DNA of an adult sheep. [FN92] In response to this startling development, President Bill Clinton asked his National Bioethics Advisory Commission (NBAC) to comment on the prospect of human cloning. In its report, the NBAC noted that Wilmut had made 277 embryos and produced only one lamb. If cloning were attempted in humans, “it would pose the risk of hormonal manipulation in the egg donor; multiple miscarriages in the birth mother; and possibly severe developmental abnormalities in any resulting child.” [FN93] Concluding that it was not yet safe to create a child through cloning, the NBAC recommended Congress enact a three to five year moratorium on such attempts until safety and ethical concerns could be resolved. [FN94]

In January 1998, an eccentric physicist named Dr. Richard Seed claimed he planned to clone babies. [FN95] Even though Seed had no lab and was not a biologist, a media firestorm resulted. [FN96] Shortly thereafter, Commissioner Michael Friedman announced that the FDA had the statutory authority to regulate reproductive cloning under the Food, Drug, and Cosmetic Act (FDCA). [FN97] Any scientist interested in conducting clinical research would first have to file an investigative new drug (IND) application with the FDA. [FN98]

In October 1998, the FDA sent a warning letter to medical and research institutions. The FDA claimed clinical research to clone a human being was subject to its jurisdiction, but made clear it would deny any IND application due to “major unresolved safety questions.” [FN99] Read in light of the NBAC report, the letter must have referred in part to the concern that cloned children could have developmental abnormalities.

The FDA soon extended its reach to another novel technology: nuclear transfer. Back in 1998, Doctors Jamie Grifo and John Zhang were inventing a *270 new means of giving infertile women in their forties the chance to have genetic children. [FN100] Their strategy involved taking nuclei (and thus chromosomes) from the eggs of the infertile patients and transferring them into enucleated eggs from healthy young donors. [FN101] This was not cloning; the eggs were fertilized with sperm following the nuclear transfer. The point was to give the infertile patients the benefit of the younger eggs [FN102] and the fresh ooplasm inside them. That fluid contains mitochondria, structures that produce energy and facilitate embryonic development. [FN103]

Doctors Grifo and Zhang transferred reconstructed and fertilized eggs to two patients without achieving a pregnancy. They then presented their results at an ASRM meeting in October 1998. [FN104] The media ran critical stories on the new method, which resembled cloning in that nuclear DNA was being transferred into an egg. [FN105] Once aler-
ted, the FDA claimed it had the authority to regulate nuclear transfer. [FN106] Grifo had to end the research. [FN107]

Three years later, in 2001, the media reported that Dr. Panayiotis Zavos, an American fertility doctor, and Dr. Brigitte Boisselier, a scientist who belonged to a religious sect known as the Raelians, both had plans to clone babies. [FN108] These sensational reports fanned the flames of public sentiment against cloning and inspired the U.S. House of Representatives to hold extensive hearings on the matter. [FN109] One influential witness was Dr. Rudolph Jaenisch, a biology professor at Massachusetts Institute of Technology. He claimed animal clones suffered from premature death and birth defects because the cloning process failed to “reprogram” the DNA used to create them. [FN110] In other words, the clones had all the genes they needed to develop, but some of those genes were not expressed properly. He asserted there probably were no “normal” animal clones. [FN111]

*271 Another key witness was Dr. Kathryn Zoon, Director of the Center for Biologics Evaluation and Research (CBER) at the FDA. She asserted that low success rates, abnormalities in offspring, and safety risks to mothers raised concerns about the use of cloning to clone a human being. [FN112] Dr. Zoon claimed that the FDA had authority to control the use of cloning technology under the biologics provisions of the Public Health Service Act (PHSA) and the drug and device provisions of the FDCA. [FN113] She assured lawmakers that the agency would deny permission to clone on safety grounds. [FN114]

Thereafter, the FDA immediately sent another wave of warning letters to research institutions and unleashed investigators upon Zavos and Boisselier, who moved their activities offshore. [FN115]

2. Ooplasm Transfer: Dangerous Technology or Treatment for Middle-Aged Women?

Meanwhile, Dr. Jacques Cohen of the Saint Barnabas Medical Center in New Jersey had pioneered a new technology known as ooplasm transfer. [FN116] A doctor injects ooplasm from donor eggs into the infertile eggs of an older woman, along with sperm. [FN117] The mitochondria in the donor ooplasm aid fertilization and proper embryonic development. [FN118] Nearly thirty children have been born through this method worldwide. [FN119]

To infertile women, ooplasm transfer must have seemed a Godsend. From the FDA’s perspective, however, it was a potential landmine. Here was another exotic technology that involved manipulation of cells and had the potential to grab headlines and irritate Congress.

In 2001, Dr. Zoon sent yet another round of warning letters to researchers (including fertility doctors). [FN120] The FDA claimed it had jurisdiction over “human cells used in therapy involving the transfer of genetic material by means other than the union of gamete nuclei.” [FN121] Examples included cell *272 nuclei (used in cloning), oocyte nuclei (used in nuclear transfer), and ooplasm containing mitochondrial genes (used in ooplasm transfer). [FN122] Asserting that use of such genetically manipulated cells in humans required submission of an IND application, the letter cited a 1993 document in which the FDA had claimed authority over cell and gene therapy products. [FN123]

Since then, the FDA has identified three specific concerns about ooplasm transfer. First, children born through the method have a mix of mitochondria from both recipient and donor. [FN124] This bothers the FDA because harmful mutations in mitochondria can lead to disease. [FN125] Second, two of eighteen fetuses conceived at Saint Barnabas had Turner syndrome (a genetic abnormality where one of the X chromosomes is missing); one miscarried and the other was aborted. [FN126] Third, because ooplasm transfer mixes the mitochondria of two women in the reconstructed egg, it effects a genetic modification that the resulting child can pass on to future generations. [FN127]

But, on closer examination, the FDA’s safety reasoning does not hold up. Ooplasm transfer need not lead to disease,
for it mixes two healthy populations of mitochondria. [FN128] As for Turner syndrome, that is a chromosomal problem. The women treated with the donated ooplasm were older, and thus more likely to generate eggs with a missing X chromosome. [FN129] If donated ooplasm improves the developmental potential of older eggs, it may generate more aneuploid embryos, but that problem is traceable back to the age-based infertility of the patients, rather than the technology involved. [FN130] Nevertheless, now that the FDA has framed the issue as a matter of public health, it is unlikely to allow ooplasm transfer to proceed, even if the true problem is advanced maternal age.

3. The FDA Asserts Questionable Authority to Regulate the Procreation of Infertile Men and Women

To summarize, the FDA has blocked the use of reproductive cloning, *nuclear transfer, and ooplasm transfer in the United States. Yet, there is a problem. The FDA can act only within the bounds of the statutory authority that Congress grants. The agency has been vague about the basis for its jurisdiction over cloning, nuclear transfer, and ooplasm transfer, stating only that it has jurisdiction over therapy involving gene transfer. [FN131]

Examining this claim more closely, one finds that the FDA long has claimed jurisdiction over clinical trials that transfer genes [FN132] to existing persons in an effort to cure their genetic diseases. [FN133] Such gene transfers have the same purpose and effect as drugs, making it plausible that the FDA has authority and can require an IND application. [FN134]

However, when it comes to cloning, nuclear transfer, and ooplasm transfer, the analogy to traditional drugs is extremely weak. Fertility doctors do not transfer somatic cell nuclei, egg nuclei, and ooplasm directly into patients. They transfer them into unfertilized eggs that are not human beings.

Perhaps the FDA thinks the embryo created from the somatic cell nuclei, egg nuclei, or ooplasm is a “drug” or “biological product” being supplied to the mother as patient. If so, the agency’s statutory reasoning is erroneous. Even if we assume that the mother is infertile due to aging or dysfunctional eggs, cloning, nuclear transfer, and ooplasm transfer do not prevent, cure, or treat her disease. [FN135] Rather, these novel methods of reproduction add a young egg donor as one of two (cloning) or three (nuclear or ooplasm transfer) biological parents. [FN136]

There is a third possibility, however, which deserves consideration. In 2003, two scholars from the Genetics and Public Policy Center argued that cloning was a drug because the somatic cell nucleus was an article intended to affect the structure or body of a future person, namely the cloned child. [FN137] In *support of their claim that the FDA had a mandate to regulate for the benefit of future persons, [FN138] the scholars relied on legislative history. Congress had amended the FDCA to require pre-market approval of drugs in response to the Thalidomide tragedy, in which a drug marketed to pregnant women to reduce nausea led to the birth of children without arms and legs. [FN139]

This theory has one clear advantage: by focusing on the child, it comes closest to addressing the concerns the FDA has about cloning, nuclear transfer, and ooplasm transfer. However, it fails to recognize one key distinction: when the FDA controls drugs such as Thalidomide that can cause harm when administered to a pregnant woman, it acts to protect an existing fetus. The FDA does not prevent the woman from reproducing; she is already in the process of doing so. Nor does the FDA seek to control the genetic characteristics of the eventual child; those have been determined at conception. Nor does the FDA attempt to judge or control the pattern of gene expression in the fetus; it allows that to emerge on its own during gestation.

By contrast, when the FDA prohibits cloning, nuclear transfer, and ooplasm transfer, it is acting to block the conception of children. This means that the FDA is deciding what genetic characteristics children are allowed to have. Under the FDA regime, children are not allowed to share DNA with another person (cloning), and they are not allowed to have
mixed mitochondria that come from two different women (ooplasm transfer). Moreover, children are not allowed to exist if their gene expression might deviate from the norm, as is alleged to be the case with clones.

The ramifications are huge. First, by taking these technologies away from severely infertile men and women, the FDA is eliminating any chance they have to conceive genetic offspring. Second, by regulating to prevent the conception of children who might be flawed, the FDA is arrogating to itself the power to decide who is perfect enough to be born. The only protection it has to offer these children is the void of nonexistence. In the case of ooplasm transfer, it is also asserting authority to control the genetic profile of future generations.

The FDA appears to have stumbled into its new role as the reproductive police as a result of cloning politics. Congress never authorized the FDA to take on such a role, and it is wrong for the FDA to assume it. What the FDA is doing runs counter to our tradition of procreative autonomy [FN140] and ignores public sentiment, which opposes coercive reproductive policies. [FN141]

*275 B. The President's Council on Bioethics

In 2001, former President George W. Bush created a President's Council on Bioethics (Council) to report on bioethical issues in biomedical science and technology. [FN142] The man he appointed to head the Council was Dr. Leon Kass, a long-time opponent of IVF. [FN143] Though President Barack Obama has since disbanded the Council, [FN144] its reports could have a lasting impact on public policy and must be taken seriously.

One of the Council's first actions was to issue a report entitled Human Cloning and Human Dignity: An Ethical Inquiry. [FN145] The report concluded that it was too risky to clone at the present time, [FN146] and called upon Congress to ban reproductive cloning. [FN147] More dramatically, it asserted there was no ethical way to make cloning safe, now or in the future. [FN148] Animal experiments might not predict risks to humans, and a cloned child could not consent to the experiment. [FN149]

But, the Council did not stop with cloning. It insinuated that the first IVF attempts had also been unethical experiments upon the unborn. [FN150] and cited the Hansen study to suggest that IVF and ICSI might be unsafe for children today. [FN151] And, at the end of its report, the Council expressed the need to undertake a comprehensive review of conventional ART, claiming little was known about the risks involved. [FN152]

In 2004 this dark seed blossomed into a new report entitled Reproduction & Responsibility: The Regulation of New Biotechnologies. [FN153] The report covered a variety of technologies ranging from stem cell research to genetic engineering. [FN154] However, the Council chose ART as its starting point, in part due to concern for the safety and well-being of children. [FN155]

After describing available ART and success rates, the Council turned to ethical considerations, in particular the well-being of children. It reviewed the existing literature and raised the following concerns.

ART children might be twice as likely to suffer major birth defects. [FN156] ICSI could allow men to pass genetic abnormalities (including chromosomal deletions that cause male factor infertility) to children. [FN157] ICSI might be associated with an increased rate of chromosomal abnormalities and mental developmental delays. [FN158] Culture media, duration of culture, and cryopreservation of embryos could harm children by affecting gene expression or shortening telomeres. [FN159] Multiple gestations placed children at risk of premature birth and low birth weight, and even singletons might face these risks. [FN160]
The Council surveyed existing regulation [FN161] and concluded the patchwork of federal, state, and private oversight was inadequate to address its ethical concerns, particularly the safety and well-being of children. [FN162] However, it stopped short of recommending immediate enactment of new legislation or regulation. Instead, it claimed that more information was needed, particularly on the health of children conceived through ART. [FN163] Thus, it recommended the federal government fund a prospective longitudinal study of the impact of ART on the health of children. [FN164]

The Council also recommended doctors treat children to be born through ART as their patients. [FN165] The doctors should cooperate with researchers studying the health impacts of ART, take steps to reduce the rate of multiple embryo transfers and births, and extend human subject protections to embryos whenever research or innovative clinical interventions could affect the health and welfare of resulting children. [FN166]

Though these recommendations may seem modest, one should not underestimate them. As we have seen, the FDA has halted cloning, nuclear transfer, and ooplasm transfer on safety grounds. [FN167] Taken together with the *277 Council report, these developments are signposts on the road to a future in which federal and state governments use data acquired from studies as a rationale for restricting access to IVF and ICSI on safety grounds.

Moreover, the Council report has set the stage for increased governmental intervention. The choice of child welfare as the touchstone, the lengthy recital of studies suggesting negative health impacts, and the criticism of industry self-regulation all point to the need for governmental control over ART, even if the Council did not quite have enough data to support that recommendation. Certainly the Council anticipated that further research would lead to such a conclusion:

The need seems clear for more data to determine what risks, if any, different assisted reproduction techniques present to the well-being of the future child. Moreover, in cases where ART is the only available means for individuals or couples to conceive a biologically related child, it is an important ethical and social question what level of increased risk can be privately justified by patients and doctors, and what level of increased risk should be publicly justified by society as a whole, especially should the society bear the costs of caring for any resulting health problems. [FN168]

IV. ART and Safety: The Latest Studies

Five years have passed since the Council called for more data. What have we learned from the latest medical studies? Is it true that ART is unsafe for children?

To answer these questions, this Part reviews medical studies that compare ART children [FN169] with spontaneously conceived children in order to determine whether the former face increased risk. Three categories of health problems will be considered: (1) major birth defects; (2) rare disorders; and (3) poor outcomes during the critical “perinatal” period immediately before and after birth, such as premature birth and low birth weight.

A. Birth Defects

Around 3% of newborn infants in the United States have a major defect that can be detected at birth. [FN170] Do children conceived through ART have a *278 higher rate of major birth defects? [FN171]

In 2005, Tracy Shevell and an American research consortium reported the results of a prospective study of singletons conceived through IVF and other ART. [FN172] This team found no increased rate of chromosomal or structural abnormalities compared with spontaneously conceived controls. [FN173] These results were consistent with those in many
earlier studies. [FN174]

However, other recent studies show that singletons are 1.3 to 1.5 times more likely to have a birth defect if conceived through IVF and other ART. [FN175] If these studies are correct, and the rate of major birth defects in the general population is 3%, then 4-4.5% of IVF singletons could be expected to have such defects.

What kind of birth defects do ART singletons have? In 2009, CDC researchers reviewed six years of data from the National Birth Defects Prevention Study. They found 230 women who conceived through ART and bore a child with a major birth defect. [FN176] Compared with spontaneously conceived babies, the ART singletons had 2.1 times the risk of septal heart defects (i.e., gaps in the muscle wall between the atrial or ventricular heart chambers). [FN177] They also had 2.4 times the risk of cleft lip and palate, 4.5 times \*279 the risk of esophageal defects, 3.7 times the risk of anal and rectal defects, and 2.1 times the risk of hypospadias. [FN178] The results of this study have received widespread media attention. [FN179]

What about twins and other multiples? Because multiples must share maternal resources, they tend to have a higher rate of birth defects than singletons. For example, one study found spontaneously conceived twins were 1.38 times more likely to have a major birth defect than spontaneously conceived singletons; for triplets and higher-order multiples, the risk nearly doubled. [FN180]

Multiple embryo transfer increases a woman’s odds of bearing multiple babies. [FN181] However, when compared with spontaneously conceived multiples, IVF multiples show no or minimal increase in the risk of birth defects. [FN182] In other words, though multiples conceived through any means are more likely to have birth defects than singletons are, being conceived through ART does not appear to heighten the risk for multiples any further.

This observation raises an apparent contradiction in the data. How can ART multiples not face an increased risk of birth defects when many studies show that ART singletons do? The answer could lie in study design. Monozygotic (identical) twins have a higher rate of complications than dizygotic (fraternal) twins [FN183] and occur more often among spontaneously conceived infants. [FN184] Thus, studies comparing IVF multiples with spontaneously conceived controls could mask an increase in risk of birth defects associated with IVF. [FN185] However, researchers have not yet substantiated this theory. [FN186]

\*280 1. Is Technology to Blame?

Since some studies have found an increased risk of major birth defects, the next challenge is to identify the cause. Do these defects originate in some feature of assisted reproductive technologies themselves?

Some writers speculate that the ovarian stimulation protocol used during IVF cycles might disrupt the uterine environment, alter pre-implantation embryonic development, or recruit chromosomally abnormal eggs that otherwise would not have matured. [FN187] However, a recent survey of the literature on fertility drugs found no current evidence that gonadotropins cause birth defects. [FN188] The gonadotropin releasing hormone agonists used to down-regulate the pituitary gland also appear to be safe. [FN189] As for progestins (used to prepare the uterus for implantation and pregnancy), most studies showed no link to birth defects aside from an increased rate of hypospadias in baby boys. [FN190]

Another common speculation is that defects result when the basic IVF process is enhanced through ICSI, the process whereby a lab technician injects sperm into eggs to achieve fertilization. [FN191] Some have worried that this technique may enable fertilization when either sperm or eggs have chromosomal or structural abnormalities or are of poor quality. [FN192] In addition, \*281 the injection process could contaminate the egg with foreign substances or disrupt its struc-
ture. [FN193] But, studies of birth defects do not point to ICSI as the culprit. For example, in 2004, American researchers conducted a meta-analysis of nineteen studies and found that ICSI singletons had 1.33 times the risk of major malformations. [FN194] This falls within the 1.3-1.5 range found in recent studies of IVF singletons, [FN195] suggesting that ICSI may not add much risk beyond that already associated with IVF. [FN196]

Cryopreservation of spare embryos also has been cited as a potential risk to children who may later be born from those embryos. [FN197] However, Scandinavian doctors recently reviewed the medical literature and concluded children had comparable rates of birth defects whether born from fresh or frozen embryos. [FN198]

2. Infertility as the Root Cause

There is another possibility: the increased risk of birth defects observed in children of ART may be related to the underlying physiologic characteristics of infertile parents.

More than half of all ART cycles using fresh embryos made from the patient's own eggs involve women who are thirty-five or older. [FN199] Advanced maternal age is strongly linked with not only infertility but also chromosomal abnormalities in offspring. [FN200] Of course, scientists who study birth defects realize the importance of maternal age; most provide age-matched controls or adjust data to account for chronological age. However, they may still be comparing apples and oranges.

As discussed in Part I.A, what matters most is ovarian reserve, which reflects biological age. Women thirty-five and older who are able to conceive on their own may have better-than-average ovarian reserve, while infertile patients in the same age group may have worse-than-average ovarian reserve. If so, age-matched controls will be mismatches, and chronological adjustments to data will be inaccurate, causing studies of birth defects to overstate the risk that ART presents.

Moreover, we know that infertile men and women are more likely to produce aneuploid eggs and sperm. Resulting embryos that bear the wrong number of chromosomes will often miscarry but sometimes grow into children with Down syndrome and the like. [FN201] Infertile men and women are also more likely to have major structural chromosomal abnormalities that can produce faulty gametes and children with unbalanced translocations and severe birth defects. [FN202]

Such gross chromosomal abnormalities are the tip of an iceberg that scientists are just beginning to explore. Some believe infertility also results from more subtle structural chromosomal abnormalities, genetic mutations, and epigenetic anomalies. [FN203] These problems are carried in sperm and eggs and can disrupt the development of unborn children. [FN204]

For example, German researchers Bernhard Horsthemke and Michael Ludwig have suggested that developmental pathways are ordinarily robust enough to produce organisms with the standard “phenotype” (body and other visible characteristics) even if the organism incorporates minor genetic variation or has been subjected to changes in its environment. [FN205] This could explain why “the vast majority of children conceived by assisted reproduction technology (ART) are healthy, although ART bypasses a lot of biological filters such as selective gamete resorption, selective sperm uptake, sperm competition and selective syngamy, and subjects the gamete and early embryo to environmental stress (hormones, culture media and physical stress).” [FN206]

At the same time, there is enough plasticity in development to allow organisms to respond to environmental stressors with epigenetic changes that generate modified phenotypes. [FN207] Horsthemke and Ludwig theorize that infertile men
and women have genes that predispose them to epigenetically unstable gametes. This makes their embryos more vulnerable to epigenetic changes, whether conceived through ART or not. [FN208] Once epigenetic control is lost, the embryo may develop incorrectly or reveal genetic variations that result in birth defects. [FN209]

Given the importance of chromosomal, genetic, and epigenetic factors, studies that compare children of ART born to infertile parents with spontaneously-conceived controls born to fertile parents are likely to mislead because they entangle two issues: infertility and technology. [FN210]

To find out whether ART causes birth defects, researchers would have to recruit fertile men and women who already have healthy children and ask them to conceive more children using the technology. [FN211] But, fertile men and women do not use ART, and have no incentive to undergo the pain, expense, and putative risk of treatment. Therefore, it is not possible to design the ideal study. [FN212]

Nevertheless, researchers are striving to design experiments with better, if not ideal, controls. [FN213] For example, Jin Liang Zhu and colleagues examined the Danish national birth cohort from 1997 to 2003. [FN214] Singleton born to infertile couples who underwent fertility treatment had a 6.7% birth defect rate, which is 1.39 times the 5% rate observed in singletons born to fertile couples. [FN215] That falls within the range noted in recent articles that have run similar comparisons. [FN216]

However, Zhu and his team added a new twist to the research. They also studied singletons born to infertile couples who conceived naturally, but after more than twelve months. [FN217] Compared with singletons born to fertile couples, the offspring of infertile couples were more likely to be born with birth defects, even when no fertility treatments were involved. [FN218]

The team did not stop there. It directly compared singletons of treated and untreated infertile couples. [FN219] Those born to the treated couples were only 1.17 times more likely to have a birth defect than those born to the untreated couples. [FN220] In other words, once children of infertile parents were chosen as controls, there was a big drop in the risk associated with treatment. This implies that infertility itself is a risk factor for having children with birth defects. [FN221] Indeed, the 17% increase in risk for the singletons of treated couples could be associated with infertility severe enough to require medical assistance, rather than treatment as such. [FN222]

Similarly, in 2005, Christine Olson and a team of researchers studied children conceived and born in Iowa. [FN223] The team found 1.44 times the risk of major birth defects in IVF singletons. [FN224] Within the IVF group, use of ICSI, embryo freezing, and length of culture did not affect the birth defect rate. This led the researchers to suggest that the problem “might be inherent in the infertile couples or secondary to ovulation induction.” [FN225] However, children conceived through intrauterine insemination (IUI) following ovulation induction faced only 1.19 times the risk, [FN226] so drugs alone could not account for the IVF results. Again, the rate of birth defects might rise along with the severity of the underlying infertility. [FN227] Since IVF is so expensive, patients usually do not pursue it until less invasive methods like IUI have already failed. [FN228]

An earlier paper had results that were even more striking. In 2001, Erickson and Kallen published a study of over 9000 infants conceived through IVF and born in Sweden during the period 1982-1997. [FN229] Raw data showed that children conceived through IVF had 1.47 times the risk of major and minor congenital malformations. [FN230] Following adjustment for maternal age, parity, and plurality, IVF singletons still faced 1.24 times the risk. [FN231] However, once the data were adjusted for years of involuntary childlessness, the IVF singletons actually had a lower risk of congenital malformations than infants in the general population. [FN232]
Why does this matter? Lawmakers and regulators might react differently if the problems observed in children are related to characteristics of the parents, as opposed to ART as such. Those who feel comfortable attacking “unsafe” technologies may shrink away from restricting ART in order to keep infertile men and women from having children.

*B285* B. Rare Disorders

This Part now considers two rare disorders. The first, Beckwith-Wiedemann syndrome (BWS), has multiple symptoms, including enlarged tongue and organs, abdominal wall defects, low blood sugar, lethargy, poor feeding, seizures, and predisposition to certain cancers. [FN233] It results when genes on the maternal copy of chromosome 11 malfunction due to chromosomal abnormalities, gene mutations, or defects in the chemical imprints that regulate gene expression. [FN234]

BWS is rare, occurring in one out of 13,700 children. [FN235] Recent studies indicate children of ART have a six- to nine-fold greater risk of BWS compared with the general population. [FN236] However, the absolute risk is still extremely low.

The second rare disorder, Angelman syndrome, [FN237] also has multiple symptoms, including microcephalus, severe mental retardation, jerky movements, inability to speak, and inappropriate laughing. [FN238] It results when the maternal copy of the UBE3A gene on chromosome 15 does not function, most often because of a chromosomal abnormality or gene mutation, but occasionally due to an imprinting defect. [FN239]

Angelman syndrome occurs in one out of 16,000 children. [FN240] In 2002, German researchers raised eyebrows with a report that two ICSI children had Angelman syndrome because of an imprinting defect. [FN241] A report of a third ICSI child who was similarly affected followed. [FN242] Imprinting defects occur in only 3-4% of Angelman syndrome patients. [FN243] To some, it seemed improbable that such a rare syndrome with such a rare cause should manifest itself in three ICSI offspring as a matter of chance. [FN244]

At first, scientists feared that BWS and Angelman syndrome were linked to ICSI. [FN245] Later, when it was discovered that only ten out of twenty-three ART-related BWS cases involved ICSI, scientists shifted their attention to the possibility that some other element of the IVF process was responsible for the increased risk. [FN246]

Speculation has centered on the possibility that the materials and processes used to grow embryos in the lab are causing imprinting defects (and perhaps other as yet undetected errors in gene expression). [FN247] In support of this theory, researchers argue that imprinting defects are seldom the cause of BWS and Angelman syndrome, except in children of ART. [FN248] They also point to animal studies. Some cattle and sheep conceived through IVF and cloning have large offspring syndrome [FN249] due to imprinting defects. [FN250] IVF and embryo culture also have been observed to cause imprinting defects in mouse embryos. In one study, mouse embryos had the same type of imprinting defect linked to BWS in children conceived through ART. [FN251]

However, analogies to animal studies must be drawn with caution. Large offspring syndrome does not occur in children conceived through ART. [FN252] *287* Rather, as we shall see, such children face an increased risk of low birth weight. [FN253]

Moreover, there is another possible explanation. These rare disorders might result when severely infertile men and women conceive with sperm and eggs that carry or are susceptible to imprinting errors. [FN254]

Some research supports this interpretation. In 2007, Dutch researchers examined 220 Dutch children born with
BWS, Angelman syndrome, or Prader-Willi [FN255] syndrome. [FN256] They found that the children were three times more likely to be born after ART than were children in the Dutch population. [FN257] In other words, children of ART were overrepresented among the 220 children with disorders. However, the researchers also found that the families of these 220 children were three times more likely than families in the general Dutch population to have suffered from fertility problems of any kind. [FN258] Since the relative risks were the same, the researchers concluded that the increased fertility problems of the parents fully explained the increased incidence of rare disorders after ART. [FN259]

German researchers also have found a link to infertility. The research team studied sixteen children with Angelman syndrome born to infertile couples. [FN260] Elevated rates of the rare imprinting-defect form of the syndrome were found not only in children of couples who had undergone fertility treatment, but also in children of couples who had become pregnant without treatment but after more than two years of trying. [FN261] The researchers suggested the parents might have a genetic predisposition to producing gametes and embryos that were epigenetically unstable. That would account for both their infertility (since most embryos would be too defective to survive) and *288 increased risk of having a child with imprinting defects. [FN262] For such parents, fertility drugs might further increase risk by stimulating the production of flawed eggs. [FN263]

**C. Perinatal Outcomes**

The final claim leveled against ART is that it produces children who have poor outcomes during the perinatal period immediately before and after birth.

As discussed above, CDC researchers caused a stir in 2002 when they declared the children of ART at increased risk for preterm delivery and low birth weight. [FN264] In 2004, the CDC researchers published a follow-up study of singletons conceived through ART in 1996 through 2000. Compared with the general population, these babies had 1.41 times the risk of delivery before term (thirty-seven weeks), 1.62 times the risk of low birth weight (2500 grams or less), and 1.79 times the risk of very low birth weight (under 1500 grams). [FN265]

Taking the low birth weight data and breaking it out, the CDC researchers found that singletons born prematurely had 1.74 times the risk of low birth weight. [FN266] However, singletons born at term had only 1.39 times the risk of low birth weight [FN267]--a big drop from the headline-grabbing 2.6 increase reported back in 2002. [FN268] The researchers could not explain the improvement, but speculated that increased use of ultrasound-guided embryo transfer might have improved the position of the placenta (the vehicle for fetal nutrition). [FN269]

The CDC researchers also found that ICSI did not increase these risks. [FN270] To the contrary: ICSI singletons had risk ratios that were slightly lower for each measured outcome, except for low birth weight at term. [FN271]

Turning to multiples, the 2002 CDC study found that ART twins born at term did not show an increased risk of low birth weight compared with twins *289 in the general population. [FN272] and most subsequent studies have produced similar results. [FN273] But, these favorable results might be misleading given the higher percentage of monozygotic twins (and risk) among spontaneously conceived babies. [FN274] To correct for this, a recent Australian study used spontaneously conceived boy-girl twins (presumed to be dizygotic) as controls. [FN275] The researchers found ART twins had an increased risk of poor outcomes, including preterm birth, low birth weight, and perinatal death. [FN276]

The increased rates of low birth weight and preterm birth in children of ART are worrisome. Children who enter the world with low birth weight are at increased risk for hypertension, cardiac disease, stroke, and perhaps osteoporosis in midlife. [FN277] Those born very preterm face an increased risk of medical disabilities, such as cerebral palsy and men-
tal retardation. [FN278] So, the question arises: what is the cause of these poor outcomes and can anything be done about it?

Again, some researchers blame ART. For example, the 2004 CDC report speculated that drugs used to stimulate ovulation and prepare the uterus for implantation might affect the uterine lining, cervix, and placenta, or impair synchronization of the embryo with the uterine lining. [FN279] However, such speculations remain unproven.

Cryopreservation is another common feature of ART. But, a recent review of the medical literature concluded children born from frozen embryos were no more likely to be born preterm or at low birth weight. [FN280]

Multiple-embryo transfer is yet another possible cause of poor perinatal outcomes. We know from ultrasound exams that some embryos implant, perhaps even develop a heartbeat, and then mysteriously vanish. Among ART singletons, one out of ten is the sole survivor of a vanishing twin pregnancy. [FN281] *290 According to a Danish study, when compared with ART babies born after single gestations, survivors of vanishing twins face 1.7 times the risk of low birth weight, 2.1 times the risk of very low birth weight, and 1.3 times the risk of preterm birth. [FN282] The risk of cerebral palsy doubles. [FN283] and the risk of child death triples. [FN284] Most of the increased risk comes from losses that happen after eight weeks gestation. [FN285]

However, vanishing twins appear not to be the only reason for poor perinatal outcomes; CDC researchers separately analyzed cases in which only one fetal heart was detected and found that the risk of low birth weight decreased slightly but did not disappear. [FN286]

A fourth possibility has little to do with ART and everything to do with parents, particularly mothers. Though the root causes remain unclear, a number of studies suggest that infertile women may be more likely to give birth early and to have children with low birth weight.

For example, the 2004 CDC report ran various analyses of the available data. [FN287] One analysis looked at a subset of singletons born to couples with male factor as the only infertility diagnosis (in other words, the mothers were healthy and fertile). This group had the lowest risks of preterm delivery and preterm low birth weight. The researchers conceded that maternal infertility might account for poor perinatal outcomes, at least in part. [FN288]

Norwegian researchers have reached a stronger conclusion. Working from a database of more than one million births over a span of twenty-two years, Liv Bente Romundstad and her research team found data for 2204 women who had conceived some of their children spontaneously and others through IVF. [FN289] The singletons conceived through IVF had an increased risk of low birth weight, short gestation, small size for gestational age, premature delivery, and perinatal death when compared with babies from the general population. [FN290] But, these differences disappeared or were minimal when the researchers compared the IVF singletons with their spontaneously conceived siblings. [FN291] In other words, babies born of the same mother were no worse off *291 when conceived through IVF. From this, the researchers concluded that infertility could be the cause of poor perinatal outcomes. [FN292]

A study of singletons conceived through ovulation induction and IUI supports this conclusion. Babies conceived with donor sperm had similar perinatal outcomes to spontaneously conceived controls. [FN293] Since donor sperm is used when the male partner is infertile and the female partner is fertile, this result implied that babies were fine when the mother was fine. But, babies conceived with a partner's sperm faced an increased risk of preterm delivery and had nearly five times the risk of low birth weight. These results implied that infertility in women and their partners caused poor perinatal outcomes. [FN294]
Finally, other researchers have studied infertile women who became pregnant without any fertility treatment. The findings were striking: the longer it took women to achieve pregnancy (and thus the more intractable their infertility), the greater their risk of producing children with preterm birth, low birth weight, small size for gestational age, and perinatal death. [FN295]

V. Eugenics in the Twenty-First Century

Scientific studies that provide us with more knowledge about ART are good. Such knowledge may allow fertility doctors to improve treatment protocols and lab conditions, thereby safeguarding the health of patients and their children. Such knowledge may also enable infertile men and women to give consent that is truly informed. [FN296]

However, the studies may also be used for less benign purposes. Lawmakers and regulators could assert them as grounds to restrict access to IVF, ICSI, or other ART. [FN297] What forms might such legislation or regulation take?

*292 A. Legislative Bans and Regulatory Impediments

Congress is unlikely to ban ART, for two reasons. First, though any one state may have only a small fertility industry, on a national level the industry is substantial. Faced with a threat to their businesses and jobs, thousands of doctors, nurses, lab technicians, and other professionals would lobby hard against a federal ban.

Second, technologies involving human life bring abortion politics into play and create legislative gridlock. For example, Congress has been unable to ban reproductive cloning because its members cannot agree on whether to ban research cloning (which destroys embryos). [FN298]

A proposal to ban ART could lead to a similar stalemate. Conservatives would probably support such legislation; the Roman Catholic Church and other pro-life forces have long objected to IVF on the ground that some embryos fail to implant or are discarded. [FN299] Liberals would oppose the legislation out of concern that protecting IVF embryos could undermine abortion rights.

However, state legislatures are a different matter. Just as conservative states have banned both reproductive and research cloning, [FN300] conservative states might ban ART. Safety concerns could provide conservative legislators with a convenient excuse for attacking technologies that they already oppose on religious or ideological grounds. And even in states where conservatives ordinarily would not command enough votes to ban a controversial technology, safety concerns could sway enough moderates to tip the legislative balance in favor of a ban.

State legislatures are not the only threat to ART. Federal regulatory agencies may also take action. For example, the FDA has already halted cloning, nuclear transfer, and ooplasm transfer. In the case of ooplasm transfer, the agency cited as justification the conception of two Turner syndrome fetuses—a result that could have been caused by advanced maternal age rather than the technology involved. [FN301] Given the right witch's brew of experimental results, media hype, and demand for safety regulation, the FDA could decide to expand its already questionable jurisdiction to encompass ART, particularly methods such as ICSI that achieve the union of sperm and egg by “unnatural” means. If recent experience is any guide, the FDA would then refuse to grant permission to use any technology brought within its jurisdiction.

Critics might even persuade Congress to create a new agency charged with oversight of ART. [FN302] The agency would conduct research and review the *293 results of external scientific studies. If research indicated that children conceived through ART had an increased risk of health problems, the agency might blame the technology rather than hered-
ity and restrict access.

The foregoing comments assume that regulators will act out of genuine concern for the safety of children. But, it bears mentioning that regulators can also exploit safety concerns to achieve political goals.

To illustrate, consider the FDA's decision to assert jurisdiction over reproductive cloning. Dr. Richard Seed's declaration in early 1998 that he planned to clone a baby fanned the flames of public hysteria and encouraged Congressional conservatives to demand a federal ban on all cloning, including for research. At that time, however, President Bill Clinton was in office, and the appointed members of his National Bioethics Advisory Council had recommended the year before that Congress prohibit only the cloning of babies. By declaring that it had the authority to halt reproductive cloning on safety grounds, the FDA cleverly headed off a legislative ban and permitted research cloning to continue.

A future President with pro-life views could do something similar. He or she could staff the FDA or a new regulatory body with conservative appointees who would be more than happy to assert the dangers of ART as a rationale for prohibiting methods of conceiving children that offend their values.

B. Brave New Eugenics

At first glance, these possibilities may not seem troubling. Protecting children from birth defects and other health hazards is a worthy goal--so much so that many people would accept increased regulation despite the risk that politicians might twist the science around to achieve ideological ends.

However, before embracing safety-based restrictions on ART, we should consider historical parallels with eugenic sterilization laws of the twentieth century. The more parallels we find, the stronger the argument that we are stumbling towards a brave new eugenics, with the infertile and their children as the targets.

1. Eugenic Sterilization in the Twentieth Century

In 1865, Francis Galton claimed that humans inherited intellectual, psychological, and physical traits. From there he leaped to the bold conclusion that human evolution should not be left to chance. Men and women with superior traits should be encouraged to reproduce, while those with inferior traits should be discouraged from having offspring. Galton later coined the term “eugenics” (from the Greek eugenes meaning “good in birth”) to describe his plan for selective breeding.

The emergence of genetics gave a boost to eugenics. In 1883, a German scientist named August Weismann provided evidence that sperm and eggs were unaffected by environment and transmitted from parents to offspring without change. And, around 1900, biologists rediscovered Gregor Mendel's theory that heritable elements contained in seeds controlled the traits of offspring.

As the twentieth century dawned, the eugenics movement began to blossom. Researchers collected family genealogies and used the data to argue that feeblemindedness, insanity, epilepsy, alcoholism, criminality, and even poverty were heritable. The American Eugenics Society and the Human Betterment Foundation sponsored lectures, research, and propaganda. Soon the movement claimed a wide range of supporters, including scientists, doctors, conservatives, socialists, feminists, and philanthropists.

Meanwhile, vasectomy had been invented at the turn of the century, making sterilization safer and cheaper than it had been before.
been in the days when castration was the only alternative for men. [FN317] Lawmakers quickly recognized the potential of the new technology; in 1907, Indiana enacted the first eugenic sterilization law. [FN318] By the mid-twenties, state laws mandated sterilization of the feebleminded, rapists, habitual criminals, epileptics, alcoholics, life prisoners, syphilitics, drug addicts, sexual perverts, and moral degenerates, among others. [FN319]

*295 Courts invalidated some laws for failure to provide procedural due process basics like notice, hearing, and representation. [FN320] They threw out other laws for limiting sterilization to inmates of institutions in violation of equal protection. [FN321] However, state lawmakers were not discouraged. They enacted new laws and modified old ones to correct such constitutional deficiencies. [FN322]

Virginia was one of the states that had a eugenic sterilization law. [FN323] Pursuant to its law, a teenager named Carrie Buck was declared feebleminded and ordered to undergo sterilization. [FN324] In Buck v. Bell, [FN325] the United States Supreme Court upheld the sterilization order, reasoning that it did not violate Carrie's substantive due process [FN326] or equal protection rights. [FN327]

The Buck decision gave the legal green light to eugenic sterilization. Twenty-four states had sterilization laws at the end of the nineteen-twenties, [FN328] and by 1942 that number had climbed to thirty-two states. [FN329] Sterilizations surged during the Great Depression of the nineteen-thirties, running from 2000 to 3000 cases in most years [FN330] and shifting in focus from men to women. [FN331]

Fortunately for the nation, eugenic sterilization declined during the *296 nineteen-forties and fifties, along with the eugenics movement. [FN332] Scholars have noted several reasons for the decline, including horror at Nazi excesses, [FN333] diversion of doctors into military service during World War II, [FN334] and Roman Catholic opposition. [FN335]

Ironically, the U.S. Supreme Court that had done so much to encourage eugenic sterilization also played a role in bringing the gruesome practice to an end. The 1942 case of Skinner v. Oklahoma presented a constitutional challenge to an Oklahoma law mandating sterilization of criminals. [FN336] Casting marriage and procreation as basic rights, the Court reasoned that the classifications made in a sterilization law had to be subjected to strict scrutiny. [FN337] Finding no meaningful eugenic distinction between thieves and robbers, who were subject to the law, and embezzlers, who were not, the Court invalidated the law on equal protection grounds. [FN338] Though the Court did not overrule Buck v. Bell, its holding signaled to legislators that the judiciary was no longer enthusiastic about eugenic sterilization.

With this background in mind, this Article now considers whether laws or regulations that ban or restrict ART on safety grounds are similar to eugenic sterilization laws. Four points will be discussed: whether the laws target the disabled; whether the laws seek to prevent transmission of health problems from one generation to the next; whether the laws interfere with reproduction; and whether the laws have common underlying goals.

2. Infertile Men and Women Are Disabled

Turning to the first point, the Americans with Disabilities Act of 1990 *297 (ADA) [FN339] prohibits discrimination against disabled persons, not only in employment and places of public accommodation, but also by public entities such as state and local governments. [FN340] This federal law reflects national policy; accordingly, this Article will use it to determine whether laws that ban or restrict ART are similar to eugenic sterilization laws because both target the disabled.

Congress enacted the ADA Amendments Act of 2008 to clarify its intent to provide broad protection against discrimination for disabled persons. [FN341] As amended, the ADA defines the “disability” of an individual to include “a phys-
ical or mental impairment that substantially limits one or more major life activities of such individual.” [FN342]

Eugenic sterilization laws targeted not only criminals and others who transgressed social norms, but also persons with epilepsy, feeblemindedness, sexually transmitted disease (syphilis), and alcoholism. [FN343] Today, regulations that implement the ADA define “physical or mental impairment” to include epilepsy, mental retardation, human immunodeficiency virus (HIV) disease, drug addiction, and alcoholism. [FN344] Since such diseases or conditions can often substantially limit a major life activity, it seems likely that many victims of sterilization laws would be considered disabled today under the ADA.

Many infertile men and women also should be considered disabled under the ADA, for three reasons. First, inability to conceive a child through unprotected sexual intercourse will often be due to a “physical impairment.” [FN345] Second, the Supreme Court has recognized that reproduction is “substantially limited” for HIV-infected individuals because it would expose their sex partners and offspring to the risk of infection. [FN346] Most infertile men and women will have an even stronger case because their physical impairments will make reproduction impossible without medical assistance. [FN347] Finally, the *298 ADA as amended in 2008 expressly recognizes reproductive function as a “major life activity.” [FN348]

The classification of infertile men and women as disabled follows even in cases where ART may permit them to have children. Through its 2008 amendments, Congress has directed courts to disregard the ameliorative effects of mitigating measures such as medication or assistive technology when determining whether a physical impairment substantially limits a major life activity. [FN349]

3. Transmission of Health Problems

Moving on to the second point, the question is whether laws that ban or restrict ART attempt to prevent transmission of health problems from parent to child, as eugenic sterilization laws once did.

At first glance, the answer seems to be no. Critics have complained that parents and doctors are inflicting unsafe technologies on children who cannot consent to the dangerous circumstances under which they are conceived. [FN350] For the most part, the debate has not explicitly focused on transmission of traits.

However, chromosomal, genetic, and epigenetic abnormalities contribute to infertility, [FN351] and infertility is associated with an increased risk of conceiving children who suffer from birth defects, imprinting errors, and poor perinatal outcomes. [FN352] IVF and ICSI enable a subset of infertile men and women to overcome these natural barriers and conceive children who are at risk due to underlying parental characteristics. [FN353] Thus, upon closer examination, the drive to ban “unsafe” technology turns out to be something else: a drive to stop a group of disabled persons from transmitting health problems to their children.

This conclusion may come as a surprise to well-intentioned academics and policymakers who want only to protect unborn children against what they perceive as an overreaching fertility industry. However, this link between outcomes and parental characteristics deserves serious consideration, because it gives the debate over the safety of ART a decidedly eugenic cast.

*299 4. Regulation as the New Sterilization

To address the third point, we must consider whether laws that ban or restrict ART interfere with reproduction, as eugenic sterilization laws did.
Sterilization laws compelled fertile individuals to undergo vasectomies and tubal ligations. [FN354] By contrast, no one advocates that infertile men and women should be sterilized. Physically they will remain untouched.

However, there are two important similarities between ART regulation and sterilization laws. First, both bring the coercive power of the government to bear upon the individual. [FN355] Second, both take away the opportunity to conceive children. The state need not wield the scalpel when it can simply ban the technologies that infertile men and women need to reproduce.

In fact, there is reason to believe that legal restrictions on ART could be more effective (and thus more oppressive) than sterilization laws ever were. Identifying and sterilizing victims took significant time and expense. Since sexual intercourse could take place in private, those subject to eugenic sterilization had a ready means to defy the laws and continue reproducing.

The infertile have fewer options. They can have all the private sex they want, but it will do them no reproductive good. Instead, they must gain access to doctor's offices, clinics, and pharmacies. But, these are chokepoints where regulators can block illicit reproduction before it occurs.

To be sure, infertile men and women might travel to other countries for access to ART, but that significantly increases the cost of an already expensive treatment. Moreover, there is no guarantee that they will gain access to the treatments they need in foreign countries. Rather, it has been foreigners who come to the United States in an effort to escape the restrictive laws and regulations that already exist in their own countries. [FN356] A crackdown on ART in the United States could not only leave Americans without options, but have eugenic effects around the world.

5. Eugenic Goals

The last point to consider is whether laws that ban or restrict ART and eugenic sterilization laws have common goals. This section examines three goals: improving the species, saving money, and protecting the unborn from their own flawed existence.

a. Improving the Species

Eugenicists wanted to improve the human species. [FN357] They believed crime, insanity, disability and sickness could be solved within just a few generations through selective breeding. [FN358] Towards that end, they tried to stop the “unfit” from reproducing and passing their allegedly inferior genes to the next generation. [FN359]

This author has discovered two species-oriented arguments against ART in the course of her research. First, some believe that IVF and ICSI have unleashed an “infertility time bomb” upon the unsuspecting fertile population. The Darwinian account goes something like this: Nature would ordinarily weed infertile men and women and their inferior sperm and eggs out of the gene pool, but technology is preventing that from happening. Instead, the infertile are breeding more infertile to the detriment of the human species, which may itself be rendered infertile. [FN360]

The time bomb argument rests on shaky assumptions. Infertility is not always heritable. It has many non-genetic causes, including scarring from venereal disease and delayed childbearing. [FN361] Thus, it is scientifically inaccurate to assume that every man or woman who employs ART is transmitting infertility to the next generation. Moreover, even though some men and women do harbor genetic defects in their sperm and eggs, it is highly unlikely that IVF and/or ICSI will cause the infertile to outnumber the fertile and doom the species.

A recent article addressed the concern that ICSI could transmit Y chromosome deletions to the sons of infertile men,
thereby precipitating a future decline in male fertility. [FN362] Assuming that 1% of infertile men had a transmissible genetic defect, even if half of such men used ICSI to sire children, the authors concluded it would take two hundred years to double the already low rate of such infertility. [FN363] Total male infertility was very unlikely due to the prospect of biomedical progress and social and economic factors that limited the number of men able to benefit from ICSI. [FN364]

Second, the FDA's decision to halt ooplasm transfer also reflected concern for the genetic condition of the human species. The agency not only asserted that a mixture of mitochondria could cause disease, but also complained that ooplasm transfer effected a genetic modification that the resulting child could pass on to future generations. [FN365] Thus, by blocking the technique, the agency acted to prevent “bad” mitochondrial genes from spreading and having inter-generational effects.

b. Saving Money

Eugenicists wanted to save money. [FN366] They recognized that some disabled men and women could not support a family, but believed these individuals could at least support themselves. [FN367] Therefore, they viewed sterilization as key. [FN368] The procedure could facilitate the release of inmates from expensive public institutions [FN369] and reduce the number of children with heritable defects who otherwise would burden taxpayers and social services. [FN370] As the Great Depression took hold, such financial rationales for sterilization became more dominant. [FN371]

Eighty years later, financial concerns are now being asserted as grounds to control ART. For example, consider the furor over Nadya Suleman, a single woman who already had six children but used IVF to give birth to eight more in 2009. In a panicky era when layoffs were widespread and stock markets down, the public and lawmakers expressed rage at the thought that this mother and her brood could end up on welfare at taxpayer expense. [FN372] Legislators introduced bills to limit the number of embryos transferred during IVF, not only to protect child health, but to save the public purse. [FN373]

Though the “Octomom” [FN374] controversy may seem limited to the specific issue of multiple-embryo transfer, it is not hard to find similar reasoning in the general debate over the health impacts of ART. Recall that the President's *302 Council on Bioethics released a report in 2004 emphasizing the increased risks to children conceived through ART. [FN375] In that report, the Council opined that patients and doctors were not the only ones who must decide whether increased risk was justified; society as a whole had to address that question, particularly if it would bear the costs of caring for offspring with health problems. [FN376]

The Council’s point was only too clear: He who pays the piper must call the reproductive tune, all in the name of the public good. It bears emphasizing that this disturbing message did not come from some muckraking journalistic account about “Octomom”; rather, it came from a prestigious national body of experts appointed to consider biotechnological issues and provide the nation with ethical guidance.

American policymakers are not alone in articulating such sentiments. As two European scientists commented upon the health impacts of ART, the desires of would-be parents must be balanced against those of deformed children “and the society that might have to provide increased support for them.” [FN377]

c. Protecting the “Better Not Born”

Last but not least, eugenicists wanted to relieve human suffering. In their view, parenthood weighed heavily upon the “unfit” and life itself was a burden to offspring with heritable defects. [FN378] Thus, Karl Pearson, a prominent British eugenicist, described eugenics succinctly as the “better not born” doctrine. [FN379]
Albert Wiggam, an American eugenicist, emphasized this point in his popular books:

You fondly imagine you can speed up evolution with cakes and cream for the unfit. But nature has progressed by letting the devil take the hindmost. Your method is to increase the number of the hindmost. Nature slaughters the innocents, but you merely throw more innocents into her ravenous maw. Your very mercy often only adds to nature's brutality. [FN380]

Wiggam offered the nation a new Golden Rule as enhanced by biological understanding, one that he claimed Jesus Christ himself would have approved: “Do unto both the born and the unborn as you would have both the born and unborn do unto you. [FN381] This is the real golden rule. This is the biologist's conception of the brotherhood of man.” [FN382]

The Buck v. Bell decision expressed the same attitude. Writing for the Court, Justice Oliver Wendell Holmes reasoned: “It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.” [FN383] In other words, rather than relegate “degenerate offspring” to terrible deaths through execution or starvation, Holmes deemed it better for the entire world --including the offspring themselves--if they simply never came into existence. This view resonated with the views of Pearson, Wiggam, and others who believed eugenics showed sincere compassion towards the unborn.

Returning to the field of assisted reproduction, we find that legislators and regulators have already banned cloning, nuclear transfer, and ooplasm transfer on the reasoning that resulting children are at risk of health problems. These laws and regulations exemplify the belief that such children are better off never born.

If the government next attempts to ban or restrict IVF, ICSI, or related technologies on safety grounds, it will be employing the same “cruel-to-be-kind” reasoning. Some infertile men and women can reproduce only through these technologies. Laws that block access might succeed in reducing birth defects, rare disorders, and poor perinatal outcomes, but only by eliminating the children along with them. Such laws reflect a value judgment that nonexistence is preferable to life with certain physical defects or conditions. [FN384] The harshness of this judgment becomes all the more apparent when one remembers that even major birth defects can often be corrected through surgery, [FN385] and that most pre-term infants go on to lead healthy and normal lives. [FN386]

C. Is the New Eugenics a Bad Thing?

The foregoing parallels lead to the conclusion that the historical analogy is valid. Laws and regulations restricting access to ART on the ground that the resulting children might suffer from health problems are eugenic in character, and bear more than a passing resemblance to the sterilization laws of the twentieth century.

*304 The question remains: Is this brave new eugenics a bad thing? Or can we embrace it without fear or regret? In searching for an answer, this Article reasons by analogy to critiques of twentieth-century eugenics.

1. Coercive Reproductive Policies

Professor Lombardo has opined that “governmental involvement in coercive reproductive policies is the most objectionable feature of eugenics to most people today.” [FN387] In other words, we remember sterilization laws unfavorably because they took away the ability of adults to decide for themselves whether to have children. The state substituted its own judgment, which was that certain people should not have children. Victims experienced not only a loss of autonomy,
but also a loss of children and posterity.

Many infertile men and women cannot have children without the aid of IVF, ICSI, and the like. Therefore, laws or regulations restricting access to these technologies would take away their ability to decide for themselves whether to have children. The state would substitute its own judgment, namely, that those who need ART should not have children. Again, victims would experience not only a loss of autonomy, but also a loss of children and posterity. Such coercive laws and regulations would be out of step with the present culture, which cherishes reproductive autonomy. [FN388]

2. Tyranny of the Majority

This train of thought leads naturally to the next topic of concern. Twentieth-century eugenics has been criticized for its oppression of the disempowered. [FN389] Eugenicists used education and moral suasion to encourage middle and upper-class Americans to reproduce and spread their genes. [FN390] Meanwhile, sterilization laws curbed the reproduction of groups whom the majority considered “unfit,” such as criminals and the disabled. [FN391] Though poverty was not grounds for sterilization, poor men and women were at greater risk. [FN392] Lack of proper nutrition and health care increased the odds of disease, and poverty brought them into contact with courts and public institutions that had the power to classify them as mentally deficient. [FN393]

This history reminds us that democracy has an ugly side. Those who already have privilege can vote themselves more. The sterilization laws of the twentieth century were used to oppress individuals who had the bad luck to be poor, physically or mentally disabled, or convicted of a crime. [FN394]

Returning to ART, infertile men and women who use IVF and ICSI tend to be white and have enough money to pay for treatments even when health insurance does not cover them. [FN395] At first glance, they would not seem to be a group vulnerable to oppression.

However, this narrow view ignores three points. First, infertile men and women are a minority of the population. [FN396] Most in this minority are treated with drugs or surgery; less than 5% of infertility services involve IVF and the like. [FN397] Thus, ART patients are a minority of a minority. Fertile men and women far outnumber them and have the political muscle to strip them of children through the ballot box.

Second, infertility carries a social stigma, and many infertile men and women are severely depressed. [FN398] Few are likely to have the energy or courage to come out of the closet and bare their souls in an effort to persuade the fecund majority not to restrict ART. Fertility doctors may advocate for them, but their financial interest makes them less likely to garner public sympathy and support.

Third, Congress enacted the ADA to protect the disabled against discrimination, including at the hands of public entities. As explained above, many infertile men and women are properly classified as disabled under the ADA. [FN399] Thus, the ADA reflects a congressional judgment that the infertile are indeed disempowered.

Here again, the lesson of history is clear. If lawmakers and regulators take ART away from infertile men and women, their actions could be viewed (and later condemned) as oppression of the members of a vulnerable minority. [FN397]

3. Stigma and Inequality

Thus far, the discussion has centered on the impact that regulation could have on infertile men and women who need IVF, ICSI, and related technologies to reproduce. Though these are the most obvious victims of the brave new eugenics,
they are not the only ones.

Twentieth-century eugenicists argued that children with bad genes should never be conceived because they would suffer too much. [FN400] Though sugar-coated with compassion, this argument was based on the assumption that some lives were more worth living than others. At its core, the compassionate case for eugenics was as virulently anti-egalitarian as the rest of the movement.

Despite the best of intentions, the drive to control ART on the ground that it is unsafe for children falls into exactly the same trap. Blinded by inapt analogies to laws that protect the interests of existing fetuses or children, [FN401] its proponents fail to see the eugenic implications of regulating ART to prevent the very conception of children.

Infertile men and women suffer from a variety of medical conditions. Some of these conditions hold the potential to impair the health of offspring. Any move to take ART away from the infertile--or a subset of them, such as severely infertile men who need ICSI--necessarily implies that they are too flawed to reproduce, and that their children are too unhealthy to exist. When the case for ART regulation is viewed through the lens of current medical research, its ultimate logic comes uncomfortably close to a Darwinian judgment that only the fittest should exist.

That judgment has two consequences. First, it is stigmatizing. Infertility is a disability that already deals a hard blow to the dreams and self-esteem of millions of men and women. If, on top of that, the law blocks their only means of reproducing on the ground that their children run too high a risk of health problems, it sends a dehumanizing message: the infertile are not worthy of reproducing and contributing to the species. [FN402]

But, the message does not stop there. Children conceived through ART also are stigmatized as being too flawed to exist, along with anyone else who happens to have birth defects, rare disorders, or perinatal outcomes of the same kind used to justify laws restricting access to ART. Because millions of such *307 persons already exist, the message can damage their self-esteem and place them at risk of employment and insurance discrimination. [FN403]

Second, laws that stigmatize in this way undermine our commitment to egalitarianism. In a society that claims to view all men and women as equals, the government should not only talk the talk, but walk the walk. It should not arrogate to itself the power to decide which lives are worth living and which are not. Such judgments run contrary to the very principle of equality, and entice us down a slippery slope in which further damaging judgments can be made on the strength of bad precedent. [FN404]

4. Science and Politics

Twentieth-century eugenics is easy to criticize on scientific grounds. For example, eugenicists thought they could eradicate undesired traits through sterilization. But, some traits are linked to recessive genes. It does no good to control the reproduction of the unlucky few who manifest the genes if those who appear normal continue to pass the recessive genes along to their offspring. [FN405] And eugenicists made other big mistakes too, such as failing to recognize that undesired traits may result when genes interact with the environment. [FN406] Physical and mental deficiencies can result from something as simple as inadequate nutrition. [FN407] The people who Wiggam derided for wanting to provide “cakes and cream for the unfit” turned out to be correct. [FN408]

Today our understanding of genetics and epigenetics is more sophisticated. We also have access to a lot of research on children conceived through ART.

This raises an interesting question: are laws with eugenic implications acceptable when based on accurate sci-
Laws and regulators might take that position, reasoning that restrictions on ART are worthwhile so long as they really do protect children.

Even that stance is problematic, however. To explain why, this Article will evaluate two kinds of laws and regulations: those that control ART in general, and those that control the reproduction of infertile men or women with particular characteristics.

a. Technology Controls

As discussed above, some researchers have found that children of ART have an increased risk of birth defects, rare disorders, and poor perinatal outcomes. [FN409] Suppose lawmakers and regulators read the research and decide *308 to ban or restrict ART to protect the safety of children. Is that a decision based on good science?

As this Article has explained, there is good reason to believe that these health problems (which occur only in a minority of children) can be traced back to the underlying chromosomal, genetic, and epigenetic characteristics of a subset of infertile men and women. [FN410] Those who believe ART is unsafe have overlooked this point.

This illustrates a problem with using science as a rationale for restricting autonomy. What appear to be obvious answers sometimes turn out to be misinterpretations of data. Moreover, science is always advancing. Research that appears to be correct this year may turn out to be incorrect the next. [FN411] Any lawmaker or regulator who restricts ART runs the risk that she will end up like twentieth-century eugenicists, condemned for well-meaning reliance on science that later turned out to be wrong.

In theory, lawmakers and regulators could adjust laws and regulations to take new scientific information into account. But, history teaches that it can be hard to stop a bad idea once it gathers momentum.

Critics raised questions about twentieth-century eugenics early on. By 1917, geneticists were already discussing the fact that recessive genes could not be purged from a large population. [FN412] This insight should have ended the eugenics movement. Instead, the movement gathered momentum. Many eugenicists continued to rely on biological rationales, contending that any effort to stamp out bad genes was better than none. [FN413] Others shifted tactics and argued the “unfit” should be sterilized because it cost money to institutionalize them [FN414] and they were incapable of parenting a child. [FN415] This example shows that public policies can be hard to change, particularly when an issue as complicated and sensitive as human reproduction is involved.

b. Patient Controls

What about the fact that some infertile men and women do indeed have a higher risk of transmitting chromosomal, genetic, or epigenetic problems? Does that justify laws or rules blocking such individuals from accessing ART? [FN416]

Lawmakers and regulators could probably establish a few workable rules. For example, they could order doctors to refuse treatment to individuals who *309 are found to carry chromosomal abnormalities such as balanced translocations. They could establish an age limit for women, since age increases the risk of conceiving disabled offspring. They might even ban ICSI for men with Y chromosome deletions.

Beyond that, however, it would be extremely difficult to fashion workable controls. Researchers believe that minor chromosomal deletions, genetic mutations, and epigenetic factors contribute both to infertility and offspring health problems, but scientific knowledge remains incomplete. It would be very hard to identify affected men and women and block their access to ART.
Moreover, legislation and regulation that targeted older women and others at risk for transmitting chromosomal, genetic, or epigenetic abnormalities would heighten the equality-based concerns discussed above. Overpowered by the fertile majority (and perhaps abandoned by other infertile men and women desperate to retain their own access to ART), this small subgroup would have a difficult time obtaining relief through the democratic process. Random biological or medical factors would exacerbate the unfairness: some with disfavored characteristics would eventually succeed in reproducing through sex or simpler medical interventions (such as fertility drugs), while others would remain forever childless.

There is one bright side to legislation or regulation based on patient characteristics. Once matters such as age and genes are frankly discussed, the eugenics of any such proposal will become more obvious. Even the most oblivious legislator or regulator might recognize the historical parallels and recoil. [FN417]

To summarize this Part, it is reasonable to anticipate that legislators or regulators could assert health problems in children as grounds to ban or restrict access to IVF and ICSI. This Part has argued that such restrictions would be the practical equivalent of mandatory sterilization laws, imposed against a class of disabled persons (the infertile) to prevent them from transmitting health problems to offspring. This brave new eugenics threatens to perpetrate the same wrongs as before: coercive reproductive policies, oppression of a minority group, and stigma, all in the name of imperfect science.

VI. Conclusion

Today, we remember the eugenics movement of the twentieth century primarily in terms of its drive to improve the gene pool. We recall that eugenicists forged ahead at the expense of those who were disabled and poor. What we tend to forget is that the eugenics movement had a softer side. Sterilization was considered a compassionate response to those who were “better not born.”

*310 This aspect of twentieth-century eugenics should not be overlooked, for it links the past and present to a potential legal future that is frighteningly appealing to many well-intentioned people. Regulators have already made novel treatments such as cloning, nuclear transfer, and ooplasm transfer illegal. Conventional technologies such as IVF and ICSI now have come under fire, with federal policymakers demanding more studies of their safety and academics proposing tougher regulation, all in the name of protecting children.

The possibility that parental characteristics may be to blame for health problems observed in children of ART has been largely overlooked. Advocates of increased governmental control over ART have failed to recognize the eugenic implications of acting to “protect” children from their own existence.

That public eugenics should reemerge in the twenty-first century, speaking solemnly about the welfare of children, should give us all serious pause. Whatever the dangers of ART may be, they are nothing compared to the power of the state to relegate a class of disabled persons to childlessness based on the prejudgment that the lives of their offspring are not worth living. Such discrimination betrays our core values and must not be tolerated.

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[FN1]. Like federal law, this Article defines assisted reproductive technologies as treatments or procedures that involve handling eggs or embryos outside the body, including in vitro fertilization (IVF), gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), and intracytoplasmic sperm injection (ICSI). See Fertility Clinic Success Rate and Certification Act of 1992, 42 U.S.C. § 263a-1, 263a-7 (2006) (“The term ‘assisted reproductive technology’ means all treatments or procedures which include the handling of human oocytes or embryos, including in vitro fertilization, gamete intrafallopian transfer, zygote intrafallopian transfer, and such other specific technologies as the Secretary may include in this definition....”).

[FN2]. See discussion infra Part I.


[FN4]. See infra Part II.A.

[FN5]. See infra text accompanying notes 78-91 and 153-68.

[FN6]. See infra Part III.


[FN9]. Toby Ord, The Scourge: Moral Implications of Natural Embryo Loss, 8 Am. J. Bioethics 12, 16 (2008) (“The figures for early spontaneous abortion (within the first 6 weeks) range from 45% to 75%....”).

[FN10]. Id.

[FN11]. Id. at 17.

[FN12]. See James Evans et al., Genetics, in Science for Lawyers 175, 186 (Eric York Drogin ed. 2008).


[FN14]. 80% of trisomy 21 embryos miscarry. Id. at 293.

[FN15]. Id. at 299.

[FN16]. Id. at 298. See also id. at 294-97 (explaining meiosis).

[FN17]. Id. at 275.

[FN19]. Silber, supra note 13, at 49.

[FN20]. See Martin, supra note 18, at 524 (discussing possible risk factors leading to aneuploid concepti).

[FN21]. See id. at 525 (comparing “aneuploidy frequencies” of embryos among fertile and infertile donors).

[FN22]. Id.

[FN23]. Silber, supra note 13, at 336. One recent study examined more than five million births in the United States and concluded paternal age had relatively little impact on the rate of birth defects. Q. Yang et al., Paternal Age and Birth Defects: How Strong Is the Association?, 22 Hum. Reprod. 696 (2007). Compared with fathers age twenty-five to twenty-nine, fathers in their forties faced an 8% increase in the risk of producing offspring with birth defects, while those fifty and older had an increased risk of 15%. See id. at 697 tbl. I (displaying data for prevalence of, and relative risks for, birth defects by paternal age group).

[FN24]. See Martin, supra note 18, at 525 (discussing incidence of chromosome abnormalities in human sperm).

[FN25]. See id. at 526 (indicating that aneuploidies occur both in the autosomal chromosomes 1 through 22 and in the sex chromosomes X and Y).

[FN26]. See id. (indicating an “association of increased sperm aneuploidy frequencies in infertile men”).


[FN28]. Id.

[FN29]. Silber, supra note 13, at 303.

[FN30]. Id.


[FN32]. Id.

[FN33]. Id.

[FN34]. Id. at 519.

[FN35]. See Silber, supra note 13, at 303-05 (describing translocations and their consequences in human reproduction).

[FN36]. Id. at 317.

[FN37]. Id. at 318-19.

[FN38]. Id. A normal man who produces 200 million sperm in his ejaculate will produce 100,000 sperm with a Y chromosome deletion per day (1%). The odds are against the defective sperm, but if one fertilizes an egg, an infertile baby boy may result. Id. at 322.
[FN39]. See David C. Page et al., Men with Infertility Caused by AZFc Deletion Can Produce Sons by Intracytoplasmic Sperm Injection, but Are Likely to Transmit the Deletion and Infertility, 14 Hum. Reprod. 1722, 1722 (1999) (stating that sons inherit the Y chromosome deletion which can cause infertility).

[FN40]. See Silber, supra note 13, at 320-24 (evidencing the X chromosome's role in egg and sperm production through the examples of Kallman's syndrome, where a chromosomal abnormality causes sterility in male descendants, and Turner syndrome, where women have only one X chromosome and produce no eggs).

[FN41]. See id. at 324 (stating that women who carry excessive repeats of a certain gene on the X chromosome are at risk both for premature ovarian failure and conceiving offspring with fragile X syndrome, a source of mental retardation).


[FN44]. See Evans et al., supra note 12, at 186 (discussing the inheritance of human chromosomes).

[FN45]. Macintosh, supra note 43, at 52 (“Most genes are expressed on both maternal and paternal chromosomes; however, genes subject to parental imprinting are expressed only on either the maternal or paternal chromosome.”) (citing Twyman, supra note 43, at 97).

[FN46]. Id.

[FN47]. See id. at 51-61 (discussing the observed and potential effects of abnormal genetic imprinting on gene expression in clones of animals and humans).


[FN49]. See Douglas T. Carrell & Saher Sue Hammoud, The Human Sperm Epigenome and Its Potential Role in Embryonic Development, 16 Molecular Hum. Reprod. 37, 42 (2010) (stating that men with low sperm counts have altered DNA methylation); Kobayashi et al., supra note 47, at 1583 (stating that “methylation errors are present at imprinted loci in the sperm of infertile men, particularly those with oligospermia.”).

[FN50]. See Kobayashi et al., supra note 46, at 1585 (explaining study that looked at aberrant maternal methylation in ART samples).

[FN51]. Id. at 1589.

[FN52]. Id. (stating that in seven cases “the same imprinting errors were present in the parental sperm and the matched ART sample, suggesting that abnormal hypomethylation at H19 and GTL2 was transmitted directly from the father's sperm.”).

[FN54]. See id. at 479-80 (discussing “the loss of epigenetic control”).

[FN55]. See infra notes 205-09 and accompanying text.

[FN56]. See Silber, supra note 13, at 174-76, 201-02 (describing the nature and use of these medications).

[FN57]. See id. at 177-78 (discussing administration of human chorionic gonadotropin) and 220-22 (describing the procedure for egg retrieval).

[FN58]. See id. at 222-23, 233 (discussing sperm preparation and culture with eggs).

[FN59]. See id. at 179 (discussing use of progesterone to support pregnancy), 233-35, 243 (describing culture of embryos and transfer to uterus).


[FN61]. See Silber, supra note 13, at 260-65 (describing the “Step-by-Step Details of the ICSI Procedure”). ICSI was used in nearly half of all ART cycles in 2001. President's Council on Bioethics, Reproduction and Responsibility: The Regulation of New Biotechnologies 27 (2004) [hereinafter Reproduction and Responsibility] (suggesting that some doctors and patients are turning to ICSI as “insurance” that fertilization will occur); see also Silber, supra note 13, at 270 (suggesting that there are no significant differences in overall ART results when undergoing conventional IVF versus ICSI).


[FN63]. See id. at 267-69 (describing how doctors are able to retrieve sperm from the testicles or the epididymis).

[FN64]. See Fertility Clinic Success Rate and Certification Act of 1992, 42 U.S.C. § 263a-1-a-7 (2006) (stating clinics must report success rates and other data to the Centers for Disease Control and Prevention, which publishes most of that information in annual reports for consumers); see also Reproduction and Responsibility, supra note 61, at 47-51 (describing the Act and its implementation).

[FN65]. See Reproduction and Responsibility, supra note 61, at 54-62, (providing a thorough discussion of how the FDA exercises its authority).

[FN66]. The FDA has assumed limited control over sperm banks and ART clinics and labs. See generally 21 C.F.R. § 1271 (2008) (stating sperm banks and ART clinics and labs must register with the FDA, screen third-party donors for communicable diseases, and maintain records).

[FN67]. See Reproduction and Responsibility, supra note 61, at 64-71 (describing state oversight and regulation for assisted reproduction).

[FN68]. Id. at 51. A few states, such as New Hampshire and Pennsylvania, comprehensively regulate ART. Other states have laws that regulate egg and sperm donation, outline parental rights and obligations, and limit research on embryos. Id. at 51-54.
[FN69]. According to its website, ASRM is a multidisciplinary organization dedicated to the advancement of reproductive medicine. Its basic functions include education, research, and advocacy on behalf of patients, doctors, and health care providers. ASRM: Mission Statement, http://asrm.org/detail.aspx?id=60 (last visited Sept. 14, 2010). Its membership includes doctors, nurses, biologists, laboratory technicians, and mental health professionals. Id.

[FN70]. See Reproduction and Responsibility, supra note 61, at 72-73 (stating that “ASRM’s system of professional self-regulation is voluntary and there appear to be no penalties for or consequences of noncompliance.”).

[FN71]. See id. at 71 (explaining that the organizations qualified to certify labs of SART members are the College of American Pathologists, the Joint Commission for Accreditation of Healthcare Organizations, and the New York State Tissue Bank program).


[FN75]. See Laura A. Schieve et al., Are Children Born After Assisted Reproductive Technology at Increased Risk for Adverse Health Outcomes? 103 Obstetrics & Gynecology 1154, 1155 (2004) [hereinafter Schieve I] (noting that 36% of ART pregnancies conceived in 2001 resulted in deliveries of multiples); 2007 Art Report (stating that 54% of ART infants born in 2000 were part of a multiple birth compared with 3% of infants in the general population).

[FN76]. See Reproduction and Responsibility, supra note 61, at 41 (stating that one in ten children born following a high-order pregnancy will die before their first birthday; the disabilities that multiples suffer include blindness, respiratory dysfunction, and brain damage; premature birth can lead to infection, respiratory distress, and heart defects; and that low birth weight may affect health throughout life, leading to hypertension, cardiac disease, stroke, and osteoporosis.).


[FN79]. See id. at 725 (stating that 4.2% of the 4000 naturally conceived infants studied had a major birth defect). Major
defects included cardiovascular, musculoskeletal, chromosomal, and urogenital. Id. at 730. Interestingly, many contemporaneous studies reached the opposite conclusion, namely, that IVF and ICSI did not increase the rate of birth defects. See, e.g., Jamie Grifo & Michael Steinkampf, Major Birth Defects After Assisted Reproduction, 347 New. Eng. J. Med. 1449, 1449 (2002) (“Among 134,985 children conceived as a result of assisted reproductive technology between 1996 and 2000, 2597 infants (1.9%) were reported to have a major birth defect. This rate is similar to the incidence of major abnormalities reported in general populations in both Europe and North America.”); Matthew Retzloff & Mark Hornstein, Is Intracytoplasmic Sperm Injection Safe? 80 Fertility & Sterility 851, 857 (2003) (stating that the slight increased risk of malformation for IVF offspring compared with the natural conception groups was “no longer statistically significant when confounding variables such as maternal age, parity, and ethnicity were controlled”). However, it was the Hansen study that captured media and academic attention.

[FN80]. Laura A. Schieve et al., Low and Very Low Birth Weight in Infants Conceived with Use of Assisted Reproductive Technology, 346 New Eng. J. Med. 731, 736 tbl. 4 (2002) [hereinafter Schieve II]. The children studied were born in 1996 and 1997. The results did not change materially when researchers adjusted the data for maternal characteristics such as age and parity, or treatment factors such as use of ICSI. Id. at 733, 734 tbl. 2.

[FN81]. Id. at 732.

[FN82]. Id. at 733.

[FN83]. See id. at 735 (suggesting that “the increased risk of low birth weight in singleton infants born at term who were conceived with assisted reproductive technology may be directly related to such treatments for infertility”).

[FN84]. See, e.g., George Kovalevsky et al., Do Assisted Reproductive Technologies Cause Adverse Fetal Outcomes? 79 Fertility & Sterility 1270, 1270 (2003) (indicating that complications could be results of an infertility-related condition rather than the use of ART).

[FN85]. Id. at 1271.

[FN86]. Id. at 1270.


[FN90]. Id. Professor Marsha Garrison has suggested a quasi-public partnership between a private entity staffed by medical professionals and a federal agency such as the Department of Health and Human Services. The professionals would be responsible for drafting regulatory standards and updating them as necessary to accommodate new knowledge or practices. Following federal approval, the standards would become binding on fertility clinics. See also Marsha Garrison, Regulating Reproduction, 76 Geo. Wash. L. Rev. 1623, 1648-49 (2008) (discussing the quasi-regulatory system in organ donation and implantation).

[FN91]. Michael Malinowski, A Law-Policy Proposal to Know Where Babies Come from during the Reproduction Re-
volution, 9 J. Gender Race & Just. 549, 551 (2006). In a previous article Professor Malinowski had argued that the Centers for Disease Control or FDA should regulate ART, both to ensure safety and to control emerging practices that could give parents the power to screen embryos and select the genetic characteristics of their children. Michael Malinowski, Choosing the Genetic Makeup of Children: Our Eugenics Past-- Present, and Future? 36 Conn. L. Rev. 125, 218 (2003).


[FN94]. See id. at 109 (recommending federal legislation to prohibit anyone from attempting to create a child through somatic cell nuclear transfer cloning for a time period of three to five years).


[FN96]. Macintosh, supra note 43, at 82. Dr. Seed has since sunk into obscurity. There is no evidence that he ever came close to achieving his goal.


[FN98]. See Macintosh, supra note 43, at 82 (discussing the application process with the FDA regarding clinical research).


[FN100]. Kate Johnson, First Human Pregnancy from Nuclear Transfer: Lasted Until 29 Weeks' Gestation (Dec. 15, 2003), http://findarticles.com/p/articles/mi_m0CYD/ls_24_38/ai_112303392/?tag=content;col1.

[FN101]. Id.


[FN103]. See Macintosh, supra note 43, at 23-24 (discussing the function of mitochondria).

[FN104]. Weiss, supra note 102.

[FN105]. See, e.g., id. at A12 (explaining that “most researchers have said they are adamantly opposed” to this procedure).


[FN107]. Id. After the FDA shut them down, Grifo and Zhang shared their research on nuclear transfer with Chinese doctors. Id. The Chinese applied the method with a twist: fertilization with sperm was accomplished first, and transfer of the nuclear DNA to the donor egg came afterwards. Denise Grady, Pregnancy Created Using Egg Nucleus of Infertile Woman, N.Y. Times, Oct. 14, 2003, at A1, available at ht-
A patient became pregnant with triplets but lost them one by one to selective reduction, ruptured membranes, and infection. Id. The intended twins had no evidence of genetic defects. Id. The attending doctors believe the bad outcome was due to the triplet pregnancy and not the nuclear transfer, but Chinese authorities still banned the technique. Id.


[FN109]. See id. at 164 (discussing the media attention and Congressional action that followed the claims of Zavos and Boisselier).


[FN111]. Id.

[FN112]. Id. at 80 (statement of Kathryn C. Zoon).

[FN113]. Id.

[FN114]. Id. at 79-80.

[FN115]. See Macintosh, supra note 43, at 83 (detailing how Zavos and Boisselier moved their research outside the United States).


[FN117]. Id.

[FN118]. Id.

[FN119]. Id.


[FN121]. Id. On what basis did the FDA exempt the union of ordinary sperm and eggs from the IND requirement? Dr. Zoon's letter stated that certain human cells, tissues, and cellular and tissue based products (HCT/Ps) were regulated solely under regulations designed to prevent transmission of communicable disease and issued pursuant to section 361 of the PHSA. See id. (citing 21 C.F.R. § 1271 (2008)). These regulations provide that an HCT/P will be regulated solely under section 361 of the PHSA when certain criteria are met. Sperm and eggs that have been minimally manipulated meet these criteria because they function as living cells and are for reproductive use. See 21 C.F.R. § 1271.10(a) (setting out the requirements for when section 361 of the PHSA will solely regulate an HCT/P). The skeptical reader is left to wonder just how firm this exemption is, given that the agency retains the power to amend its own regulations.

[FN122]. Zoon, supra note 120.

[FN124]. See Barritt I, supra note 116, at 515 (documenting that ooplasm transfer children have mitochondrial DNA from two different women).

[FN125]. Biological Response Modifiers Advisory Comm., Ctr. for Biologics Evaluation and Research, Food and Drug Admin., Dep't of Health and Human Services, Open Session, Meeting #32, 44-46 (May 9, 2002) [hereinafter BRMAC Meeting Transcript], available at http://www.fda.gov/OHRMS/DOCKETS/ac/02/transcripts/3855t1-01.pdf.

[FN126]. Id. at 46; See generally Jason A. Barritt et al., Epigenetic and Experimental Modifications in Early Mammalian Development: Part II Cytoplasmic Transfer in Assisted Reproduction, 7 Hum. Reprod. Update 428, 429 (2001) [hereinafter Barritt II].

[FN127]. BRMAC Meeting Transcript, supra note 125, at 42 (“In both cases heritable genetic modifications will be produced”); see also Biological Response Modifiers Advisory Comm., Ctr. for Biologics Evaluation and Research, Food and Drug Admin., Dep't of Health and Human Services, BRMAC Briefing Document for Day 1, May 9, 2002: Ooplasm Transfer as Method to Treat Female Infertility (asserting that genetic modification of eggs “crosses a line” by altering the genetic profile of unborn children), available at http://www.fda.gov/OHRMS/DOCKETS/ac/02/briefing/3855B1_01.pdf.


[FN129]. See Barritt II, supra note 126, at 429-30 (discussing possible reasons for abnormalities).

[FN130]. Id.

[FN131]. See supra text accompanying notes 121-23.

[FN132]. Therapeutic gene transfer usually is accomplished by infecting a person with a specially-designed virus loaded with a normal gene. The virus releases the normal gene into malfunctioning target cells. The hope is that the new gene will make proteins that will help the target cells function properly. Other methods of gene transfer include liposome vectors, linking the gene to a molecule that binds to cell receptors, and directly introducing the gene to the cell. See generally U.S. Dep't of Energy Office of Sci., Human Genome Project Information: Gene Therapy, http://www.ornl.gov/sci/techresources/Human_Genome/medicine/genetherapy.shtml (describing gene therapy).

[FN133]. See Merrill & Rose, supra note 97, at 118 (indicating the FDA has regulated gene therapy for several years).

[FN134]. Id.


[FN136]. See generally 21 U.S.C. § 321(g)(1) (2006) (defining “drug,” according to the FDCA, as also including articles intended to affect the structure or any function of the body of man). Although embryos created through cloning, nuclear transfer, and ooplasm transfer would affect the structure of a woman's body by making her pregnant, such embryos should not be considered drugs on this ground. The legislative history of the FDCA suggests that drugs must provide
some health benefit for the person affected. See Merrill & Rose, supra note 97, at 122 (drawing from the FDCA definition of “drug” an emphasis on an inquiry into the intended use). Otherwise, as Professor Elizabeth Price Foley has noted, the FDA must have the power to require pre-market approval for all embryos, including those created through sexual intercourse and IVF. Elizabeth C. Price, Does the FDA Have Authority to Regulate Human Cloning? 11 Harv. J. L. & Tech. 619, 630, 633 (1998).

[FN137]. See Gail H. Javitt & Kathy Hudson, Regulating (For the Benefit of) Future Persons: A Different Perspective on the FDA’s Jurisdiction to Regulate Human Reproductive Cloning, 2003 Utah L. Rev. 1201, 1218 (2003) (explaining that “the transfer of a nucleus affects both the structure and function of the future individual. Moreover, the harms that have been posited with respect to human cloning will be experienced primarily, and perhaps entirely, by this future person.”).

[FN138]. Id. at 1218-22.

[FN139]. The scholars also cited FDA actions consistent with a presumption that the agency had the power to regulate on behalf of future persons: requiring manufacturers to label drugs with information about effects on fetuses, regulating medical instruments employed during ART procedures, and asserting jurisdiction over ooplasm transfer. As the scholars themselves acknowledged, however, the mere fact that the FDA had taken these steps did not mean that it was acting within the statutory authority granted by Congress. Id. at 1222-27.

[FN140]. See Price, supra note 136, at 630 (arguing that Congress never intended the FDA to regulate the formation of human life and that federal power over the fundamental right to procreate should not be implied).


[FN146]. Id. at 89-90.

[FN147]. Id. at 205.

[FN148]. Id. at 94 (“There seems to be no ethical way to try to discover whether cloning-to-produce-children can become safe, now or in the future.”).

[FN149]. See id. at 92-94 (describing the moral concerns and practical limitations inherent in any attempt to develop human cloning).
[FN150]. See id. at 93 (noting that the success of IVF attempts did not automatically make the attempts themselves ethical).

[FN151]. See id. (citing the Hansen study, which found the major defects associated with IVF and ICSI were cardiovascular, musculoskeletal, chromosomal, and urogenital in nature).

[FN152]. See id. at 211 (concluding that a moratorium on cloning and related research should be declared until an extensive review of the practices could be conducted).


[FN154]. Id.

[FN155]. See id. at 3-4 (discussing the scope of the inquiry and its reasons for focusing upon ART).

[FN156]. See id. at 38 (citing the Hansen study discussed above in the text accompanying notes 78-79).

[FN157]. See, e.g., Page et al., supra note 39 at 1725 (showing that men with infertility caused by a gene deletion can have sons by ICSI but are likely to transmit the deletion and infertility to their sons).

[FN158]. See Reproduction and Responsibility, supra note 61, at 39-40 (citing several studies linking ICSI to genetic and developmental defects).

[FN159]. See id. at 40 (citing studies addressing the risks associated with ART and freezing of embryos).

[FN160]. See id. at 41 (addressing the dangers faced by ART children during gestation).

[FN161]. See id. at 46-75 (discussing state and federal regulations of ART extensively).

[FN162]. Id. at 75-78.

[FN163]. See id. at 205-06 (“We do not accurately know, for example, how the technologies and practices at the heart of our inquiry affect the health of those whose lives are touched by them--most notably, the children conceived with their aid.”).

[FN164]. Id. at 208-09.

[FN165]. Id. at 215. At an earlier point in the report, the Council criticized ASRM guidelines for relying on infertile men and women to safeguard the interests of their prospective children without making allowance for conflict of interest. Id. at 78. Curiously, the Council seemed not to realize that if infertile adults and their prospective children are indeed in conflict, having fertility doctors treat both as patients could create a conflict of interest for the doctors.

[FN166]. Id. at 215-17.

[FN167]. See Judith A. Johnson, Cong. Research Serv., RS 21096, Human Cloning 5 (2001) (“The Food and Drug Administration (FDA) has sent letters to the research community stating that the creation of a human being using cloning is subject to FDA regulation under the Public Health Service Act and the Food, Drug and Cosmetic Act.”). See also Ctr. for Genetics and Soc'y, Ooplasmic Transfer (Mar. 30, 2003), http://www.geneticsandsociety.org/article.php?id=381 (“A general consensus was reached at the meeting that more preclinical data would be necessary before FDA would allow
further clinical trials involving ooplasm transfer to proceed.


[FN169]. Though most of the studies in this Part focus on children conceived through IVF, some include offspring of GIFT and ZIFT. These methods are similar to IVF in that they involve ovulation stimulating drugs and the handling of sperm and eggs outside the body. Also, in some studies IVF children may have been conceived through ICSI.


[FN171]. In general, a “major birth defect” is an anatomical defect that requires treatment or impairs function. Rolv T. Lie et al., Birth Defects in Children Conceived by ICSI Compared with Children Conceived by Other IVF-Methods; A Meta-Analysis, 34 Int'l J. Epidemiology 696, 697 (2004). Some researchers categorize defects according to an established system, but there are more than one. Compare Christine K. Olson et al., In Vitro Fertilization Is Associated with an Increase in Major Birth Defects, 84 Fertility & Sterility 1308, 1310 (2005) (applying CDC guidelines), with Jin Liang Zhu et al., Infertility, Infertility Treatment, and Congenital Malformations: Danish National Birth Cohort, 333 BMJ 679, 680 (2006) (employing International Classification of Diseases, 10th revision, with some adjustments).

[FN172]. See Tracy Shevell, M.D. et al., Assisted Reproductive Technology and Pregnancy Outcome, 106 Obstetrics & Gynecology 1039, 1039 (2005) (giving the results of a study on the effects of ART). Most studies control at least for maternal age and parity. This study made a Herculean effort to adjust data to control for multiple confounders, such as age, race, marital status, education, preterm deliveries or fetal anomalies in prior pregnancies, body mass index, smoking history, and bleeding during gestation. See id. (listing the confounders this study adjusted for).

[FN173]. Id.

[FN174]. See supra studies cited note 79.


[FN177]. See id. at 360 (reporting a 2.1 adjusted odds ratio for septal heart defects); accord, Olson et al., supra note 171, at 1312 tbl. 4 (finding more than double the rate of cardiovascular defects among IVF infants, including septal heart defects). Septal heart defects are common, occurring in one out of 100 newborns in the general population. These gaps often close as an infant grows. The rest can be corrected through surgery. See If Your Child Has a Heart Defect, Kids Health, http://kidshealth.org/parent/system/ill/if_ heart_defect.html (last visited Sept. 19, 2010) (discussing congenital heart defects in children). Therefore, some ART researchers believe they should not be classified as major abnormalities. See Retzloff & Hornstein, supra note 79, at 854-55 (disagreeing with a study that classified cardiac malformations as ma-
jor abnormalities). Moreover, the level of scrutiny an infant receives may determine whether a septal heart defect is detected. The CDC attempted to correct for this by adjusting data for family income and demographic factors. Reefhuis et al., supra note 176, at 365. However, when parents or pediatricians know a child was conceived through technological means, they may be more vigilant, leading to increased detection of septal heart defects.

[FN178]. See Reefhuis et al., supra note 176, at 360 (summarizing the results of the study). Hypospadias is a male condition in which the urethral opening is located in the wrong place—for example, on the underside rather than the tip of the penis. It can be corrected with surgery. See Caring for Your Baby and Young Child, Birth to Age 5 606-07 (Steven P. Shelov & Robert E. Hannemann eds., rev. ed. 1998) (discussing hypospadias and its treatments). Hypospadias is a relatively common birth defect, occurring in three to four out of 1000 births in the general population. Suzan L. Carmichael et al., Maternal Progestin Intake and Risk of Hypospadias, 159 Archives of Pediatric & Adolescent Med. 957, 962 (2005).


[FN180]. Olson et al., supra note 171, at 1312. See also Wei Cui et al., Sex Differences in Birth Defects: A Study of Opposite-Sex Twins, 73 Birth Defects Res. (Part A): Clinical and Molecular Teratology 876, 876 (2005) (giving population data from Florida Birth Defects Registry showing 4.72% of male and 3.67% of female twins have birth defects).

[FN181]. See supra text accompanying notes 74-76.


[FN184]. Monozygotic twins account for one-third of all spontaneously conceived twins, but only 2% of IVF twins. McDonald et al., supra note 182, at 149.

[FN185]. Reefhuis et al., supra note 176, at 363; Rimm et al., supra note 175, at 442.

[FN186]. A recent Australian study compared ART twins with spontaneously conceived boy-girl twins (presumed to be dizygotic). With monozygotic twins removed from the control population, the ART twins had 1.4 times the risk of birth defects. However, the researchers did not consider this increased risk to be statistically significant. Michèle Hansen et al., Twins Born Following Assisted Reproductive Technology: Perinatal Outcome and Admission to Hospital, 24 Hum. Reprod. 2321, 2323 tbl. I, (2009) (hereinafter Hansen II). Similarly, a Swedish study that also used spontaneously conceived boy-girl twins as controls found IVF twins had only 1.1 times the rate of birth defects. A. Ericson & B. Källén, Congenital Malformations in Infants Born after IVF: A Population-Based Study, 16 Hum. Reprod.504, 506 (2001).

more likely when large amounts of exogenous gonadotropins are avoided.").

[FN188]. The authors noted that the research on this point was older and should be updated. See Elizur & Tulandi, supra note 170, at 1600 (“There is no or minimal risk of congenital malformation associated with... gonadotropin.... Nevertheless, most studies evaluating the possible relationship between birth defect and gonadotropin were in the 1980s and early 1990s.”).

[FN189]. Id. at 1599. The authors did find problems with a different drug sometimes used to stimulate ovulation in infertile women. Clomiphene citrate has a chemical structure similar to diethylstilbestrol (DES), a well-known teratogen. Some data associate clomiphene citrate with a slightly elevated risk of neural tube defects, and a six-fold increase in severe hypospadias in boy babies. Id. at 1595-96. However, this drug does not stimulate the ovaries as powerfully as gonadotropins and is not commonly used as part of IVF cycles.

[FN190]. Id. at 1598-99. One study found that the use of progestin during the first trimester of pregnancy was associated with 3.7 times the risk of bearing a son with moderate or severe hypospadias. Carmichael et al., supra note 178, at 959-60. Mothers who underwent no fertility treatments beyond progestin still had twice the risk of producing a son with hypospadias, suggesting that the drug itself was to blame. Id. at 960. However, one weakness of this study is that the researchers did not have direct information about the infertility of the parents (such as the time to conception), and so could not account for that confounder. Id. at 961.

Another study (not cited in the Elizur & Tulandi survey) showed a more dramatic five-fold increase in the risk of hypospadias for IVF infants. However, this data was not adjusted for maternal age. See Richard I. Silver et al., In Vitro Fertilization Is Associated with an Increased Risk of Hypospadias, 161 J. Urology 1954, 1955-56 (1999) (finding a five-fold risk of hypospadias for male IVF infants, but noting that maternal age was unavailable for the control group).

[FN191]. See, e.g., Winston & Hardy, supra note 187, at S17 (“Most reports concerning ICSI were fairly encouraging, although a re-classification of cases from a large series suggested that the incidence of major defects had been underestimated.”).

[FN192]. See Retzloff & Hornstein, supra note 79, at 852 (“There is the potential for incorporating sperm mitochondrial DNA or fertilizing anomalous female gametes that would otherwise be bypassed by natural selection.”).

[FN193]. Id.

[FN194]. Rimm et al., supra note 175, at 441 tbl. II.

[FN195]. See supra text accompanying note 175.

[FN196]. This meta-analysis was not ideal because some of the IVF studies included ICSI babies in their sample set. This overlap could inflate the rate of birth defects in the IVF studies, making it appear more similar to the rate in ICSI studies. However, two other studies have reached similar conclusions. A team of German scientists studied more than 3000 ICSI babies and found they were 1.24 times more likely than spontaneously conceived controls to have major congenital malformations. Alexander Katalinic et al., Pregnancy Course and Outcome After Intracytoplasmic Sperm Injection: A Controlled, Prospective Cohort Study, 81 Fertility & Sterility 1604, 1604 (2004). A Norwegian meta-analysis found that IVF performed with ICSI was associated with only 1.12 times the risk of major birth defects as IVF alone. Lie et al., supra note 171. In addition, ICSI children have been closely examined for developmental issues. Toddlers have been shown to have normal neurological development. See AG Sutcliffe et al., Outcome in the Second Year of Life After In-vitro Fertilisation by Intracytoplasmic Sperm Injection: A UK Case-Control Study, 357 Lancet 2080, 2080 (2001) (finding little or
no difference between ICSI children and children of a control group in mental development). Five-year olds have been found to have cognitive and motor skills comparable to spontaneously conceived children. I. Ponjaert-Kristoffersen et al., International Collaborative Study of Intracytoplasmic Sperm Injection-Conceived, In Vitro Fertilization-Conceived, and Naturally Conceived 5-Year-Old Child Outcomes: Cognitive and Motor Assessments, 115 Pediatrics e283, e283 (2005).

[FN197]. See Reproduction and Responsibility, supra note 61, at 40 ("Cryopreservation might affect gene expression or lead to other molecular effects....").


[FN200]. See supra text accompanying notes 15-18 (discussing the risks of advanced maternal age).

[FN201]. See supra text accompanying note 14 (stating that three 21 chromosomes often leads to miscarriage, but may result in a child with Down syndrome).

[FN202]. See supra text accompanying notes 31-35 (discussing risks of structural chromosomal abnormalities).

[FN203]. See supra Part I.A.2 and .3 (discussing these potential infertility causes).

[FN204]. Id.

[FN205]. Horsthemke & Ludwig, supra note 53, at 473.

[FN206]. Id.

[FN207]. See id. at 473-74 ("[D]evelopmental plasticity provides organisms with the ability to develop a certain range of phenotypes in response to environmental cues. Such cues probably affect gene expression by inducing epigenetic changes.").

[FN208]. Id. at 473.

[FN209]. See id. at 479-80 (noting loss of epigenetic control may change "development trajectories and/or expose hidden genetic variance").


[FN211]. See id. (suggesting lack of control groups causes research issues).

[FN212]. See id. (suggesting enough issues may arise to negate the possibility of an ideal study).
[FN213]. See id. (noting organizations could promote ideal studies).

[FN214]. See Zhu et al., supra note 171 at 679-81 (describing a study of three groups of live born children and their mothers).

[FN215]. Id. at 680 tbl. 1. For purposes of this study, fertility treatments included IVF, ICSI, intrauterine insemination, hormonal treatment, and surgery. See id. at 680-88 (noting comparisons between these methods and fertile couples).

[FN216]. See supra text accompanying note 175. Studies show that singletons are 1.3 to 1.5 times more likely to have a birth defect if conceived through IVF and other ART. Id.

[FN217]. Zhu et al., supra note 171, at 679.

[FN218]. Id. at 680.

[FN219]. Id. at 679.

[FN220]. Id. at 680 tbl. 1. The only specific risk that more than doubled was that of genital organ malformations. Id. This outcome could indicate a drug effect, id. at 681, but could also reflect the more severe infertility of the treated couples. See Retzloff & Hornstein, supra note 79, at 856 (noting that hypospadias is linked to paternal infertility); Silver et al., supra note 190, at 1956 (explaining that hypospadias runs in families and also is more common in the offspring of mothers older than forty years).

[FN221]. See Olson et al., supra note 171, at 1313 (suggesting that genetic problems in parents could impair infertility and cause birth defects in children).

[FN222]. See Zhu et al., supra note 171, at 682 (conceding that untreated infertile couples might differ from treated infertile couples in type or degree of infertility).

[FN223]. Olson et al., supra note 171, at 1308.

[FN224]. Id. at 1311 tbl. 3.

[FN225]. Id. at 1314.

[FN226]. Id. at 1311 tbl. 3.

[FN227]. Id. at 1314.

[FN228]. See generally REPRODUCTION AND RESPONSIBILITY, supra note 61, at 153 (discussing the costs of reproduction).

[FN229]. Ericson & Kallen, supra note 186, at 504.

[FN230]. Id. at 505 tbl. 1.

[FN231]. Id.

[FN232]. Id.
More specifically, there are two imprinting control regions on chromosome 11, known as IC1 and IC2. IC1 is associated with a differentially methylated region (DMR). The paternal copy is methylated (imprinted) and regulates expression of the H19 and IGF2 genes. IC2 is associated with a DMR known as KvDMR1. The maternal copy of KvDMR1 is imprinted and regulates expression of the KCNQ1 and CDKN1C genes. Eamonn R. Maher, Imprinting and Assisted Reproductive Technology, 14 Hum. Molecular Genetics R133, R136 fig.2 (2005). Two types of imprinting defects can cause BWS. In the first, the IC1 DMR is imprinted in both paternal and maternal copies. As a result, H19 is silenced and IGF2 expresses itself from both paternal and maternal copies. Id. This accounts for 2-7% of BWS cases. Amor & Halliday, supra at 2827. In the second type, the maternal copy of KvDMR1 loses imprinting, causing the maternal copy of CDKN1C to lose expression. Maher, supra at R136 fig.2. This accounts for around 40-50% of all BWS cases. Id. at R135.

Amor & Halliday, supra note 234, at 2827.


Gerald F. Cox et al., Intracytoplasmic Sperm Injection May Increase the Risk of Imprinting Defects, 71 Am. J. Hum. Genetics 162, 162 (2002). The maternal copy of SNRPN on chromosome 15, which should have been methylated, showed a loss of methylation. Id. at 163. SNRPN is an imprinting control center which regulates expression of the nearby UBE3A gene. Maher, supra note 234, at R134 fig.1 and accompanying caption.


Ludwig, supra note 238, at 289.

As one article explained, three children with the imprinting disorder type of Angelman syndrome would be predicted out of 900,000 births. However, at the time of these studies, the estimated number of all ART births worldwide was only 1,000,000. Thus, unless researchers had located all children born with the imprinting disorder type of Angelman syndrome following ART (which seemed unlikely), rates of the disorder must be higher among ART offspring. Maher, supra note 234, at R134.
[FN245]. See, e.g., Cox et al., supra note 241 at 162 (reporting 2 ICSI children with Angelman syndrome); DeBaun et al., supra note 236, at 158 (reporting that five out of seven BWS children studied had been conceived through ICSI).

[FN246]. See, e.g., Maher, supra note 234, at R135 (“[I]t appears that ICSI per se is not the major determinant of the observed association between ART and imprinting disorders.”).

[FN247]. See Kolata, supra note 179 at D6 (noting possible complications concerning the culture medium which might adversely affect embryo growth and development).

[FN248]. See Maher, supra note 234, at R134-35 (stating that in a review of molecular data, twenty-three out of twenty-four ART babies with BWS showed imprinting loss at a specific site (KvDMR1) on the maternal copy of chromosome 11; only 40-50% of spontaneously conceived babies with BWS have the same defect); see also Cox et al., supra note 241 at 162 (reporting on two ICSI babies that had been found to have a rare form of Angelman syndrome involving loss of imprinting on the maternal copy of chromosome 15); see also Ørstad et al., supra note 242 at 218-19 (describing, similarly, how one ICSI baby found also to have a rare form of Angelman syndrome).


[FN250]. See Amor & Halliday, supra note 234, at 2831 (describing evidence of imprinting syndromes resulting from epimutations that have caused large offspring syndrome in sheep).

[FN251]. See id. at 2831-32 (citing R.M. Rivera et al., Manipulations of Mouse Embryos Prior to Implantation Result in Aberrant Expression of Imprinted Genes on Day 9.5 of Development, 17 Hum. Molecular Genetics 2008 at 1).

[FN252]. Macintosh, supra note 43, at 52-53. Though nothing comparable to large offspring syndrome has been observed, one small study from New Zealand did find that IVF children were slightly taller on average than naturally conceived controls and had increased serum levels of growth factors IGF-I and IGF-II. Harriet L. Miles et al., In Vitro Fertilization Improves Childhood Growth and Metabolism, 92 J. Clinical Endocrinology & Metabolism 3441, 3443-45 (2007). The researchers speculated but did not show that the differences could be due to epigenetic alteration of imprinted genes. Id. at 3444. Alternatively, larger and healthier babies could result when doctors select the best quality embryos for implantation. Id.

[FN253]. See Maher, supra note 234, at R136 (mentioning ART is associated with an increased frequency of low-birth weight in babies); see also infra text accompanying notes 264-69 (discussing low birth weight in children of ART).

[FN254]. See supra text accompanying notes 205-209 (discussing possible complications concerning sperm and eggs of severely infertile men and women).

[FN255]. See Amor & Halliday, supra note 234, at 2829 (noting that Prader-Willi syndrome occurs in around 1 out of 17,500 children, with symptoms including obesity, cognitive impairment, hypogonadism, and distinctive facial features; moreover, epigenetic mutations are to blame in less than 1% of cases, and there have been no reports of ART offspring who have this syndrome on account of epimutations).

[FN257]. See id. at 2477 (defining ART broadly to include not only IVF and ICSI but also intrauterine insemination and the use of fertility drugs to stimulate ovulation). For Prader-Willi syndrome, the Dutch researchers found a significant association with fertility problems but not ART. Id. at 2478.

[FN258]. Id. at 2478. The study defined “fertility problems” as an inability to conceive within 12 months of unprotected intercourse and/or the use of ART. “Fertility problems of any kind” referred to families that had experienced such fertility problems in conceiving the child born with the imprinting disorder, a normal sibling, or both. Id. at 2477.

[FN259]. Id. at 2478 (ruling out the alternative possibility of a “causal relationship between ART and imprinted diseases”).

[FN260]. See Ludwig et al., supra note 238, at 289 (defining infertility as having received treatment for infertility, or taking more than two years to achieve a pregnancy).

[FN261]. See id. at 290 tbl. 1 (showing infertility-defect in both children of couples who had gone through fertility treatment and children of couples who became pregnant without fertility treatment).

[FN262]. See id. (“Based on these findings, we propose that there is some genetic predisposition, possibly of a heterogeneous nature, to epigenetic instability of gametes or early embryonic cells.”).

[FN263]. See id. (“[H]ormonal stimulation, which is also used for ICSI, may lead to the maturation of ‘poor quality’ oocytes that would not have been ovulated without treatment, or that a too rapid maturation provoked by the hormonal stimulation procedure disturbs the process of DNA methylation in the oocyte.”).

[FN264]. See supra text accompanying notes 80-83.


[FN266]. Id.

[FN267]. Id.

[FN268]. Schieve II, supra note 80.

[FN269]. Schieve III, supra note 265, at 1151. Similarly, a University of California at San Francisco team meta-analyzed data from fifteen studies and found IVF singletons had two times the risk of preterm delivery, 1.8 times the risk of low birth weight, 2.7 times the risk of very low birth weight, 1.6 times the risk of being born small for their gestational age (birth weight less than tenth percentile), and 2.2 times the risk of being stillborn or dying within seven days of birth. See Rebecca A. Jackson et al., Perinatal Outcomes in Singletons Following In Vitro Fertilization: A Meta-Analysis, 103 Obstetrics & Gynecology 551, 552, 554 (2004) But see Shevell et al., supra note 172, at 1043 (finding no association between ART and low birth weight).

[FN270]. Schieve III, supra note 265.

weight associated with IVF).

[FN272]. Schieve II, supra note 80, at 736.

[FN273]. For example, Canadian researchers reviewed the literature and deduced that IVF twins were about 1.5 times more likely to be born preterm than spontaneously conceived twins, but no more likely to die or have low birth weight. McDonald et al., supra note 182, at 141.

[FN274]. See supra text accompanying notes 183-85; see also McDonald et al., supra note 182, at 149 (stating IVF twins had worse perinatal outcomes in other studies that matched for zygosity or gender).

[FN275]. Hansen II, supra note 186, at 2321.

[FN276]. Id. at 2323 tbl. I, 2322-33.

[FN277]. Winston & Hardy, supra note 187, at S18.

[FN278]. See Dag Moster et al., Long-Term Medical and Social Consequences of Preterm Birth, 359 New Eng. J. Med. 262, 266 (2008). This extensive study of more than 900,000 Norwegian births found that as gestational age decreased, disabilities increased. See id. at 268-72. For example, less than 1% of infants born at term had cerebral palsy. However, 6% of infants born from twenty-eight to thirty weeks had cerebral palsy, and the rate increased to 9% for infants born from twenty-three to twenty-seven weeks. See id. at 268 tbl. 2 (showing the rate of cerebral palsy across different gestational periods).

[FN279]. See Schieve III, supra note 265, at 1151; see also K. Kapiteijn et al., Does Subfertility Explain the Risk of Poor Perinatal Outcome after IVF and Ovarian Hyperstimulation? 21 Hum. Reprod. 3228, 3231 tbl. IV (2006) (reporting that singletons born to women treated with ovulation inducing drugs had double the risk of birth before thirty-two weeks and triple the risk of very low birth weight compared with offspring of infertile women who conceived spontaneously).

[FN280]. Wennerholm et al., supra note 198, at 2168. Indeed, some of the reviewed studies showed children born from frozen embryos as having lower rates of preterm birth and low birth weight. Id. The reasons are unknown; embryos capable of surviving the freezing and thawing process might be of better quality. Id. at 2169. Similarly, children conceived with frozen donor sperm do not face an increased risk of preterm birth, low birth weight, or perinatal mortality. Lansac & Royere, supra note 198, at 34.


[FN282]. Id. at 2825 tbl. IV. The odds ratios cited in this paragraph refer to survivors whose twins vanished prior to twenty-two weeks of gestation. Survivors of stillborn twins were excluded.

[FN283]. Id. at 2825. Thus, vanishing twins may help to account for the increased risk of cerebral palsy that some studies have noted among IVF singletons. Alastair G. Sutcliffe & Michael Ludwig, Outcome of Assisted Reproduction, 370 Lancet 351, 355 (2007).


[FN285]. Id. at 2826.
[FN286]. Schieve II, supra note 80, at 736 tbl. 4; Schieve III, supra note 265, at 1150 tbl. 4. Some have criticized the CDC researchers on the ground that they did not account for anembryonic gestations, which could have a negative impact even if no fetal heart developed. See Kovalevsky et al., supra note 84, at 1271 (contending that not controlling for anembryonic gestations could have a negative impact regardless of fetal heart development). It is biologically plausible that such gestations could have some impact. However, since vanishing twins have the most serious consequences when they disappear after eight weeks, Pinborg et al., supra note 281, at 2826, early gestations that never develop a fetal heart probably do not entirely account for poor perinatal outcomes.

[FN287]. Schieve III, supra note 265 at 1144.

[FN288]. Id., at 1148, 1151.


[FN290]. Id. at 737.

[FN291]. For deliveries from the same mother, the researchers adjusted for maternal age, parity, offspring sex, time between pregnancies, and year of delivery. Id. at 739. They also considered order of mode of conception (i.e., whether the IVF or spontaneously conceived child was born first) and found it made little or no difference to most of their findings. Id. at 739-40. The exception was perinatal mortality, which was four times more likely when the spontaneous conception occurred before the IVF pregnancy. Id. at 740-41. The researchers speculated that a perinatal death could damage subsequent fertility or indicate inherently impaired fertility. Id. at 742.

[FN292]. See id. at 742 (“a perinatal death could indicate an inherent tendency for adverse pregnancy outcomes or could have a strong effect on subsequent fertility”).

[FN293]. See Marco Gaudoin, Ovulation Induction/Intrauterine Insemination in Infertile Couples Is Associated with Low-Birth-Weight Infants, 188 Am. J. Obstetrics & Gynecology 611, 615 (2003) (“This finding agrees with a larger report showing that the perinatal outcome of infants conceived with donor semen is no different from that of infants conceived naturally.”).

[FN294]. See id. at 615-16 (stating that factors related to subfertility could cause low-birth-weight infants).

[FN295]. See Sutcliffe & Ludwig, supra note 283, at 353 (summarizing results of several studies, including Elizabeth Draper et al., Assessment of Separate Contributions to Perinatal Mortality of Infertility History and Treatment: A Case-Control Analysis, 353 Lancet 1746 (1999) (offspring of untreated infertile women three times more likely to suffer perinatal death)).


[FN297]. See Robertson, supra note 297, at 24-25 (anticipating legal restrictions on ART based on studies showing an increased risk of birth defects, rare disorders such as Beckwith-Wiedemann syndrome, and low birth weight).

[FN298]. See Macintosh, supra note 43, at 76-79 (stating that there were efforts to ban reproductive cloning only, but the bill was never put to a vote in the Senate because many lawmakers were against the destruction of human embryos).
[FN299] The Roman Catholic Church also holds that IVF is immoral because procreation should result from sexual intercourse between a married man and woman. Congregation for the Doctrine of the Faith, Instruction Dignitas Personae on Certain Bioethical Questions, PP 14-16 (2008). The Church condemns ICSI on the ground that it allows technology to dominate the origin and destiny of the human person. See id. at P 17.


[FN301] See supra text accompanying note 130.


[FN303] See Price, supra note 136, at 623-26 (noting that Republican-sponsored bills offered in response to Dr. Seed's declaration contained language broad enough to “ban any use of somatic cell nuclear transfer, including potentially useful stem cell research”).

[FN304] See NBAC Report, supra note 93, at 109 (“Federal legislation should be enacted to prohibit anyone from attempting... to create a child through somatic cell nuclear transfer cloning.”).

[FN305] See Price, supra note 136, at 625-28 (outlining the background of the FDA's decision to assert jurisdiction).

[FN306] Cf. Carson Strong, Too Many Twins, Triplets, Quadruplets, and So On: A Call for New Priorities, 31 J.L. Med & Ethics 272, 279 (2003) (“There are a number of topics related to infertility treatment... that are subject to political controversy. Although such topics might not initially be intended for regulation, politicians might see an opportunity for political gain by attempting to regulate activities associated with them.”).


[FN308] Id.

[FN309] Id.


[FN311] Id. at 41.

[FN312] See Kevles, supra note 307, at 41-44 (detailing how Mendel's 1865 theory languished for decades until other biologists began to conduct experiments of their own confirming that Mendel was correct).

[FN313] See id. at 46, 78 (writing that eugenicists used the term “feebleminded” to describe a broad range of mental disabilities and nonconforming behavior.).

[FN314] Id. at 46, 55-56.


W. Eliot, and David Starr Jordan and radicals like Emma Goldman and Hermann J. Muller, a future Nobel [L]aureate for his work in genetics....

Paul, supra note 310, at 17-21 (describing the eugenic movement's broad range of appeal to many people of different interests, backgrounds, and political affiliations).

[FN317] Reilly, supra note 315, at 31; see also Kevles, supra note 307, at 53 (noting that even after the vasectomy was invented, some castrations were performed in an effort to reduce sex drive); Jeffrey F. Ghent, Annotation, Validity of Statutes Authorizing Asexualization or Sterilization of Criminals or Mental Defectives, 53 A.L.R. 3d 960, § 2[a], at 964 (1973) (noting in early cases the court construed the statute as permitting castration as well as vasectomy).

[FN318] See Ghent, supra note 317, at 963 (noting sterilization of confirmed criminals, idiots, imbeciles, and rapists in state institutions was mandatory upon a recommendation by a board of experts).


[FN320] See Ghent, supra note 317, at 964 (noting invalid statutes are those with an inadequate due process standard for notice, hearing, opportunity to confront or cross-examine witnesses, or right of appeal).

[FN321] See id. at 965 (stating statutes are invalidated on due process grounds when they create arbitrary classifications); Kevles, supra note 307, at 109 (explaining that many state sterilization statutes “ran afoul of the courts” due to the lack of basic procedural protection afforded the sterilization candidates and due to the statutes’ focus on sterilizing those confined to state institutions); Reilly, supra note 315, at 50-55 (describing how numerous legal attacks on the sterilization statutes, based on due process and equal protection challenges, negated the legal victories won by sterilization supporters).

[FN322] See Reilly, supra note 315, at 84-85 (explaining that after the period of 1918 to 1922, in which legislative enactment of sterilization laws slowed down, proponents of eugenics drafted new laws “that purported to safeguard the procedural rights” of the potential candidates).

[FN323] See Kevles, supra note 307, at 110 (noting that with the drafting assistance of eugenicists the Virginia legislature passed a sterilization statute in March 1924).

[FN324] Buck v. Bell, 130 S.E. 516, 517 (Va. 1925). Carrie had been sent to an institution for the feebleminded after bearing a non-marital child. Id. Those who advocated her sterilization claimed that Carrie was the daughter of a feebleminded woman, had the mind of a nine year-old child herself, and had given birth to an infant daughter who was mentally defective. Id. Professor Paul Lombardo paints a very different picture. According to his research, Carrie was a prolific reader and had a clear memory even in old age, belying the intelligence testing that labeled her as feebleminded. Far from being an imbecile, her daughter was very bright, making the honor roll in grade school before dying young of an infectious disease. Paul A. Lombardo, Three Generations, No Imbeciles: New Light on Buck v. Bell, 60 N.Y.U. L. Rev. 30, 61 (1985).


[FN326] Justice Oliver Wendell Holmes penned the decision. In rejecting Carrie’s substantive due process claim, he reasoned that sterilization laws were necessary to prevent the nation from being “swamped with incompetence.” Id. at 207. He followed this up with the infamous observation that “[t]hree generations of imbeciles are enough.” Id.
Carrie argued the law violated equal protection because it subjected only institutional inmates like her to sterilization. Justice Holmes rejected the argument, reasoning that the Virginia law sought to bring all similarly situated persons within its scope as far and fast as possible. In a cruel twist, he added that allowing current inmates to be sterilized and released into the world would open space in the asylum for more inmates, thus increasing equality of treatment. Id. at 208.

Kevles, supra note 307, at 111.

Ghent, supra note 317, at 963.

Reilly, supra note 315, at 97, 101, 129.

Id. at 98. Salpingectomy (a procedure similar to tubal ligation) was invented later than vasectomy. The pioneer was a German surgeon who sterilized eighty-nine women between 1910 and 1920. Id. at 34. Apparently it took some time for other doctors to learn about the new procedure and develop the confidence and skill to use it.

Id. at 128; see also James B. O’Hara & T. Howland Sanks, Eugenic Sterilization, 45 Geo. L.J. 20, 35 (1956) (discussing the “steady decline” of eugenic sterilization during this time period). By 1955, the number of annual operations had dwindled to around 1000. Id. A few states continued the unwelcome surgeries into the nineteen-sixties and seventies. See Reilly, supra note 315, at 143, 149 (discussing instances of eugenic sterilizations during this period). Around 60,000 mentally ill or disabled Americans were sterilized from 1907 to 1960, id. at 2, with more than half the victims in California. Paul, supra note 310, at 83. In 1978, the Department of Health, Education and Welfare published regulations that prohibit federally-funded programs from sterilizing individuals without their signed consent and a thirty-day waiting period. 42 C.F.R. §§ 50.201, 50.203, 50.204, 50.205 (2008); Reilly, supra note 315, at 152. Under no circumstances may such programs sterilize persons who are mentally incompetent or institutionalized. See 42 C.F.R. § 50.206 (2008) (banning sterilization of mentally incompetent individuals).

See, e.g., Kevles, supra note 307, at 251. The Nazis borrowed beliefs and strategies from the American eugenics movement. See generally Stefan Kuhl, The Nazi Connection: Eugenics, American Racism, and German National Socialism (1994) (describing how American scholars inspired Nazi movement in Germany during the early twentieth century). Acting pursuant to the Law for the Prevention of Genetically Diseased Progeny, the Nazis sterilized at least 300,000 to 400,000 persons with mental or physical disabilities. Paul, supra note 310, at 89. They also executed mental patients. Reilly, supra note 315, at 110.

Reilly, supra note 315, at 128.

In 1930, Pope Pius XI released Casti Connubi: On Christian Marriage. This encyclical declared it beyond the proper authority of the state to block marriage and sterilize men and women in order to prevent hereditary transmission of defects to offspring. The encyclical also condemned voluntary sterilization and birth control as a means of reducing family size. Id. at 119-20. Responding to this guidance, clerics and lay Catholics lobbied against and defeated many sterilization bills during the nineteen-forties. Id. at 120; O’Hara & Sanks, supra note 332, at 38.


Id. at 541.

See id. at 541-42 (finding discrimination occurred when those who committed larceny were sterilized, but not those who were guilty of embezzlement).


[FN342]. Id. at sec. 4, § 12102(1)(A), 122 Stat. at 3555.

[FN343]. See supra text accompanying note 319 (listing the targets of eugenic sterilization laws).


[FN345]. See 29 C.F.R. § 1630.2(h)(1) (2009) (defining a physical impairment as any physiological disorder or condition that affects the reproductive system); see also Pacourek v. Inland Steel Company, 916 F. Supp. 797, 801 (N.D. Ill. 1996) (recognizing the inability to reproduce as a physical impairment even when the precise cause of the infertility is unknown). Whether infertility resulting from advanced maternal age qualifies as a disability is an open question. See Saks v. Franklin Covey Co., 117 F. Supp. 2d 318, 326 (S.D.N.Y. 2000), aff'd in part, 316 F.3d 337 (2d Cir. 2003) (indicating that at least one court has suggested in dictum that a post-menopausal woman who could not conceive would not be considered disabled).


[FN348]. ADA Amendments Act of 2008, sec. 4, § 12102(2)(B), 122 Stat. at 3555; see also Bragdon, 524 U.S. at 639 (recognizing reproduction as a major life activity).

[FN349]. See ADA Amendments Act of 2008, sec. 4, § 12102(4)(E), 122 Stat. at 3556 (stating that mitigating measures that should not be considered when determining disability include “medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies”). Congress made this amendment to repudiate Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999), and other cases holding that whether an impairment substantially limits a major activity must be determined in light of the ameliorative effects of mitigating measures. See sec. 2(b)(4), 122 Stat. at 3554 (stating that the holding in Sutton eliminated the ADA’s protection for many people Congress intended to protect).

[FN350]. But see infra text accompanying note 360 (discussing the “infertility time bomb” argument).

[FN351]. See supra Part I.A.
[FN352]. See supra Part III.

[FN353]. See supra Part I.B.

[FN354]. See generally Buck v. Bell, 274 U.S. 200 (1927) (requiring the cutting of the fallopian tubes of a young woman who was believed to be an imbecile and who had already borne a child).

[FN355]. See supra Part II.


[FN358]. See Paul, supra note 310, at 68 (quoting some eugenicists’ belief that eugenics could eliminate “practically all of the cacogenic varieties of the race”).

[FN359]. Those considered to have inferior genes included the feebleminded, the insane, epileptics, epileptics, alcoholics, drug addicts, those afflicted with disease or suffering from blindness or deafness, criminals, orphans, the homeless, and paupers. Paul A. Lombardo, Medicine, Eugenics, and the Supreme Court: From Coercive Sterilization to Reproductive Freedom, 13 J. Contemp. Health L. & Pol'y 1, 3 (1996).

[FN360]. See, e.g., Jens Peter Ellekilde Bonde & Jórn Olsen, Interpreting Trends in Fecundity Over Time Is Complicated by the Lack of Direct Markers, 336 BMJ 339, 339 (2008) (“With the advent of assisted conception, subfertile couples may have as many children as fertile couples, so that genetic factors linked to infertility will become more prevalent in the generations to come.”); Smith, supra note 8 (stating that infertile couples are using IVF to have children). See also Eric A. Posner & Richard A. Posner, The Demand for Human Cloning, 27 Hofstra L. Rev. 579, 596-99 (1999) (speculating that if infertile people are allowed to reproduce through cloning, infertility will “spread like a virus” and infertile clones will come to dominate the population).

[FN361]. See Smith, supra note 8 (stating that there are multiple causes to infertility).

[FN362]. See generally Malcom J. Faddy et al., Intra-cytoplasmic Sperm Injection and Infertility, 29 Nature Genetics 131 (2001) (discussing that ICSI may lead to increased infertility).

[FN363]. Id.

[FN364]. See id. (stating that even though IVF could increase the occurrence of infertility by passing on the infertility causing genes, external factors that limit access to IVF will prevent “total male infertility”).

[FN365]. See supra text accompanying notes 124-27 (recognizing that genetic modification of embryos alters the genetic makeup of children conceived through IVF. In one example, a child had two sets of mitochondrial DNA).
[FN366]. See Reilly, supra note 315 at 94 (stating that one goal of eugenics “was to reduce new burdens on the public purse”).

[FN367]. See id. (explaining how eugenics was “concerned with preventing parenthood in those individuals who were thought to be unable to care for children”).

[FN368]. Id. at 92.

[FN369]. See id. at 91-92 (discussing how eugenicists believed sterilization would allow “defective persons” to leave state-funded institutes).

[FN370]. See Pernick, supra note 316, at 91-92 (discussing how eugenics is for the “collective good” of society).

[FN371]. See Kevles, supra note 307, at 113-15 (noting the increasing numbers of mentally disabled people and the public cost of caring for them and discussing how eugenicists attributed unemployment and low socioeconomic status to mental incapacity).


[FN375]. See supra text accompanying notes 153-60.

[FN376]. See Reproduction and Responsibility, supra note 61, at 42 (stating that because babies conceived through ART have an increased risk of health problems, society must decide if the risk is justified because taxpayers might bear the cost of caring for the babies).

[FN377]. See Sutcliffe & Ludwig, supra note 283, at 357 (explaining that society needs to balance the needs of the children—specifically those conceived through IVF—against parents’ desire for children conceived through IVF).

[FN378]. See Victoria F. Nourse, In Reckless Hands: Skinner v. Oklahoma and the Near Triumph of American Eugenics 21 (2008) (explaining that many viewed eugenics as a means of alleviating the suffering of both parents whose offspring had heritable defects and the offspring themselves); Suter, supra note 357, at 947 (noting how eugenicists argued that a parent who gave birth to a feebleminded child would feel despair for the child, thereby intimating that sterilization benefited both parents and the unborn).

[FN379]. Pernick, supra note 316, at 195 n.41; see also Kevles, supra note 307, at 90 (“The superficially sympathetic man flings a coin to the beggar; the more deeply sympathetic man builds an almshouse for him so that he need no longer beg; but perhaps the most radically sympathetic of all is the man who arranges that the beggar shall not be born.” (quoting Havelock Ellis, The Task of Social Hygiene 401 (1912)) (emphasis added)).
[FN380]. Wiggam, supra note 357, at 55.

[FN381]. Id. at 110-11.

[FN382]. Id.; see also American Eugenics Society, A Eugenics Catechism 2 (1926) (arguing that true kindness requires taking steps to reduce births of “hereditary defectives”).


[FN384]. See Ken R. Daniels et al., The Best Interests of the Child in Assisted Human Reproduction: The Interplay Between the State, Professionals, and Parents, 19 Pol. & Life Sci. 33, 37 (2000) (“[I]f the best interests of hypothetical children are optimized by their not being conceived, has the argument moved from a high-minded concern for offspring welfare to an unacceptable form of eugenics?”).

[FN385]. See supra notes 177-78 (discussing major birth defects that can be corrected through surgery).

[FN386]. Eero Kajantie et al., Young Adults with Very Low Birth Weight: Leaving the Parental Home and Sexual Relationships Helsinki Study of Very Low Birth Weight Adults, 122 Pediatrics e62, e62 (2008).

[FN387]. Lombardo, supra note 141, at 216.

[FN388]. See Paul, supra note 310, at 71 (“Revelations of Nazi atrocities, the trend toward respect for patients’ rights in medicine, and the rise of feminism have converged to make reproductive autonomy a dominant value in our culture.”). Whether such laws and regulations would infringe procreative liberty in the constitutional sense is a complicated question beyond the scope of this Article. The Supreme Court has stated in dicta that substantive due process protects the right to procreate. See, e.g., Lawrence v. Texas, 539 U.S. 558, 574 (2003); Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992); Carey v. Population Services Int’l, 431 U.S. 678, 685 (1977) (all indicating protection of the right to procreate in certain circumstances). Since procreation is seldom outlawed or restricted, the Court has not had the opportunity to address directly the right to procreate through coitus or ART. However, a federal district court has recognized the constitutional right of an infertile woman to procreate, including through technologies such as embryo transfer. See Lifchez v. Hartigan, 735 F. Supp. 1361, 1376-77 (N.D. Ill. 1990) (“[W]ithin the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy.”), aff’d, 914 F.2d 260 (7th Cir. 1990) (unpublished opinion). Academic opinion is divided on the question of whether there is a constitutional right to procreate through ART. Compare Robertson, supra note 297, at 25 (arguing the right to procreate includes ART) with Ann MacLean Massie, Regulating Choice: A Constitutional Law Response to Professor John A. Robertson’s Children of Choice, 52 Wash. & Lee L. Rev. 135, 135 (1995) (contending the right to procreate protects only coitus).

[FN389]. See Suter, supra note 357, at 958 (arguing neoeugenics makes it more likely for people to identify individuals in terms of their disabilities or undesirable traits, which is harmful to vulnerable members of the community).

[FN390]. The American Eugenics Society and like-minded organizations funded lectures, meetings, journals, educational films, and exhibits. There even were contests at state fairs where families competed like livestock based on medical history, intelligence testing, physical examination, and psychiatric assessment. Kevles, supra note 307, at 60-62.

[FN391]. Id. at 100.

[FN392]. Id. at 131-32.
[FN393]. See id. (discussing how critics of eugenics found an environmental link between poverty and mental deficiency).

[FN394]. Id. at 92-94, 100, 131-32.

[FN395]. See Judith F. Daar, Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms, 23 Berkeley J. Gender, L. & Just. 18, 39-40 (2008) (discussing how low-income, nonwhite individuals have higher rates of infertility, but still have less access to fertility treatment).


[FN398]. See Daar, supra note 395, at 29-30 (discussing the emotional and psychological effects of infertility).

[FN399]. See supra text accompanying notes 345-349.

[FN400]. See, e.g., Lombardo, supra note 141, at 204 (citing Charles B. Davenport's opinion which suggests the suffering of individuals with bad genes).

[FN401]. Consider, for example, a recent article by Professor Marsha Garrison. Garrison, supra note 90. Arguing for increased regulation of ART, she draws analogies to: adoption, which is regulated to safeguard adopted children, id. at 1626-27; state neglect laws that protect fetuses and children against parental health care choices that are harmful; wrongful death and criminal statutes that protect fetuses; human subject research regulations that limit experimentation on children; and federal law that prohibits federally-funded hospitals from withholding care from disabled newborns. Id. at 1641. But all of these other laws address existing fetuses or babies whose characteristics have already been determined, not by the state, but by the reproductive choices of parents.

[FN402]. Cf. Daar, supra note 395, at 76 (arguing that laws and clinic screening practices that deny ART based on wealth, ethnicity, race, marital status, or sexual orientation express the view that the rejected patient is unworthy of parenthood and membership in the human race).

[FN403]. Cf. Macintosh, supra note 43, at 120-23 (discussing the stigma that anti-cloning laws inflict upon human clones).

[FN404]. Cf. id. at 130-33 (arguing that anti-cloning laws undermine commitment to egalitarianism).


[FN406]. See id. at 639-42 (explaining that genes may predispose to schizophrenia and other mental illnesses but environmental factors also play a role in the expression of these diseases).

[FN407]. Kevles, supra note 307, at 143.

[FN408]. See supra text accompanying note 380.
[FN409]. See supra Part III.

[FN410]. Id.

[FN411]. See Suter, supra note 357, at 946 (arguing against the privileging of contemporary standards of science).

[FN412]. See Paul, supra note 310, at 68 (discussing the findings of Harvard geneticist, Edward East).

[FN413]. See id. at 69 (“... the fact that we cannot do everything is not a valid reason for neglecting to do what little can be done...”).

[FN414]. See Reilly, supra note 315, at 101-102 (citing studies that proved sterilization had proven its value since sterilized persons cost the state less money than had the nonsterilized parole groups).

[FN415]. See id. at 89 (noting physicians' concerns were shifting from the control of genetic disorders to reducing procreation by socially inadequate parents).


[FN417]. In addition, legislation or regulation based on patient characteristics could lead to some surprising results. For example, a proposed law to prevent older women or carriers of genetic or epigenetic anomalies from accessing ART would keep some married heterosexuals from having children; meanwhile, young and healthy singles, gays, and lesbians would be left free to reproduce through ART. Conservative legislators who believe heterosexual marriage is the foundation of family might refuse to enact such a law.

INTRODUCTION: FEINBERG'S MORAL LIMITS, AND BEYOND

Stuart P. Green [FN1]

Joel Feinberg's epic work, The Moral Limits of the Criminal Law, consists of four closely reasoned, marvelously inventive, and deeply humane volumes, in which the author sets out to describe the moral conditions necessary to justify coercive legislation in a liberal society. [FN1] In its impact on contemporary analytic philosophy, few works can compare. Practically everyone who thinks or writes about liberalism, legal moralism, autonomy, paternalism, coercion, and a host of other concepts in moral, legal, and political philosophy owes a debt to Feinberg's Moral Limits.

Despite its influence in philosophical circles, however, Feinberg's magnum opus seems less well known than it should be among legal academics and lawyers—even including those with a special interest in criminal law. This is unfortunate, for Moral Limits offers an almost endless source of insights into matters that are of central concern to the criminal law—including the prohibition of various kinds of supposedly immoral private consensual activity, the enactment of bad samaritan laws, assisted suicide, obscenity, insider trading, environmental crime, and the supposed paradox of blackmail, to name just a few.

The purpose of this special issue of the Buffalo Criminal Law Review is to provide a forum for considering Feinberg's Moral Limits not only within the realm of theory, but also as it applies to the real world of criminal law legislation, doctrine, and practice, and to do so in a comparative context. The issue brings together a distinguished and diverse group of contributors from the United States, Canada, Germany, England, Scotland, and Wales. Some are philosophers who write about legal issues. Others are academic lawyers whose work is informed by philosophical analysis.

What all of the papers presented here have in common, roughly speaking, is an interest in extending Feinberg's analysis beyond its current boundaries. The eight essays, collectively, address four basic questions: First, exactly how do we distinguish between harmful conduct that is appropriate for criminalization and harmful conduct that is not? What Feinberg means when he talks about “harming as wronging” is the subject of essays by Antony Duff and Hamish Stewart. Second, under what circumstances can omissions satisfy the requirements of the harm principle? This is the question addressed by Patricia Smith. Third, what exactly is the relationship between Feinberg's conception of harmfulness and the use of punitive, criminal law sanctions? This is the subject of the contributions by Hugo Bedau and Bernard Harcourt. Finally, how should the analysis developed in Moral Limits be applied to the real world of criminal law legislation, including legislation not expressly dealt with by Feinberg in the book? This is the subject of papers by Paul Roberts, Tatjana Hörnle, and Peter Alldridge.
Harming and Wronging

As Feinberg explains in some detail at the beginning of Harm to Others, merely causing “harm,” at least in the limited sense of what he refers to as a “setback to interest,” is not enough to justify the use of criminal sanctions. A defendant who acts out of necessity or pursuant to a victim’s consent may cause harm, but it is not likely to be *3 the sort of harm we would want to criminalize. In order to be criminalized, a setback to interest must be accompanied by some form of “wrongfulness”—defined as an unjustifiable violation of another’s rights. Feinberg’s attempt to define “harm” to include a sense of moral wrongfulness is the subject of essays by both Antony Duff and Hamish Stewart, although the two authors treat the subject in quite different ways.

Duff, in his essay, [FN2] argues that Feinberg’s account of the harm principle distorts the character of the relevant criminal harm by artificially separating setbacks to interest from wrongdoing. Imagine that a burglar and a tornado cause precisely the same physical damage to one’s house. Although the setbacks to interest suffered are the same, the “harm” suffered by the burglary victim is very different from the “harm” suffered by the victim of a natural disaster. We cannot, Duff says, simply identify some group of acts as harmful in morally neutral terms, and then proceed to make a moral determination as to which subclass of harms should be eligible for criminalization. Moreover, says Duff, the tendency to separate the concepts of setbacks to interest and wrongfulness leads to other problems as well. Consider the familiar hypothetical of gladiatorial contests in which contestants volunteer to fight to the death in front of paying spectators. Does the criminal law have a proper role to play in prohibiting such contests? Because the gladiators voluntarily consent to be injured, Feinberg would conclude that no legally cognizable wrong occurs—at least to the participants in the contest. The same principle of volenti non fit injuria (a person is not wronged by that to which he consents) would seem to apply as well to the consensual sado-masochistic activities at issue in R. v. Brown. [FN3] According to Duff, however, Feinberg’s account of *4 harmfulness proves inadequate to explain what is truly wrong in the gladiator case (and perhaps the Brown case as well). Feinberg’s account fails not only to explain the way in which the parties deny each other’s “humanity,” but also the specifically “public” aspect of the wrong involved.

Like Duff, Hamish Stewart focuses on problems related to the “wrongfulness” element in Feinberg’s conception of criminal harm. [FN4] But, unlike Duff, who thinks that Feinberg runs into trouble by trying to separate out harms and wrongs, Stewart believes that Feinberg’s real difficulty lies in his tendency to conflate the two concepts. As one of several examples, Stewart considers Feinberg’s treatment of the effect of fraud on a defendant’s liability for rape. [FN5] The traditional rule is that fraud in the factum nullifies a woman’s consent to sexual intercourse, while fraud in the inducement does not. [FN6] Feinberg explains the traditional rule by suggesting that fraud in the factum involves a greater harm than fraud in the inducement. But Stewart asks, what exactly does Feinberg mean when he says that fraud in the inducement is “not very harmful”? Does he mean “not very wrongful” or “not a serious setback to interest”? According to Stewart, Feinberg’s analysis of what kinds of conduct should be eligible for criminalization would be clearer if he were clearer about the difference between setbacks to interest and wrongfulness, and particularly about the role that rights play in determining the latter.

*5 Causing and Allowing

Under what circumstances, if any, can one justly be held criminally liable for failing to prevent harm? Are “bad samaritan” statutes, which require persons to undertake “easy rescues” under threat of legal sanctions for failure to do so, consistent with the harm principle, or must one resort to legal moralism to justify them? In Chapter 4 of Harm to Others, Feinberg responds to many of the arguments made against bad samaritan legisla-
tion, drawing a distinction, among other things, between legal duties of aid that require only minimal trouble and those that require unreasonably difficult rescues. He concludes that requiring people to help prevent harms can be, in appropriate circumstances, as reasonable a legal policy as preventing people from actively causing harms.

Patricia Smith, in her paper, uses Feinberg’s discussion of failures to prevent harm as a jumping off point for a more detailed exploration of the causal status of omissions. [FN7] Smith questions the assumption that omissions are less likely to be held legally responsible because they are less causally potent. In fact, she says, many of our common, unreflective intuitions about allowing and causing and controlling turn out to be wrong, or at least misleading. For example, rather than being its opposite, “allowing” is actually a subset of “causing things to happen.” And, although we tend to think of acting as being more causally potent than not acting or not intervening, the fact is that we tend to underestimate the significance of our omissions. Smith shows, for example, that while causing an act does not necessarily imply control over it, allowing an outcome always does, since saying that one allowed something to happen implies both that the thing allowed actually happened and that one could have prevented it. She then *6 goes on to sketch out some of the implications of this account for criminal law, including the reasons why liability for omissions is generally limited to those cases involving “distinct duties” (e.g., doctor-to-patient, parent-to-child).

Feinberg and Punishment

How does the theory developed in Moral Limits relate to the question of punishment more generally? Two issues seems particularly worth considering here. First, on what basis should we decide between criminal sanctions (whatever exactly they are) and other forms of state coercion, such as civil fines, injunctions, taxes, and license fees? At times, Feinberg’s project seems like it is concerned more with the moral limits of “government prohibition” generally than it is with the moral limits of “criminal law” per se. Second, what exactly is the purpose of criminal sanctions? Feinberg’s focus on the criminal law as a means for preventing harm seems to suggest that he regards deterrence as the paramount purpose of criminal law. Yet, elsewhere, most prominently in his 1965 essay on the “Expressive Function of Punishment,” [FN8] Feinberg is very much concerned with at least one form of retributivism. So the question naturally arises, what exactly is Feinberg’s theory of punishment?

Curiously, as Hugo Bedau points out in his contribution to the symposium, the only way to discover Feinberg’s theory of punishment is to survey scattered references throughout his very considerable published oeuvre, rather than any one or two definitive texts. [FN9] What *7 Bedau’s survey reveals are Feinberg’s views on crucial questions concerning the meaning, purpose, and types of punishment, the apportionment of punishment, and the persons upon whom and by whom it should be imposed. (Among other things, Bedau’s essay provides a useful overview of the elements any comprehensive theory of punishment should contain.) Like Hamish Stewart, Bedau explores the tension in Feinberg’s thought between the idea of punishment as a means of expressing moral condemnation of the offender and his purportedly non-moralistic focus on punishment as a means of deterring harmful conduct. In the end, Bedau concludes, Feinberg’s embrace of retributivism is only halfhearted; his primary commitment is to deterrence.

Like Bedau, Bernard Harcourt is struck by the apparent anomaly that Moral Limits contains no real theory of punishment. [FN10] Moral Limits, Harcourt says, is about defining what conduct should be prohibited; it is not about deciding what the remedy should be when rules are broken. For that, we need to look to Feinberg’s “Expressive Function” piece. The most influential aspect of that piece is the descriptive claim that punishment
has an expressive dimension. But, Harcourt reminds us, the piece also contains an important normative claim—namely, that the amount of punishment inflicted (expressed primarily in terms of social disapproval) should be determined in proportion to the harm caused. And, indeed, Harcourt says, this normative claim provides a crucial link to Moral Limits. Without an account of “harm,” we cannot consider the question of when punishment is warranted (since the idea of punishment is premised on the notion of harm). Thus, in order to understand Feinberg’s theory of *8 punishment (as contained in the “Expressive Function” piece), we need to read into it the account of harm contained in Moral Limits.

**Theory and Practice**

To what extent can Moral Limits be expected to serve as a guide to real-world reform of the criminal law? Recall that Feinberg’s project is not to determine whether the various offenses he discusses should actually be criminalized, but only whether they satisfy the necessary conditions imposed by the harm (and offense) principles. As ambitious a philosophical project as this is, it obviously leaves a great number of questions unanswered. For example, how are we to determine whether the harm (and offense) principles are satisfied with respect to conduct that is never expressly dealt with in Moral Limits? Moreover, exactly what kinds of additional factors—apart from harm and offense—should a legislature consider in determining whether to make some particular kind of conduct criminal?

From the perspective of the criminal law reformer, Feinberg’s work can seem elusive. Imagine if one were to construct a criminal code that contained only the offenses that (1) Feinberg discusses in Moral Limits and (2) satisfy the harm or offense principle. Such a code would consist primarily of a number of philosophically interesting, but admittedly rather exotic, offenses, such as ticket scalping, blackmail, extortion, commercial fortune-telling, usury, insider trading, some forms of drug use, self-mutilation, riding a motorcycle without a helmet, certain kinds of profoundly offensive behavior, and certain failures to rescue. What a strange looking code that would be! My point is not, of course, that Feinberg views these as the only kinds of offenses worth criminalizing. Rather, the point is that, from the perspective of the pragmatic criminal law scholar, Feinberg’s account seems curiously incomplete, inasmuch as he omits to deal not only with such presumably uncontroversial crimes as murder, *9 manslaughter, negligent homicide, rape, theft, robbery, and burglary, but also with much more problematic crimes such as racketeering, bribery, fraud, false statements, and a vast range of regulatory offenses—offenses for which philosophical guidance might well be useful.

The contributions of Paul Roberts, Tatjana Hörnle, and Peter Alldridge all struggle—in quite different ways—to show how Feinbergian principles might be applied to the real world of criminal lawmaking.

While serving as a consultant to the Law Commission for England and Wales, Paul Roberts had occasion to bring Feinberg’s methodological approach to bear directly on some very real and pressing issues in criminal law reform. [FN11] The question Roberts was asked to consider was whether, and under what circumstances, English law should recognize consent as a defense to assault charges involving actual physical harm. Traditionally, the consent defense has been applicable to only certain recognized exceptions such as lawful medical treatment and certain dangerous sports (like boxing). In the wake of the Brown case, mentioned above, the question was whether the consent defense might be expanded to apply to cases involving, say, consensual sado-masochistic activities. [FN12] In his “philosophical appendix” to the Law Commission’s report on Consent in the Criminal Law, Roberts drew directly on Feinberg’s analysis. [FN13] In his essay here, Roberts reflects on the process of English law reform, the circumstances surrounding the Commission’s consideration of the defense of consent,
and the possibility of using philosophical methods as a means to meaningful reform. Among other things, Roberts finds Feinberg helpful in conceptualizing consent less as providing an affirmative defense than as negating an element of the offense.

A somewhat more speculative project is contemplated in Tatjana Hörnle's paper on Feinberg and German criminal law reform. [FN14] Hörnle suggests that German penal theory could benefit from closer attention to Moral Limits, particularly in determining whether various forms of offensive (as opposed to harmful) behavior should be criminalized. Like the conduct considered by Roberts, the kinds of conduct Hörnle has in mind—the dissemination and display of pornography, incest, offensive statements about various minorities, Holocaust denial, desecration of graves, and mistreatment of corpses—are very much within the scope of Feinberg's concerns. What Hörnle finds is a considerable conceptual gap between Anglo-American scholars such as Feinberg and prevailing German penal theory. Echoing a theme sounded in Antony Duff's essay, Hörnle points out that, unlike the individualized concepts of harm and offense that appear in Anglo-American criminal law theory, the concepts of harm and offense that appear in German penal theory represent a more abstract, more generalized, and more collectivized legal good. Hörnle's strongest reservations concern the application of Feinberg's argument regarding the criminalization of certain profound offenses (such as insults against religious denominations, pornography, and Holocaust-denial)—certainly one of the most controversial parts of Moral Limits.

Our symposium concludes with a contribution from Peter Alldridge. [FN15] As he has done elsewhere, Alldridge here seeks to broaden the perspective of criminal law theory to address newer, and less conventional, forms of offenses—in this case, money laundering. Here again, the Feinbergian approach serves primarily as a jumping off point, since Feinberg himself never mentions this offense. Is money laundering the sort of conduct that the state may legitimately make criminal? Does it satisfy the harm principle? Would the criminalization of money laundering be effective in preventing (eliminating, reducing) harm to persons other than the actor, and are there other means that would be equally effective at no greater cost to other values? In addressing these questions, Alldridge offers a useful summary of the supposed policy justifications for money laundering legislation, such as that it removes incentives to commit predicate offenses, provides a more effective form of imposing accomplice liability, helps protects financial markets and the banking system, and helps prevent tax evasion. But despite the potential seriousness of at least some of these harms, Alldridge is deeply skeptical of the idea that the criminal law provides an appropriate response. In particular, he questions whether the causal relationship between money laundering and such harms is strong enough to justify criminalization. He finds that there would have to be a great deal of money laundering by a great number of offenders before financial markets would begin to be adversely affected. Under Feinberg's harm principle, Alldridge concludes, such impact is simply too remote and too diffuse to justify the use of criminal penalties.

* * *

In the summer of 2000, while preparing to edit this special issue, I sat down and read Moral Limits from beginning to end. Although I had dipped into it on many occasions before, this was the first time I had encountered all 1300 or so pages at once. It seemed to me a work of quite profound significance—of vast learning, remarkable inventiveness, and an almost literary quality. I had absorbed so much Feinberg over so little time that he had become a part of my consciousness. I was thinking, talking, probably even dreaming Moral Limits.

The next winter, while spending the semester at the University of Arizona, I finally had the chance to meet Professor Feinberg in person. He proved to be at least as engaging and generous as I had hoped, and I was
fortunate to have the opportunity to spend time with him on several occasions. During the course of lunch one day, he expressed some apprehension at the prospect of having an entire issue of this journal devoted to the critique of his major work. What, he wondered, would be left of Moral Limits after all of the critics had had their say? As it turns out, he need not have worried. The eight essays collected here attest--above all--to the continuing value and relevance of his great work. They will, I hope, encourage those who have not previously encountered Moral Limits to do so, and those who have encountered it before, to do so again and again.

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[FN1]. Harm to Others (1984) seeks to define the complex concept of harmfulness, focusing particularly on difficult questions about posthumous and prenatal harms, vicarious and moral harms, minor and aggregative harms, and failures to prevent harm. Offense to Others (1985) explores the concept of harmless offense, focusing primarily on the concept of obscenity in its many different forms. Harm to Self (1986) deals with the concepts of legal paternalism, autonomy, and voluntariness, and considers the criminalization of acts such as assisted suicide and voluntary slavery. Harmless Wrongdoing (1988) takes up the question of legal moralism and the use of criminal law for certain kinds of non-harmful, but nevertheless “immoral,” forms of conduct.

[FN2]. R.A. Duff, Harms and Wrongs, 5 Buff. Crim. L. Rev. 13 (2001). Duff is Professor of Philosophy at the University of Stirling (Scotland), and the author, most recently, of Punishment, Communication, and Community (2001).


[FN5]. Feinberg, Harm to Self 391-400 (1986).

[FN6]. Fraud in the factum occurs when the fraud goes to the “nature and quality of the act”—e.g., when a doctor tricks a woman into having intercourse by telling her that the act she is engaging in is a non-sexual, medical procedure. Most other kinds of misrepresentations—e.g., that the parties will marry after the act, or that the woman will receive some form of compensation—are considered fraud in the inducement, and, under the traditional rule, do not vitiate consent. Id.

[FN7]. Patricia Smith, Legal Liability and Criminal Omissions, 5 Buff. Crim. L. Rev. 69 (2001). Smith, a former graduate student of Joel Feinberg’s, is now Professor of Philosophy, Baruch College and Graduate Center, City University of New York. She is the author of the forthcoming book, Omission, Law and Responsibility.


[FN9]. Hugo Adam Bedau, Feinberg’s Liberal Theory of Punishment, 5 Buff. Crim. L. Rev. 105 (2001). Bedau is the Austin Fletcher Professor of Philosophy Emeritus at Tufts University and the author or editor of numerous books, including The Death Penalty in America: Current Controversies (1997) and Making Mortal Choices:
Three Exercises in Moral Casuistry (1997).


Listen in on any argument about same-sex marriage—or it could be about euthanasia, or pornography, or prostitution, or abortion, or the “war on drugs,” or any number of other topics—and you are almost sure to hear the principle invoked: “People should be free to do what they want so long as they don’t harm anyone.” As its use in such debates suggests, this so-called “harm principle” is usually thought to be a trusty weapon in the arsenal of liberalism. It is an argument for liberty, and hence against restrictions on liberty. Or so it seems.

But is the harm principle truly liberal? On first inspection, the principle's liberal credentials seem beyond reproach. The principle was championed after all by John Stuart Mill in his classic On Liberty [FN1]; it was deployed for explicitly liberal purposes (including, centrally, the deregulation of homosexual conduct) by H. L. A. Hart in his famous attack on the more conservative “legal moralism” of Lord Patrick Devlin [FN2]; and it figures as the centerpiece of the thoroughly and avowedly liberal opus of Joel Feinberg. [FN3] If this impressive and impeccably liberal pedigree leaves any room for doubt, such doubts would seem to be dispelled by the observation that the harm principle has come in for forceful criticism in the conservative jurisprudence of Justice Antonin Scalia. [FN4] Considering who its friends and enemies are, could anyone seriously question that the harm principle is firmly aligned with liberty, and with liberalism?

It is true, of course, that proponents of regulation—of restrictions on obscenity or pornography, or nude dancing, or other controversial activities—sometimes try to turn the harm principle to their advantage by arguing that these materials or activities produce harm indirectly, or as a “secondary effect.” Thus, supporters of restrictions may argue that a disfavored activity *2 can lead to consequences that virtually anyone would consider harmful—violence, crime, exploitation. This “secondary effects” thinking has found its way into the Supreme Court's First Amendment jurisprudence. [FN5] And Bernard Harcourt argues that such “indirect harm” arguments have become so common that the harm principle has suffered a kind of “collapse.” [FN6]

Perhaps. Still, in many contexts liberals can argue persuasively that the ostensible secondary effects are too speculative or remote to justify restrictions on liberty. Indirect harm arguments did not succeed, for example, in saving the Massachusetts law limiting marriage to opposite-sex couples. [FN7] And in any event the rationale often seems more like an attempt to “get around” the harm principle than a faithful application of it. Indeed, claims about secondary effects may sometimes raise suspicions of disingenuousness; they may seem like rationalizations for restrictions arising out of different and more “moralistic” motivations. [FN8] So even if such claims sometimes weaken or blunt the force of the harm principle, they do not negate it; nor do they call into question the principle's essentially liberal orientation.
On occasion, however, the harm principle is employed in more direct ways to justify restrictions on liberty. More specifically, proponents of regulation invoke various forms of what we may call “psychic harm” and “communal harm.” [FN9]

Liberals may respond to such claims with dismissive indignation: these are plainly not the kinds of “harm” that the principle is meant to encompass and hence that can serve to support restrictions on liberty. But if in fact some people sincerely regard such injuries as “harms” (as it seems they do), what justifications can liberals give for declaring these harms irrelevant or inadmissible—or not really “harms”? And by refusing to count or give weight to evils that some people sincerely regard as “harms,” do liberals engage in the quintessentially illiberal practice of treating some people’s ideas of the good life as less worthy? In the more popular parlance, do liberals thereby “impose their values on others”?

*3 These questions invite us to consider the curious spectacle in which, as I will argue, modern liberals in the Millian tradition [FN10] have attempted—with considerable success, at least as a matter of general or public rhetoric—to commandeer a principle that is not inherently liberal, and indeed that may well be illiberal in its intrinsic tendencies, and transform it into a leading instrument of the liberal cause. Millian liberals have made the harm principle look liberal by disqualifying the kinds of harm that do not point to liberal conclusions. In this respect they are like people who insist that an issue should be resolved by democratic vote while working behind the scenes to disenfranchise groups who might be inclined to vote against their cause.

In thus seizing a potentially illiberal principle and redirecting it to the liberal cause, liberals have achieved a remarkable rhetorical or discursive triumph. How has this victory been achieved? Largely by sleight of hand, or by equivocation. Or so I will argue in this essay. By importing tendentious conceptions of what can count as “harm,” liberals have managed to prevent their audiences (and, most likely, themselves as well) from perceiving how harm principle rhetoric actually works to obfuscate the deeper issues, to conceal real injuries, and to marginalize some conceptions of the good life.

This essay is an attempt to bring those rhetorical workings to light. Part I discusses the content and jurisdictional function of the harm principle and the reasons for its rhetorical power. Part II considers illiberal uses of the harm principle based on claims of “psychic” and “communal” harm and argues that the peremptory exclusion of such harms from the application of the principle cannot be justified. Part III discusses the more elaborate accounts of “harm” developed by theorists like Mill and Feinberg and argues that, although theorists are of course free to define terms in artificial or technical senses, the harm principle as thus refined forfeits the virtues that made it rhetorically attractive in the first place.

Why then has the principle not lost its influence? The essay argues that liberal proponents of the principle have engaged in rampant equivocation, trading on more ordinary senses of “harm” for persuasive purposes while importing technical or artificial conceptions of “harm” in order to secure their desired conclusions.

*4 I. The Purpose and Power of the Harm Principle

Before considering how liberals have succeeded in commandeering the harm principle, we need to take stock of what the harm principle is—its content, its function, and the qualities that have made it so influential.

A. The Content and Jurisdictional Function of the Harm Principle

So, what exactly is the “harm principle”? For present purposes, we can treat John Stuart Mill's classic formulation as canonical. In On Liberty, Mill offered “one very simple principle [as] . . . entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control . . . .” That principle holds that “the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is . . . to prevent harm to others.” [FN11]

Under this principle, harm is a necessary but not sufficient condition for restraining liberty. [FN12] Thus, the principle imposes restrictions on government, not obligations. Donald Dripps observes that “the harm principle takes the form of a categorical and general denial of legitimate state power to adopt certain rules.” [FN13] But if government is forbidden by the principle to restrict conduct that does not cause harm, it hardly follows that government must regulate conduct that does cause harm. On the contrary, prudential and other concerns dictate that a great deal of harm-causing conduct will nonetheless go unregulated.

Jorge Menezes Oliveira expresses this point by suggesting that Mill in fact proposed two principles: a harm principle, and a more prudential principle of expediency. [FN14] If a kind of conduct is deemed harmless, then it is outside the coercive authority of the state. Conversely, if conduct does cause harm, then it is within the state's regulatory domain; but whether regulation is prudent or appropriate still depends on the application of the “principle of expediency.” There is much conduct that government legitimately could regulate but prudently should not.

In this sense, the harm principle can be regarded as jurisdictional in character. “Mill is clear,” Gerald Dworkin observes, “that the [harm] principle is supposed to settle the issue of the state's jurisdiction, not the question of when the state should exercise its power.” [FN15] Because it serves to delineate the state's coercive jurisdiction (and not to dictate the exercise of prudential judgment within that jurisdiction), the principle is supposed to operate in either/or fashion: government either has coercive jurisdiction over particular conduct (because it causes harm), or it does not. Donald Dripps makes the point by saying that “[t]he harm principle operates catastrophically; conduct is either harmless and therefore immune from punishment or harmful and thus fair game.” [FN16]

Lawyers might analogize the matter to judicial jurisdiction. In this comparison, “harm” is the sort of “minimum contacts” used to determine whether the state has jurisdiction. But the fact of harm does not tell the state how to resolve questions of regulation on the merits.

As we will see, even the most meticulous of liberal theorists may sometimes forget this point and conflate the jurisdictional “harm principle” with the more prudential “principle of expediency.” [FN17] But if they do so they smudge the harm principle's distinctive claims, subvert its jurisdictional function, and turn the principle into something trivial or platitudinous—such as the proposition that government should not restrict liberty when restrictions would do more harm than good.

B. The Irresistibility of the Harm Principle

The harm principle is a powerful weapon in debate. Proponents of a particular restriction who have the principle invoked against them are more likely to argue that the conduct in question—nude dancing, or the marketing of pornography, or whatever—does cause harm, thus acknowledging the power of the harm principle, than to suggest that the conduct should be regulated even though it is harmless. [FN18]
Why is the harm principle so potent? Its allure, I will suggest, arises from two features. First, the principle is (or at least it presents itself as) a “very simple principle,” as Mill observed, and for many purposes simplicity is an important virtue. Second, the principle's animating idea resonates with powerful intuitions and popular notions that make the precept seem almost self-evidently right.

1. Simplicity

Start with the feature of simplicity. Appearances may turn out to be deceiving, but at least on its face the harm principle seems to live up to this part of Mill's advertising. Harmful conduct is within the state's coercive jurisdiction; harmless conduct is not. Thus, Bernard Harcourt observes that “the harm principle offered a bright-line rule. A rule that was simple to apply. A rule that was simply applied.”

This apparent simplicity makes the harm principle seem almost tailor-made for judicial use in cases challenging governmental restrictions on liberty. Judges, after all, are supposed to resolve cases not by doing ad hoc cost-benefit analyses of each individual dispute, but rather by applying “law”--rules or principles of a majestic generality. Especially in the realm of constitutional law, it has become almost axiomatic that courts are supposed to act only on the basis of “principles.” Moreover, in the American constitutional system with its commitments to separation of powers and to democracy, judges are not supposed to usurp the role of legislatures.

These are mere truisms. And a “simple,” sweeping principle like Mill's caters to these judicial limitations. If conduct causes harm, then absent some other constitutional obstacle it is for the legislature--not the courts--to make the complex cost-benefit calculations or prudential judgments needed to decide whether to regulate that conduct. Courts can exult in the deference they give to the elected branches. Conversely, if conduct does not cause harm, then it is none of the legislature's business, and it is the courts' job to say so. So it should not be surprising if at least some “courts regularly turn to J. S. Mill for inspiration.”

But it is not only judges who might be expected to feel the allure of the harm principle's proffered simplicity. Academic theorists may be attracted as well. After all, theorists (at least when they are acting as theorists) are not immersed in the nitty gritty doings and disputations of life, but rather are seeking some more detached position from which to examine and, if they are normative theorists (including law professors), to criticize and prescribe. Consequently, in discussing the proper limits on government's legitimate authority to regulate abortion or obscenity or drugs, academic theorists cannot just be pragmatic moral accountants who do a cost-benefit analysis of every controversy that comes along: they need to be able to make and apply more general precepts from within the quiet of their offices or the measured calm of the seminar room or lecture hall. And to do this, they need (or at least would be greatly aided by) a relatively “simple” principle or set of principles not requiring careful, case-by-case field work for every messy question that arises.

The harm principle's apparent simplicity is thus a strong recommendation for employment in academic contexts. It seems to permit the kinds of clean arguments and judgments--and the kinds of recommendations to courts--that detached academicians are competent to make.

Joel Feinberg can serve as a nice illustration of the point. In his ambitious study of the moral limits of the criminal law, Feinberg discusses and offers prescriptions regarding a host of questions, both general and specific, about the legitimate limits of government coercion. Yet Feinberg acknowledges at the outset that as an academic philosopher, his main contribution must consist of “conceptual clarification.” Hence, his study
will “not probe deeply into the facts or discuss, for example, the varieties of drug addiction, or the effects of *8 pornography on children, or the degree of physical protection provided by seat belts.” Nonetheless, the study’s “aim is to be practical anyway” [FN25]-to discuss and even to make recommendations on just these kinds of matters. But without “prob[ing] deeply into the facts,” that practical aim could be accomplished, it seems, only with the aid of some fairly simple principle or set of principles whose application to issues does not demand any heavy reliance on empirical research. So it should hardly be surprising that the harm principle plays a central role in Feinberg’s work.

Or consider Richard Epstein’s judgment on the issue of same-sex marriage. The issue is currently the source of great controversy in popular debate, in political campaigns and initiatives, and in academic discussion; and it might seem to present a variety of difficult questions involving morality, culture, law, religion, the upbringing of children, and the sanctity-or tyranny-of tradition. But with the help of the harm principle, Epstein easily rises above such complexities:

[No one . . . requires [opponents of gay marriage] to alter anything that they do with their own lives. . . .The operative principle here should remain that two individuals can form whatever associations they choose unless one can show harm (beyond offense) to third parties, and this cannot be done in this case. [FN26]

To be sure, Epstein’s judgment is offered casually; he does not purport to offer any extended treatment of the issue. But then that is the point: the harm principle permits advocates to offer such judgments easily, casually, and with apparently unqualified confidence.

Of course, it is not only judges and theorists but also ordinary citizens who argue about the propriety of restrictions on liberty. Should motorcyclists be required to wear helmets? Should the use of marijuana be prohibited? What about abortion? The right to die? The instances are endless, and the issues can be vitally interesting to us all-and hence they are the subject of countless conversations at social gatherings or lunchtime discussions or radio call-in shows. And like the judges and academic theorists, most of us typically cannot claim to have carefully researched all of the empirical dimensions of these diverse issues. Maybe you have methodically studied the pros and cons of marijuana or motorcycle helmets, but I haven’t, and neither has anyone I know. So in order to express an opinion on such matters, we might naturally wish for criteria whose application does not require a Ph.D in a particular area *9 of social science. Mill’s “very simple principle” meets this need--or at least it seems to.

2. Rhetorical resonance

Thinking about how the harm principle works in ordinary conversations also suggests a second feature of the principle that can make it nearly irresistible: the basic precept animating Mill’s proposal seems almost self-evidently true. It resonates with intuitions most of us have, with adages that are standard fare in everyday exchanges, and with familiar wisdom about the role of and justification for government.

Thus, the harm principle expresses an intuition most of us have had from childhood. If I really want to do something, and if I'm not harming anyone, then what possible reason could Daddy or Mommy have for telling me I can't do it? And we carry this childhood intuition-along with its accompanying sense of indignation against unwarranted curtailments of our freedom-into adulthood. “What harm would it do?,” we ask with respect to some contested course of conduct. “Who [sic] would it hurt?”
A similar intuition is often expressed as a “none of your business” appeal: what doesn't injure or affect anybody else is “none of their business.” They should “mind their own business.” Or, more bluntly, “butt out.” The intuition is powerful and widespread, and though the phrasing may seem inelegant, in fact the eminent thinkers who have addressed the issue have often resorted precisely to that “mind your business” phraseology to convey the point. Thus, Mill argued that “intrusively pious” persons should “mind their own business.” [FN27] Feinberg concurs that conduct not covered by coercion-legitimating principles, especially including the harm principle, is “not the business of the state” [FN28]

In short, most all of us can happily acknowledge a sort of (as Randy Barnett puts it) “presumption of liberty.” [FN29] We understand, of course, that freedom can be abused, and that it cannot be absolute: but it is in itself a good thing. Who doubts this? So as long as a person is exercising her freedom in ways that cause no harm, why is it anybody else's “business” (including government's) to tell her she can't?

The “no harm” precept also resonates with an adage that all of us must have heard a thousand times, beginning in grade school or before: we could call this the “somebody else's nose” adage. “Everyone must understand,” as the West Virginia Supreme Court of Appeals authoritatively put the point, “that his right to swing his arm ends at the other chap's nose.” [FN30] The inculcation is familiar. The teacher tells a third grader on the playground to stop doing something that is bothering or threatening other students. The obstreperous student complains: “Why can't I? It's a free country, isn't it?” And the teacher patiently explains that freedom is not unqualified. “You have the right to swing your arm, Johnny, but only up to the point where it runs into somebody else's nose: at that point your freedom ends.” The harm principle and the “somebody else's nose” adage seem nicely congenial, if not virtually identical.

In somewhat more dignified terms, government is often conceived in the American political tradition as the product of a social contract that extricated us from a figurative “state of nature” in which we imaginatively lived (or would live) before (or without) the institution of government. [FN31] The state of nature had its attractions—there was no official authority to boss us around—but it also had drawbacks. In particular, there were no officials and no police to prevent other people from doing whatever they wanted to do to us: hence, life could be “solitary, poor, nasty, brutish, and short.” [FN32] So we formed a government, the familiar story says, in order to remedy this deficiency, preserving as much of our erstwhile liberty as possible while providing a mechanism to prevent us from injuring each other. From this picture it seems to follow that government may step in to prevent some citizens from harming others: that is why we formed government in the first place. Conversely, if someone wants to do something that does not injure or affect others, then it seems that government's commission—its reason for being—is not implicated; so the earlier rule of freedom should remain in force.

For those (like Mill) who object to the metaphors of states of nature and social contracts, [FN33] the same idea can be expressed in less figurative terms. We might simply say that the purpose of government is to protect and promote human welfare, or perhaps “human flourishing.” After all, something like that purpose seems to be the reason why we pay taxes and submit to government, doesn't it? Freedom to choose and act is surely part of human flourishing. And it seems to follow almost inexorably that if a person wants to do some action that will bring her pleasure or benefit, and if this action will cause no harm to anyone, [FN34] then government will diminish rather than enhance human welfare by prohibiting the person from engaging in this desired and harmless conduct.

In short, the precept that animates the harm principle seems virtually irresistible. Resonating powerfully with familiar intuitions and adages and political theories, the basic idea seems almost self-evidently sound. H. L.
A. Hart expressed the apparently self-evident quality of the harm principle:

[A] very great difference is apparent between inducing persons through fear of punishment to abstain from actions which are harmful to others, and inducing them to abstain from actions which deviate from accepted morality but harm no one. . . . [W]here there is no harm to be prevented and no potential victim to be protected, . . . it is difficult to understand the assertion that conformity . . . is a value worth pursuing, notwithstanding the sacrifice of freedom which it involves. [FN35]

C. The Influence of the Harm Principle

A principle as apparently accessible and irresistible as the harm principle might be expected to exert a significant influence on popular, academic, and legal debate; and in fact the harm principle has proven powerful. The extent of its influence is not precisely measurable, of course. Typically, “harm principle” arguments will be only one ingredient in the discursive mix, so even if the conclusion in a controversy seems to fit what the principle would prescribe, it is hard to be sure how much the conclusion actually owes to the principle. Conversely, the principle may sometimes operate behind the scenes, supporting or buttressing conclusions even when it is not explicitly invoked. *12 Nonetheless, it seems plain that the principle has carried considerable weight in debates on a range of issues.

Sometimes its influence is conspicuous. In Commonwealth v. Bonadio, [FN36] for example, the Pennsylvania Supreme Court stated that the “concepts underlying our view of the [state's] police power . . . were once summarized . . . by the great philosopher, John Stuart Mill, in his eminent and apposite work, On Liberty (1859)”; and the court proceeded to quote extensively from Mill, beginning with his statement of the harm principle. In another case, the Missouri Supreme Court noted that “courts regularly turn to J. S. Mill for inspiration” and went on to quote with approval Mill's formulation of the harm principle. [FN37] More recently, state courts have explicitly invoked Mill's harm principle as providing the legal rule for issues concerning the appointment of a conservator for an elderly person, [FN38] abortion regulations, [FN39] decisions regarding medical treatment, [FN40] and prohibitions of homosexual sodomy. [FN41]

The United States Supreme Court has not explicitly elevated the harm principle to constitutional status. Nonetheless, commentators and occasionally Justices themselves sometimes argue that the principle has been silently at work in the Court's jurisprudence. In Barnes v. Glen Theatre, [FN42] for example, in which a fragmented Court narrowly upheld a “public indecency” statute applied to prevent nude dancing in adults-only establishments, Justice Scalia colorfully accused the four dissenting justices of embracing the principle (though Scalia attributed the principle to Thoreau rather than Mill). [FN43] And *13 some commentators have suggested that the recent case of Lawrence v. Texas, [FN44] in which the Supreme Court invalidated a Texas law prohibiting homosexual sodomy, effectively constitutionalized the harm principle. [FN45]

In addition, the harm principle has earned widespread acceptance in the academy. The principle received a huge boost as a result of the Hart-Devlin debate of the 1960s over the enforcement of morality, in particular sexual morality. The standard wisdom holds that Hart decisively won and Devlin lost the debate. [FN46] And because the debate plausibly could be viewed as a debate about the harm principle, Devlin's supposed drubbing could be, and often was, taken to signify the triumph of that principle. Thus, Bernard Harcourt observes that over the course of the 1960s, '70s, and '80s, Mill's famous sentence began to dominate the legal philosophic debate over the enforcement of morality. Harm became the critical principle used to police the line
between law and morality within Anglo-American philosophy of law. Most prominent theorists who participated in the debate either relied on the harm principle or made favorable reference to the argument. [FN47]

Perhaps the most intricate and impressive defense of the harm principle occurred in a four-volume work by the legal philosopher Joel Feinberg that has become an oft-cited jurisprudential classic. [FN48] Feinberg was not quite a “harm principle” absolutist: he accepted a hint from Mill in allowing for limited *14 restrictions on liberty to prevent conduct that he regarded as seriously offensive but not actually harmful. [FN49] In the main, though, Feinberg’s opus amounted to a massive sympathetic exposition of the harm principle, and it generated lavish praise even from scholars who disagreed with Feinberg on important points. [FN50]

II. Illiberal Uses of the Harm Principle

Thus far, our discussion of the harm principle has produced nothing to disturb the common assumption that the principle is a central plank in the platform of liberalism. Its proponents whom we have encountered—Mill, Hart, Feinberg, Epstein—have all used the principle to oppose restrictions on individual liberty. But sometimes the principle is deployed for the opposite purpose—namely, to support regulation. Perhaps the most familiar such usage is the “secondary effects” rationale noticed in the introduction and apparent in some free speech decisions. [FN51] This familiar sort of argument contends that conduct that is initially or apparently harmless in fact causes (albeit at one or two causal removes) the sorts of evils that virtually everyone acknowledges as “harms”—violence, disorder, exploitation, decline in property values.

But even without appealing to these kinds of evils that are uncontroversially “harms” but for which the causal connection is tenuous, proponents of regulation can point to more immediate though somewhat less tangible undesirable effects. We can describe these effects as “psychic harm” and “communal harm.” Such arguments are hardly novel, [FN52] but they are typically met with peremptory dismissal by Millian liberals. Clearly these sorts of harm *15 are not what the harm principle contemplates—or at least not what the liberal thinkers who have championed the principle have contemplated.

But Mill and his descendants have no ownership rights over the harm principle. In order to rule out these disfavored types of harm, therefore, some convincing exclusionary argument would need to be given. And indeed, careful liberal theorists like Feinberg attempt to give such arguments. But it is not clear that their arguments are sound—or that they are compatible with the logic and spirit of the harm principle itself. So instead of peremptory dismissal, we ought to give closer attention to the problem.

A. “Psychic” and “Communal” Harm

Consider a common example—one that seems to present the sort of issue liberal theorists have wanted the harm principle to address. [FN53] Suppose you live in a community—call it Puritania—in which “Moral Majority” types are numerous and wield considerable political influence. The community as a whole thus tends to favor rigorous restrictions on materials that most residents regard as obscene or pornographic. As it happens, though, you are a solid citizen with a family and a steady job, but one who happens on occasion to enjoy watching hard-core, XXX films in your living room. You watch these films alone, or sometimes with a few adult friends—law firm partners, perhaps—who have been fully advised about the nature of the materials and have freely chosen to partake. But although these viewings are as private as you and your friends can possibly make them (you keep the volume down and make sure to close the curtains), they transgress the community’s anti-obscenity
ordinance, which has no “private viewing” exception. So when what you view as nosy neighbors discover what you have been doing, they complain, and the local authorities move to enforce the ordinance against you.

Naturally, you resent this invasion of your freedom. So long as you watch these films strictly in private, and so long as no one except fully informed and consenting adults participates, what business is it of the community (you ask indignantly) to tell you that you can’t do this? You invoke Mill: the community has no right to restrict your freedom, you protest, so long as you are not harming anyone.

The city council responds, though, that you are harming other people. How? you ask, and the council obliges by explaining two ways in which you are, in its view and in the view of your neighbors, causing harm.

*16 First, and most obviously, the knowledge that you are (or may be) watching XXX films in your home causes emotional or psychic distress to neighbors who view your practice with abhorrence. There are plenty of reasons, of course, to be wary of letting governments restrict freedom just to spare officious neighbors from suffering psychic distress. And your conduct might be protected by some positive legal provision such as, most obviously, the First Amendment. [FN54] But the immediate question is not whether the anti-pornography ordinance is justified or expedient or even constitutional but whether, under the harm principle, the matter is outside the city government’s coercive jurisdiction.

The harm principle says, once again, that the government has such jurisdiction if and only if an action causes harm. And in fact you (the viewer of XXX movies) cannot plausibly deny that some citizens do feel emotional distress because of what you are doing: indeed, it may be obvious that they are deeply unhappy about your movie-watching predilections. Nor can you deny that emotional distress is a kind of suffering—of pain. At least prima facie, pain (including emotional pain) would seem to be a kind of harm. After all, in other contexts (in tort law, [FN55] for example) we readily acknowledge that psychic or emotional distress is a harm and that the prevention of such distress is a perfectly legitimate state interest. Liberals typically try to redescribe this distress as “offense.” But a rose is a rose, and pain is pain: replacing the label does not change the fact that to those who suffer it, psychic distress will seem a kind of harm.

Depending on the facts, this sort of harm might even elicit the sympathies of liberal-minded citizens. In this vein, commenting on Joel Feinberg’s discussion of whether a liberal polity should prohibit gladiatorial contests limited to consenting combatants who fight to the death before consenting spectators, Richard Arneson observes that “emotional reactions to what one’s neighbors and fellow citizens are doing can be powerful and can be virtually unavoidable for persons who have not detached themselves from all personal concern for the quality of life in their community.” Arneson suggests that “we should think of citizens who would be appalled at the thought of living in a community that tolerates Roman-style gladiatorial spectacles as harmed by the bare knowledge that such events are occurring. . . .” [FN56]

*17 However, the city council goes on to explain that by watching XXX movies in your home you are also causing harm in another way that is more intangible but arguably even more substantial: you are slowly but surely altering the overall character of the community in a way that other residents find disturbing or undesirable. We could call this sort of harm “communal,” though the term may mislead. The claim is not that you are somehow harming an entity (“the community”) that is distinct from the individuals who compose it or that can suffer injury even though they as individuals are not injured. The point is much less mysterious and more commonsensical: it is that individuals care about and take an interest in the kind of community they live in, and your practices are changing the nature of that community in a way that reduces the value and character of the com-
munity for other residents. Hence, in causing “communal harm” you are harming them, as individuals.

Perhaps you will insist that your conduct is purely private and hence affects no one else against their will (except in what you will understandably regard as the officious ways noted above). But the defenders of the anti-obscenity restriction reply that you are being, or at least are pretending to be, sociologically naive: you can maintain your position only by narrowly confining your field of view in an artificial and implausible way. After all, what you and your consenting adult friends do in private will surely have some influence over the kind of people you are. Your movie-watching habits will affect what you talk about, how you spend your time, what activities you choose to engage in and support or not to engage in and support. If you spend your Friday evenings watching pornographic films you will not be attending and supporting the basketball games or the opera. Your activities will surely influence what you find interesting, and valuable, and humorous. In this way, your conduct will immediately influence and help to form you. And because you interact with the community—as teachers and lawyers and business people and consumers--it will affect others in the community as well. [FN57]

In addition, even if for now you limit the audience for your XXX films to a few friends who are all informed and consenting adults, it would be unrealistic to suppose that other people-your children, for example—will not be in some measure influenced in their own thinking about, for example, what *18 sorts of films are available, and acceptable, and interesting. And as they grow older, your own children and those of your friends will likely be permitted to participate in some of your activities. Your neighbors on the other hand would prefer that their children not be exposed to such materials but, realistically, it will be much more difficult for them to inculcate these values if many of their children's associates and friends are participating.

Or a neighbor might fear that in a certain kind of community he himself might come to develop a liking for such materials, and that this would be a regrettable moral or cultural decline. Richard Arneson describes this sort of concern as “self-paternalism,” and he argues that “self-paternalism is in principle a legitimate reason for instituting criminal prohibitions.” [FN58]

You might argue, of course, that if your neighbors prefer this level of cultural innocence they always have what we might call “the Amish option”: they can opt out of modern society. [FN59] But this observation is manifestly question-begging. Your neighbors would point out that for many people opting out is not in fact a viable option (remember Mosquito Coast?); and in any case, it would be a massive imposition on them to put them to that choice. Why should they (who we can stipulate, in case it matters, constitute a sizable majority in the town of Puritania) be the ones who are forced to take that drastic course? Why not tell you that if you really care so much about your pornographic movies you always have “the Babylon option”? Why shouldn't you move to some less squeamish community?

You would immediately recognize the cost—the “harm” that this forced choice imposes on you. But if left unregulated, the movie-watching and related habits of people like you will impose analogous harmful costs on them.

Over time, in short, what we do in private will almost certainly have a difficult to measure but nonetheless very real influence on the sort of community all of us live in. Only by pretending to be obtuse can we deny that influence. Thus, even in arguing for a “right to pornography,” Ronald Dworkin concedes this essential point. [FN60] And even citizens with no *19 independent desire to be officious or to interfere in the lives of others will typically have a strong personal interest in the kind of community they (and their children) live in. [FN61] Such desires are deeply felt and are routinely expressed in people's decisions about where to live. Richard Arneson
explains that

[p]eople, as a matter of fact, do tend to want to live in proximity to likeminded others and share ways of life in common with others. The kind of life that any person wants to live almost invariably includes relations to others beyond immediate family and close friends. Face-to-face arm's-length transactions with one's neighbors, the residents of one's local community, colleagues at work, and inhabitants of one's city or county can be important determinants of the degree to which one's life is experienced as satisfying. Call such concerns “communitarian.” The difference in price between otherwise identical houses located in “desirable” and “undesirable” neighborhoods is one indicator of the extent to which people care about such matters. [FN62]

Consequently, conduct that is likely over time to make a community incongruent with the values of many of its residents, or even just less to their liking, “harms” those people in a very palpable and commonsensical way. [FN63]

*20 The crucial point, once again, is not that the “psychic” and “communal” harms just described are sufficient to justify the anti-pornography restrictions. There may be plenty of good reasons-grounded in rights, perhaps, or in comparisons of the likely costs and benefits of allowing as opposed to prohibiting such restrictions-for concluding that the restrictions are unwise or unwarranted. [FN64] The immediate question, however, is only whether the restrictions can be ruled out-declared beyond the city government's proper coercive “jurisdiction”-for being in violation of the harm principle. And it appears that they cannot-unless, that is, a good rationale can be given for disqualifying psychic and communal harms from the set of harms that can be used to satisfy the principle.

B. Question-Begging Disqualifications

So, is any such rationale available? It is surely true that if psychic and communal harms are allowed to count, then the harm principle would support government's coercive jurisdiction over virtually any conduct that anyone might be inclined to regulate. The harm principle would thus become deeply illiberal. Liberal proponents of the principle sometimes observe these troubling implications and then peremptorily treat them as a sort of reductio ad absurdum, or as a justification for excluding the sorts of harms that would lead to such illiberal consequences. [FN65] “If the harm principle could be satisfied by that kind of ‘harm’,,” the dismissive objection seems to claim, “then all manner of restrictions on liberty would be permitted: and that conclusion is surely contrary to the purpose and spirit of the principle."

But this excuse for disqualifying such harms merely begs the question presently under consideration. If the question is whether the harm principle is intrinsically liberal in its implications, that is, then it is hardly responsive to argue that the principle is liberal by simultaneously ruling inadmissible all harms that might lead to illiberal consequences.

In addition, to declare that some evils cannot be counted as “harms” because to classify them as such would have unfortunate or undesired consequences *21 seems merely tendentious. It is as if an insurance company, in litigation with a policy-holder, were to argue against a facially plausible but broad interpretation of the coverage provided for in its policy by saying, “Even though the language of the policy may seem to apply, our policy couldn't mean that, because if it did we would lose money on the deal: whereas our whole purpose in issuing the policy was obviously to make money.”
So, is there any less tendentious and less question-begging rationale for excluding the kinds of psychic and communal harms that many people in fact regard as real harms, and that for other purposes we treat as perfectly legitimate considerations? More generally, what criteria should we use in deciding whether some perceived evil counts as a “harm”?

C. The Subjective Sense of Harm

One approach to defining harm would adopt the subjective perspective of the persons who regard different occurrences as harmful or not harmful—that is, harmful or not harmful to themselves. Your judgment that some development is or is not harmful to you would thus be entitled to prima facie respect. [FN66] If a person sincerely regards something as a harm to her, it is—and vice versa.

This subjective approach to harm could be elaborated in utilitarian terms, and the utilitarian approach seems particularly promising because liberal proponents of the harm principle have often purported or appeared to embrace utilitarianism as a basic ethical framework. “I regard utility as the ultimate appeal on all ethical questions,” Mill declared; indeed, he explicitly disclaimed reliance on nonutilitarian rights-based considerations in his defense of the harm principle. [FN67] Though less explicit on the point, Hart seems to have assumed a utilitarian stance. [FN68] Feinberg explicitly disavowed any particular metaethical position, [FN69] but utilitarian considerations figure in his analyses of various issues. So it seems natural to ask whether utilitarianism gives us a good reason to disqualify psychic and communal harm in our applications of the harm principle.

Utilitarianism, to be sure, has no single or canonical formulation; rather it has become a broad umbrella for a family of ethical theories, of which Mill’s own version seems somewhat idiosyncratic. [FN70] For our purposes, it is enough that by drawing upon the remarks at the beginning of Mill’s discussion in Utilitarianism together with the writings of his predecessor, Bentham, we can extract two slightly different versions, either of which can supply a conception of “harm” that seems congruent both with the subjective approach to harm and with commonsensical everyday understandings, and hence that might serve to assess the admissibility of the sorts of harms we have just been considering.

The most basic formulation of utilitarianism, endorsed by Bentham and recited at the outset of Mill’s own book on the subject, understands utilitarianism as a position favoring the maximization of happiness conceived of in terms of pleasure and the absence of pain. Bentham had declared that the correct moral principle “approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question,” and he had understood “happiness” in terms of those “sovereign masters, pain and pleasure.” [FN71] Mill at least appeared to concur:

Utility, or the Greatest Happiness Principle, holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure. [FN72]

On these premises, it would seem, “harm” might naturally be understood as pain—or, more accurately, as pain or the deprivation of pleasure. So my conduct harms you if it causes you pain or if it deprives you of some pleasure you would otherwise have enjoyed. We could say that this conception of harm is subject-based in the sense that if you report (sincerely) that you experience pain because of some action or state of affairs, then you have suffered harm.

*23 A slightly different version of utilitarianism would focus not directly on pleasure/pain as the central de-
sideratum but rather on the satisfaction or frustration of preferences. A page after asserting that pleasure and pain are the criteria of right and wrong, Mill casually shifted to the vocabulary of preference. [FN73] Using a utilitarianism oriented to preferences rather than pleasure, we would understand “harm” not in terms of inflicting pain but rather in terms of frustrating preferences. I harm you, it would seem, if I act in a way that prevents you from obtaining something you would prefer to have, or that brings about a state of affairs different from what you regard as the preferable state of affairs that would prevail if I acted differently. Again, this conception of harm is subject-based: if you report (sincerely) that your preferences have been frustrated, then you have suffered harm. [FN74]

Whichever of these alternatives we might choose, these utilitarian versions of “harm” preserve that principle's attractive features of simplicity and of conveying an idea that seems almost self-evidently true. Suppose we opt for the “pleasure/pain” version. Then the harm principle will mean that it is illegitimate for government to restrict my conduct except to prevent me from inflicting pain on others or depriving them of pleasure. That idea seems simple enough, at least as an abstract matter, and it also seems intuitively attractive. If I want to do something (perhaps because I think it will bring me pleasure [FN75]), and the thing I want to do will not cause anyone else pain or deprive anyone of pleasure, then what good reason could government have for stopping me? No doubt some caveats and refinements might be needed, but the powerful appeal of the basic idea is apparent.

Or suppose we adopt the “preference” version. Now the harm principle means that government can restrict my freedom only to prevent me from acting in ways that frustrate other people's preferences-that impose on them states of affairs that they do not prefer. Again, the basic idea seems both straightforward and attractive. In addition, the idea seems consistent with the liberal desire to respect the values people in fact have rather than to dictate to them the values they should have. In this vein, Richard Arneson argues that “a plausible liberal doctrine should incorporate a utilitarian value theory.” [FN76] And he explains the quintessentially liberal rationale for this utilitarian approach: “[I]n deciding on state policy, why should we care about anything except what will help make people's lives go best according to their own personal values?” [FN77]

D. Persistent Illiberalism

So these two familiar and commonsensical versions of utilitarianism both supply conceptions of “harm” that preserve the harm principle's simplicity and truistic quality. But these conceptions also render the principle incapable of protecting liberty, which of course was the Millian liberals' reason for championing the principle in the first place. That is because, once again, any sort of conduct to which some people object almost surely will inflict pain of various sorts and will interfere with the satisfaction of some people's preferences-and hence will be within the realm of conduct that government may permissibly decide whether or not to regulate.

More specifically, either of these utilitarian and subject-oriented conceptions of harm will fail to disqualify—and indeed will operate to validate—the sorts of harms discussed above. After all, psychic distress is a kind of mental pain; and it is plainly something that people prefer to avoid. Hence, conduct that causes such pain and frustrates people's preferences inflicts “harm.” The same is true for communal harm. If people get satisfaction or happiness from living in a particular kind of community, then conduct that subverts that kind of community and thus reduces such happiness inflicts a kind of “harm.” And if people have preferences regarding the kind of community in which they live (as they surely do), then conduct that frustrates those preferences is again a source of “harm.”
To sum up: if psychic and communal harm can serve to satisfy the harm principle, then the principle appears to have a decidedly illiberal character. It works to confer on the state coercive jurisdiction over virtually any kind of conduct that anyone might want to regulate. Consequently, if the harm principle is to be rescued for liberalism, it seems that some rationale needs to be supplied for disqualifying these kinds of harms. But what might seem the most obvious way of understanding “harm” (and the way most consonant with Millian liberals' generally utilitarian bent) does not support any such disqualification. On the contrary, if “harm” is understood in a utilitarian and subject-oriented sense, then these types of evils quite plainly qualify as “harms.”

So short of some major salvage operations, the harm principle—long thought to be the centerpiece of the Millian liberal tradition—continues to look distinctly illiberal. Is there anything liberals can do to remedy this unhappy situation?

III. Liberal Rigging

In fact, careful liberal theorists like Feinberg have appreciated this difficulty, and they have been at pains to define “harm” so as to avoid the illiberal implications discussed above. More specifically, Feinberg followed Mill’s lead in defining “harm” not in the utilitarian and subject-oriented sense just discussed, but rather in a more technical sense.

A theorist is of course free to define terms in technical ways that depart in some respects from ordinary usage. Indeed, most theories at least try to make central terms more precise than they are in everyday speech. Still, we need to ask whether in propounding the harm principle, this more technical approach is consistent with that principle's features, discussed in Part I, that make it so irresistible—namely, its simplicity and its rhetorical resonance.

Upon closer examination, I will argue, the technical approach to harm sacrifices these virtues. So liberals like Feinberg save the harm principle for liberalism only by tacitly relinquishing everything that made the principle attractive in the first place. In fact, though, it does not seem that liberals have been forced to pay this price. The harm principle continues to be influential in public and academic debate, as noted, and it appears to work largely as an argument for liberty: the principle is typically deployed as an argument against restrictions on marriage or sexual conduct or euthanasia or the use of marijuana.

So how have liberals managed to keep the harm principle at the same time liberal and attractive? I argue in this Part that—to be blunt—they have equivocated, using “harm” in its ordinary and subjective senses in order to gain a rhetorical advantage while tacitly importing more technical and importantly different senses of “harm” in order to secure their desired conclusions on particular controversies. Rhetorical uses of the harm principle have been “rigged” [FN78] by liberals to assure the preferred liberal outcomes.

A. Getting Technical

The primary liberal strategy for avoiding the illiberal consequences discussed above has been to define “harm” in technical ways that steer around those consequences. Two concepts have been central to that more technical approach: “interests,” and “rights.” We can see how both Mill and Feinberg make similar use of these concepts.
1. The narrowing of “harm”—Mill

Consider what Mill himself does with the concept of “harm.” Almost immediately after announcing the harm principle, Mill asserts that he “regard[s] utility as the ultimate appeal on all ethical questions,” and this assertion might lead us to suppose that he will understand “harm” in something like the straightforward utilitarian senses discussed above. But in the same sentence Mill disabuses us of this idea. “Utility” is ultimate, but “it must be utility in the largest sense, grounded in the permanent interests of man as a progressive being.” [FN79] So evidently the frustration of less “permanent” interests, or of interests not associated with “progressive” conceptions of humanity, will not count as harm.

These suggestions are somewhat obscure, to be sure. But as the essay proceeds Mill gives at least glimpses of his “progressive” view of what a good life and a good society would be. And his conception of what should be regarded as “harm” is intimately tied to those views. Thus, in a chapter on freedom of thought and expression, Mill emphasizes the value of lively, independent thought. [FN80] Later, though, he concedes—or rather vigorously insists—that very few human beings are actually capable of this sort of thought: most people are mired in “collective mediocrity.” Those of us so mired might be tempted to conclude that lively thought is not so important for us after all; but this is not Mill’s conclusion. He argues, rather, that humanity achieves its highest status and receives its general benefactors in a few “[p]ersons of genius”–the “highly instructed One or Few.” [FN81] “I insist thus emphatically,” Mill says, “on the importance of genius, and the necessity of allowing it to unfold itself freely both in thought and practice.” [FN82]

Other Millian values emerge as the essay proceeds. Mill places great value on “Individuality”; his use of the upper case conveys the emphasis. He praises whatever causes “human beings [to] become a noble and beautiful object of contemplation.” [FN83] He finds a rich diversity in ways of life highly appealing. [FN84] “Originality” is to be prized. [FN85] More generally, Mill yearns for strength and intensity (at least in the intellectual realm) over moderation and calm—for “great energies,” “vigorous reason,” “strong feelings controlled by a conscientious will.” [FN86]

For Mill, these values determine the meaning of “harm.” Contrary to what his avowed utilitarianism and his initial apparent endorsement of “pleasure” and “pain” as the ultimate desiderata might lead us to expect, “mere displeasure” is not necessarily a harm at all. [FN87] Conversely, conduct or restrictions that interfere with the development and exercise of “genius” by impairing lively thought or originality or individuality or nobility or beauty are harms. [FN88]

Later in his essay Mill introduces, almost as an afterthought, another drastic limitation on what counts as “harm.” The conduct that society can expect of us, Mill remarks in what is offered as a sort of summary of the preceding discussion, consists “in not injuring the interests of one another;”—now the crucial qualification—“or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights.” [FN89] Injury to others’ interests will not count as cognizable “harm,” it seems, unless those interests are of the type to be regarded as “rights.” [FN90] Consequently, a person’s conduct may be “hurtful to others, or wanting in due consideration for their welfare, without going the length of violating any of their constituted rights”: such hurtful (but not “harmful,” in Mill’s increasingly rarified sense) conduct may be “punished by opinion, though not by law.” [FN91]

This limitation of “harm” to injuries inflicted on interests protected as “rights” seems at once sensible, even inevitable, and also deeply problematic. It is obvious, Mill and his followers might point out, that not all injuries
to all interests can justify legal restrictions. Suppose my photocopying business (in which I surely have an “interest”) suffers because you start a competing business that provides better copies more cheaply, and you thereby drive me into bankruptcy: should I be able to say that you “harmed” me, and hence that your business should be prohibited?

This of course would not be a necessary or even a very natural conclusion of saying that my business and I were “harmed” by your business. Causing “harm” would bring your business within government’s and the law’s jurisdiction, but government obviously might decide that this sort of harm caused by free competition is no reason to prohibit you from operating your business in fair and competitive ways. [FN92] Still, it might seem easier and safer just to preempt my claim in advance by ruling that competitive injury does not count as “harm” at all—maybe because I have no “right” to be free from competition. In this vein, Don Dripps argues that “the harm principle must incorporate some idea that injuries not wrongfully inflicted do not qualify as harm. Otherwise, successful economic performance would ‘harm’ competitors.” [FN93]

Even so, by limiting harms to injuries to “rights” Mill drastically undermines the ostensible simplicity of the harm principle, and he introduces a potentially vitiating circularity into the analysis. [FN94] In addition, Mill severs “harm” from what it would mean in ordinary usage, in which it would often seem a kind of double-talk to distinguish “harming” from “hurting.” (“True, I promised to do nothing that would harm your child. But I didn’t ‘harm’ her; I only ‘hurt’ her.”)

2. The narrowing of “harm”--Feinberg

In attempting to salvage the harm principle for liberal purposes, Joel Feinberg remolds the concept of “harm” in ways that directly parallel Mill’s qualifications (though Feinberg is more careful and deliberate in his fashioning of the concept). More clearly than Mill, Feinberg disavows standard or Benthamite utilitarianism. [FN95] Feinberg also explicitly acknowledges that “harm” as he uses the term will not correspond exactly to ordinary usage, and that there will accordingly be “clear examples of harm as the term is used in ordinary language” that will not count as harms within his own theoretical framework. [FN96] More specifically, Feinberg defends two limitations that operate to exclude numerous injuries that people might ordinarily think of as “harm” from qualifying as the sort of harm that justifies legal coercion.

First, Feinberg says that “harm” consists of a “thwarting, setting back, or defeating of an interest.” An “interest,” in turn, is not for Feinberg what it was for Bentham—namely, anything that “tends to add to the sum total of [a person’s] pleasures; or, what comes to the same thing, to diminish the sum total of his pains.” [FN97] That commonsensical understanding of our “interests” would point us back to the utilitarian conceptions of “harm” from which the harm principle must be rescued if it is not to become illiberal. So Feinberg instead defines an “interest” as something in which a person has a “stake.” [FN98]

On their face these terms seem opaque, but Feinberg attempts to clarify them; in doing so he emphasizes distinctions between “harm” on the one hand and the “[u]nhappy but not necessarily harmful experiences” that he describes as mere “hurts” and “offenses” on the other. [FN99] Thus, Feinberg offers a lengthy (and somewhat macabre) list of nonharmful “hurts” [FN100] but explains that these are not “harm” because “[t]here is no interest in not being hurt as such, though certainly we all want to escape being hurt, and the absence of pain is something on which we all place a considerable value.” [FN101]

Second, like Mill, Feinberg makes “harm” dependent not only on “interests” but also on pre-existing
“rights.” Thus, he argues that a setback even to what is admittedly an “interest” does not count as a “harm” unless it is wrongfully inflicted—which is to say that it is inflicted in violation of a right.

To say that A has harmed B in this sense is to say much the same thing as that A has wronged B, or treated him unjustly. One person wrongs another when his indefensible (unjustifiable and inexcusable) conduct violates the other’s right . . . . [FN102]

So it turns out that only a carefully delimited subset of the universe of injury will count as “harm” in Feinberg’s scheme. The limitations on what kinds of injuries can be counted as “harm” are so restrictive, in fact, that Feinberg is pushed to acknowledge a whole array of other kinds of “harmless” misfortunes—or of what Feinberg himself calls “evils.” We have already noted two such evils—“hurts” and “offenses.” But in the final volume of his project Feinberg goes on to offer an elaborate taxonomy of “evils.” [FN103] On the most general level he distinguishes between what he curiously calls *31 “theological evils” (such as natural disasters and “killer diseases”) and “legislative evils,” which are the result of human action. [FN104] Subdividing the latter category, he describes “grievance evils”—“harms” belong in this subcategory—and “non-grievance evils.” Among the latter are “free floating” evils, which are so named because they “float free’ of [human] interests, needs, and desires.” [FN105]

Departing somewhat from Mill, Feinberg does not contend that the harm principle is the only possible justification for restrictions on liberty. [FN106] He allows for coercion to prevent some types of offensive conduct. [FN107] More generally, he concedes that “[s]ince evils are by definition something to be regretted and prevented when possible, it seems to follow that the prevention of an evil, any evil, is always a reason of some relevance, however slight, in support of a criminal prohibition.” But Feinberg minimizes this relaxation of the harm principle by arguing that evils other than “harm” (and to a limited extent “offense”) will rarely justify curtailing liberty. “[T]he liberal . . . can grant . . . that legal moralism is technically correct, or correct in the abstract, but insist that, in fact, non-grievance evils can never (or hardly ever) have enough weight to justify the invasion of personal autonomy.” [FN108]

In sum, both Mill and Feinberg (the author and the most careful expositor, respectively, of the harm principle) self-consciously depart from conventional or generic usages and from subject-based senses of “harm.” Instead, they define the concept in narrower, theory-driven senses that exclude many injuries that people might ordinarily regard as “harms.” In addition, they import an element of political morality into the concept, so that injuries that do not invade moral “rights” or are not “wrongfully” inflicted do not count as *32 “harms.” These qualifications are necessary, as they argue, if the harm principle is to not become an engine of illiberalism.

The refinements seem to have generated admiration among academic commentators. [FN109] And the admiration is understandable: an intricate analysis such as Feinberg’s, piling nice distinction on distinction and taxonomy on taxonomy, is surely more impressive than a crude or undifferentiated conception that merely defers to the unanalyzed notions of often unreflective human beings, accepting that if someone’s subjective desires or preferences have been frustrated she has ipso facto been harmed.

Nonetheless, by reshaping the notion of “harm” and wrenching it away from its more natural or ordinary meanings, the liberal proponents of the harm principle provoke a question: does the harm principle, thus reworked and rendered into a technical concept, retain the virtues that made it so irresistible for popular and academic debate?
B. Lost Virtues

As discussed in Part I, the power of the harm principle in popular and academic debate is in significant part ascribable to two features: its apparent simplicity, and its resonance with intuitions, adages, and political maxims and theories that are widely accepted. As we saw in Part II, the subject-oriented and utilitarian conceptions of “harm” preserve these virtues—though with the consequence of making the harm principle illiberal. Conversely, in attempting to redeem the principle from illiberality, the technical reconstruction of harm sacrifices these features.

1. Loss of simplicity

Most obviously, the numerous refinements and qualifications introduced by proponents of the harm principle deprive the principle of the simplicity that Mill attributed to it. Determining whether some evil or undesired consequence qualifies as “harm” now involves an intricate philosophical reflection involving complicated and contestable judgments about what things count as “interests” in which persons have a “stake” and what deprivations of such interests are “wrongful” and in violation of “rights.” “Harms” must be distinguished from mere “hurts,” “offenses,” and other sorts of “free-floating evils.” In its public appearances, the principle may still appear simple—but since “harm” itself is not a simple fact but rather the conclusion of a controversial and complex normative reflection, the simplicity is illusory.

Along with this loss of simplicity comes a serious danger of confusion. Without great care, discussants are likely to use the term “harm” sometimes in the complex and specialized senses elaborated by thinkers like Mill and Feinberg and at other times in the more generic senses of the term. It might seem that this is a risk that could be avoided simply by paying careful attention to how the term is being used. Perhaps—but such attentiveness is more easily preached than practiced. In everyday conversations, it would be remarkable if such confusion could be avoided. And as we will see, this risk is often realized (and indeed exploited) in academic discussions as well, even in the written work of careful theorists like Feinberg.

It may well be, of course, that problems of liberty and restraint are simply not amenable to simple propositions and nice generalizations. Nonetheless, as we have seen, its apparent simplicity is one of the harm principle’s major attractions. It is part of what makes the principle seem suitable for judicial use; and in different ways the principle’s apparent simplicity is also a major recommendation for its use in academic contexts and in everyday conversations. By depriving the principle of this attractive feature, liberal refinements would seem to make it much less useful than it at first appears.

2. Loss of resonance

The second source of the harm principle’s attractiveness is its resonance with widely-held intuitions and adages. If I sincerely want to do something, and if what I want to do doesn’t harm anyone, what good reason does the government have to stop me? We have noticed how this intuition fits with what we have called the “somebody else’s nose” and “nobody else’s business” adages. In everyday conversation (and also, as we will shortly see, in liberal theory) the point is often made in terms of a “doesn’t affect” claim: if my conduct “doesn’t affect” anyone else, then government should leave me alone.
Once “harm” has been redefined in a more technical and much narrower sense, however, proponents of the harm principle forfeit their claim to rely on these familiar intuitions. If what I am doing “hurts” and “offends” others, and if it causes them pain and frustrates their preferences, then perhaps on balance I should still be allowed to do it: but I can hardly claim in good faith that the reason I should be left at liberty is that my conduct doesn’t “affect” anyone else. What I want to do may not cause “harm” in the highly artificial senses elaborated by Mill and Feinberg, but it surely does “affect” others—detrimentally, and perhaps quite powerfully.

Imagine an extreme case in which someone—call him Mr. Boorish—wants to engage in some course of conduct that does not interfere with the sorts of interests in which by Feinberg’s analysis citizens have a “stake” and a “right,” but which pervasively inflicts the sorts of evils that in Feinberg’s catalogue rise only to the level of non-harmful “hurts.” Mr. Boorish wants to engage in activities, in other words, that cause his fellow citizens to suffer “pangs, twinges, aches, stabs, stitches, cricks, and throbs, . . . cuts, bruises, sores, infections, muscle spasms, over-dilated or contracted arteries, gas pressures, and the like,” and also “nausea . . ., itches, dizziness, tension, hyperactivity, fatigue, sleeplessness, chills, weakness, stiffness, extremes of heat and cold,” and in addition “bitterness, keen disappointment, remorse, depression, grief, ‘heartache,’ [and] despair” but nothing worse. The community acts to curb Boorish’s hurtful activities, but (flourishing his copy of Feinberg) he protests that under the harm principle, the community has no coercive jurisdiction to restrict his conduct unless he is causing “harm” to others; and technically speaking, none of the “evils” he is inflicting on his neighbors count as “harms.” How appealing is the harm principle now?

So it would seem that in the process of being rescued from its illiberal tendencies, the harm principle should forfeit its rhetorical power. And yet, as noted, the principle continues to be invoked for liberal causes, and it seems to carry considerable rhetorical force. So how have liberals managed to preserve the principle’s power?

C. Liberal Equivocations

The answer, I will suggest, is that liberals like Mill and Feinberg have resorted (consciously or unconsciously) to rampant equivocation. They exploit the ordinary or subject-oriented senses of harm for persuasive purposes while importing more technical conceptions of harm to secure their desired conclusions and to fend off illiberal uses of the harm principle. An inspection of the arguments made by the principle's leading (and, one might think, most careful) liberal proponents—Mill and Feinberg—reveals that they pervasively, even flagrantly, exploit the equivocation involved in “harm” to piggyback their arguments and conclusions onto the more straightforward senses of “harm” that they elsewhere disavow.

*35 C. Liberal Equivocations—Mill

Thus, in the same paragraph in which he introduces the harm principle, Mill gives it a powerful rhetorical boost by asserting that an individual’s freedom should be respected in that part of his conduct “which merely concerns himself.” This language is repeated throughout the essay. Almost as numbingly frequent is an appeal framed in “not affecting” language. A person should not be “restrained in things not affecting [others’] good.” He should be free in “conduct which affects only himself . . . .” Society has no coercive jurisdiction over a person in “conduct which does not affect the interests of others in their relation to him.” Or the protection of the principle may be said to cover the individual’s “judgment and purposes in what only regards himself.”
The effect of these recurring appeals is to create a depiction of the sort of regulation that Mill is resisting (and that an overbearing “society” is ostensibly eager to impose) as almost wholly gratuitous—an officious effort to interfere in and curtail conduct which simply does not “concern,” “affect,” or “regard” anyone other than the actor. Little wonder that such gratuitous interference would provoke Mill’s opposition: who other than the most insensitive meddler would not be indignant at such officious interference? [FN120]

A moderately careful reading of Mill’s essay shows, of course, that this indignation is misdirected, because the crucial terms—“concern,” “affect,” “regard—are actually being used in narrow and highly artificial senses. As Mill quietly acknowledges, the same conduct that in his special usage does not “affect” or “concern” other people may very well be “hurtful” to them, and may have a powerful detrimental impact on “interests” of theirs that (unfortunately for them) do not rise to the level of “rights.” Viewed in this light, Mill’s position seems much more fragile. Is it so obvious that *36 individuals have an “absolute” right to do things that are “hurtful” to others so long as they do not “harm” others in Mill’s special and convoluted sense? Or that society has no right to restrain such “hurtful” conduct? How much of the appeal of Mill’s position is attributable to such equivocations exploiting terms such as “harm,” “concern,” and “affect”?

2. Equivocations--Feinberg

As noted, Joel Feinberg is more deliberate in his analysis and his use of terms. Nonetheless, Feinberg does not forbear from exploiting the rhetorical possibilities of equivocating about the meaning of “harm.”

For instance, we have earlier noted that persons who value a particular kind of community or culture might plausibly argue that they do in fact suffer “harm” from actions that undermine that community or culture. (Whether such harm justifies restrictions on such actions is, once again, a different and more complicated question.) Although at times Feinberg appears to concede the point, [FN121] in his more elaborate taxonomy this sort of injury is typically classified as an “evil” but not a “harm.” Nonetheless, in arguing passionately that no one’s liberty should be restricted to prevent this kind of evil, Feinberg seemingly makes at least tacit but powerful use of a more ordinary sense of “harm.”

Thus, Feinberg protests that restrictions aimed at protecting community character, by limiting the freedom of some individuals, would inflict “palpable harms” merely to avoid “states of affairs that harm no one.” [FN122] Such an exchange—of “palpable harms” for the cessation of harmless conduct—seems manifestly unreasonable, to be sure. But then of course it is only in Feinberg’s highly artificial sense of “harm” that the loss of a kind of valued culture or community “harm[s] no one”: in any less gerrymandered sense of the term such a loss might be viewed as a very serious injury. [FN123]

It is likewise wrong, Feinberg insists, “[i]f I am forbidden on pain of criminal punishment and public humiliation from acting as I prefer in ways that harm no one . . . .” [FN124] Same response. And again: “The free-floating evils do not hurt anybody; they cause no injury, offense, or distress. . . . To prevent them with the iron fist of legal coercion would be to impose suffering and injury for the sake of no one’s good at all.” [FN125] And yet again: “[I]t is no reason whatever to restrict A’s behavior simply because B disapproves of it, in the *37 absence of harm or offense.” [FN126] In each instance, the same response applies: these protests seem powerful and persuasive, but their power is dependent on the more ordinary and subjective senses of harm. Conversely, if we keep constantly in view that Feinberg is using “harm” in a “special narrow sense,” [FN127] as he at one point puts it, and that in fact the behavior he wants to immunize does cause harm in more ordinary senses, his pleas lose much of their force.
Indeed, it is at least arguable that Feinberg quietly depends on such slippage as the major source of support for his harm principle generally. In a perceptive and in some respects admiring review of Feinberg’s opus, Gerald Dworkin attempts to clarify just what the harm principle as advocated by Feinberg entails. Having done so, Dworkin asks, “What is the argument for it?” The response is sobering: “In truth, I cannot find a clear argument in Feinberg.” [FN128] So Dworkin comments wryly that “[a]s Bertrand Russell observed with respect to logical matters, postulation has all ‘the advantages of theft over honest toil.’” [FN129]

An inspection provides support for Dworkin’s judgment. The explication of the harm principle is the task primarily of Feinberg’s first volume. That book leads off with discussions of various senses of harm. It proceeds to introduce some intricate refinements into the concept—we have noticed a few of them—and then to apply the concept as refined in imaginative and provocative ways to a host of particular problems. It is not hard to understand why the book has generated the almost extravagant praise that it along with its sequels has received. [FN130] And yet . . . if one looks for any sustained justification of the harm principle as a limitation on government, one will search the book in vain.

Perhaps it seemed that no justification was needed. Feinberg may have imagined himself, as liberal theorists sometimes self-consciously do, to be engaged in a conversation with people who already share his basic assumptions and commitments, [FN131] so that only refinements, not full-scale defenses, were needed. [FN132]

Or perhaps the efficacy of the principle just seemed self-evident. Thus, after presenting a number of potentially controversial refinements in and applications of the harm principle, Feinberg comments sanguinely that “[a]s it has been formulated here, the harm-to-others principle is virtually beyond controversy.” [FN133] His confidence at this point seems remarkable. It may be true, as discussed earlier, that the core idea contained in the harm principle is a virtual truism. Unfortunately, the truism and Feinberg, though sharing the term “harm,” are not talking about the same thing.

D. Prioritizing Harms?

The preceding discussion has suggested that the harm principle cannot persuasively perform the jurisdictional function for which it is offered: it cannot serve as a device for delineating the domain of “liberty of action,” or the realm within which “power can be rightfully exercised over any member of a civilised community, against his will.” [FN134] Unless the notion of “harm” is gerrymandered to support the limits on coercion that the theorist already favors on other grounds (or “preanalytically,” as Feinberg puts it [FN135]), the natural conclusion will be that every action causes harm, and hence that every action is subject to governmental regulation.

The primary strategy for keeping the harm principle liberal, as we have seen, is to rig the notion of “harm” so as to justify the desired conclusions: but *39 that tactic provokes the objections just discussed. So sometimes, or in some moods, liberal theorists may confess the point while seeking to avoid the conclusion by suggesting that the basic harm principle needs to be “supplemented”—reinforced with further guidelines or maxims that will help government to navigate its way through the broad ocean of diverse and often conflicting concerns that the theorist is willing to count as “harms.”

Thus, even after refining the harm principle for almost 200 pages, Feinberg acknowledges that “[w]hatever this innocuous statement of the harm principle gains in plausibility, . . . it loses in practical utility as a guide to legislative decisions.”
Solutions to these [practical] problems cannot be provided by the harm principle in its simply stated form [sic!], but absolutely require the help of supplementary principles, some of which represent controversial moral decisions and maxims of justice. [FN136]

Feinberg then goes on to suggest a number of such “principles” and “maxims” that will help legislators balance and weigh the various competing interests that real-world legislative decisions must confront.

Some of these maxims and guidelines are controversial, as Feinberg acknowledges. For example, his (and other liberals’) argument that “personal” interests should usually be given priority over “external” interests—such as interests in living a particular kind of culture or community—asserts a distinction that is conceptually dubious and highly contestable as a normative matter. [FN137] By contrast, other proposed guidelines seem uncontroversially sound—almost platitudinous. Who will quarrel with the suggestion that in making policy choices, “we should protect an interest that is certain to be harmed in preference to one whose liability to harm is only conjectural, other things being equal”? Does anyone doubt that “we should deem it more important to prevent the total thwarting of one interest than the mere invasion to some small degree of another interest, other things being equal”? [FN138]

Whether or not the particular maxims and trade-offs proposed by Feinberg or other theorists are attractive, however, for the present discussion the crucial point is that these suggestions are no longer in service of the jurisdictional purpose for which the harm principle was offered. After all, the idea that reducing harm is an important desideratum in formulating public policies is hardly either a liberal or a modern idea: it is a point so obvious that it could scarcely be doubted by anyone of any political persuasion. Preventing crime and violence, protecting property in whatever form a particular regime recognizes it: these are the most basic functions that any government performs. It seems equally obvious and elementary that since what one person wants to have or do will sometimes collide with what other people want to have or do, governments will have to assess and compare different sorts of harms that are the subject of their laws and policies. Liberal theorists like Mill or Feinberg may have useful suggestions about how these comparisons and assessments should be made, of course, and they will surely want the assessments to be made in a way congenial to liberal or “progressive” values. But this is not the sort of problem for which the harm principle was offered.

That principle was and is held out, rather, as a device for delineating a realm within which the government has “no business.” [FN139] As we have seen, the harm principle seeks to establish the outer boundaries of the coercive use of law, not to tell government how to make decisions within those boundaries. As noted earlier, the harm principle was and is offered as a principle of “legitimacy,” or of proper jurisdiction, [FN140] as distinct from the domain of prudential judgment covering matters over which government does have jurisdiction. Conversely, maxims telling government how to balance or rank harms are addressed more to questions arising within the latter domain. Such maxims may be perfectly sensible, but it is misleading to present them as if they were supplements to or refinements of the harm principle. [FN141]

As we have seen, Mill was explicit about the principle’s jurisdictional or “legitimacy” purpose. [FN142] Likewise, at the beginning of his project Feinberg carefully and explicitly distinguishes between the questions of “legitimacy,” on the one hand, and of what we might call “policy” or prudential legislative judgments on the other; and he explains that his project will address the first of these questions, not the second.

It is not my purpose to try to specify what such a [legislative] body would choose to include in its ideally wise and useful penal code, but rather what it may include, if it chooses, within the limits that morality places on its legislative decisions. This four-volume work, then, . . . attempts to provide a coher-
ent and plausible set of moral principles to guide the legislator by locating the moral constraints that limit his options. The book will not consider the further questions of cost-benefit analysis that must guide the legislator in his choices among those alternatives that do fall within the recommended moral limits. Within the proper limits the legislator must consider the social utility of his various opinions, their likely effects on various private and public interests, constituent desires and pressures, even the demands of “politics” in a narrow sense (log-rolling, compromising, political debt-paying, etc.). Our primary question, however, is not one about social utility and practical wisdom. I do not offer suggestions here about what it would be “a good idea” to legislate within the scope of what may be legislated. This book is a quest not for useful policies but for valid principles. [FN143]

Later in the book, though, in offering suggestions and guidelines for the task of “Comparing and Assessing Harms,” [FN144] Feinberg effectively does just what he says he would not do: he addresses the question of how government should operate within the domain in which the harm principle would allow that regulation is legitimate. Indeed, his maxims are self-consciously addressed to “the legislative interest-balancer” [FN145] in an effort to guide judgment in matters over which the legislature is assumed to have jurisdiction, including matters such as setting the minimum drinking age, regulating competition, setting up licensing schemes, and reducing environmental pollution. [FN146]

There is nothing wrong, probably, with an author deciding mid-course to do more than he initially set out to do—to address questions he said he would not address. But it is misleading to suggest, as Feinberg does, that these various maxims and guidelines are “supplementing” the harm principle, [FN147] or are somehow strengthening it or making it more useable or defensible for its own distinct and jurisdictional purpose. In fact, the suggestions for “comparing and assessing harms” are performing a function altogether different than the one for which the harm principle is offered—a function for which the harm principle is, by Feinberg’s admission, of no use [FN148]—and they do nothing to make the harm principle more serviceable for its own function. Nor do these interest-balancing assessments do anything to make the harm principle itself less illiberal.

IV. Conclusion

Understood in any non-gerrymandered sense, the harm principle is a deeply illiberal idea. It effectively entails, in essence, that government has coercive jurisdiction over any conduct that anyone might have any reason to want to regulate. Thus, liberals have accomplished a remarkable feat in capturing the harm principle and turning it to their own purposes. But the feat has been achieved only at the cost of pervasive conceptual cheating—of equivocations about the meaning of “harm.” Meanwhile, the possibility that the principle’s intrinsic illiberal tendencies will revive remains ever present. Consequently, the harm principle ought to provoke misgivings even—or perhaps especially—in liberals. Announcement of the harm principle’s “collapse” [FN149] seem premature, but if the principle were to collapse, it is not clear that liberals should enlist among the mourners.

[FNa1]. I thank Larry Alexander, Don Dripps, Paul Horton, David McGowan, Michael Perry, Eric Rasmussen, and George Wright for helpful comments on earlier drafts. In addition, I was helped greatly by comments and suggestions in a workshop at the University of San Diego.


[FN4]. See infra, note 43.


[FN7]. In Goodridge v. Department of Public Health, 798 N.E.2d 941 (Mass. Sup. Jud. Ct. 2003), the state argued that permitting same-sex marriage would be detrimental to the upbringing of children and wasteful of resources. Unpersuaded, the court invalidated the restriction.


[FN9]. See Part II.A infra.

[FN10]. A variety of intellectual traditions converge on liberal commitments; what we can describe as the “Millian tradition” is only one of these. In this article, references to “liberals” or “liberalism” should be understood to refer to that tradition.

[FN11]. Mill, supra, note 1, 13. Some thinkers who accept the basic principle that government should restrict liberty only to prevent harm have rejected Mill’s further, anti-paternalistic claim that the harm must necessarily be to others. See, e.g., Hart, supra, note 2, 32-33: . . . Mill carried his protest against paternalism to lengths that may now appear to be fantastic. He cites the example of restrictions on the sale of drugs, and criticises them as interferences with the liberty of the would-be purchaser rather than with that of the seller. No doubt if we no longer sympathise with this criticism this is due, in part, to a general decline in the belief that individuals know their own interests best, and to an increased awareness of a great range of factors which diminish the significance to be attached to an apparently free choice or to consent. Choices may be made or consent given without adequate reflection or appreciation of the consequences; or in pursuit of merely transitory desires; or in various predicaments when the judgment is likely to be clouded; or under inner psychological compulsion; or under pressure by others of a kind too subtle to be susceptible of proof in a law court. Underlying Mill’s extreme fear of paternalism there perhaps is a conception of what a normal human being is like which now seems not to correspond to the facts. See also Cass R. Sunstein and Richard H. Thaler, “Libertarian Paternalism is not an Oxymoron,” University of Chicago Law Review 70 (2003) 1159.

[FN12]. Jorge Menezes Oliveira observes that “Mill does certainly not pretend that the [harm] principle is a sufficient condition for legitimate use of coercion against individuals; it specifies only a necessary condition . . . . It tells us when we may restrict liberty, not when we ought to.” Jorge Menezes Oliveira, “Harm and Offence in Mill’s Conception of Liberty,” http://www.trinitinture.com/documents/oliveira.pdf, p. 3 See also Feinberg, Harm
to Others, supra, note 3, 10.


[FN16] Dripps, supra, note 13, 10.


[FN18] For example, although the legendary Hart-Devlin debate may be remembered as one in which Hart defended and Devlin opposed the harm principle, on a more plausible interpretation Devlin agreed with Hart in accepting the harm principle itself and merely differed in his analysis of harm. See Feinberg, Harmless Wrongdoing, supra, note 3, 134.


[FN20] See Part III.


[FN25] Ibid., 16 (emphasis in original).


[FN27] Mill, supra, note 1, 87. See also ibid., 86 (arguing that “with the personal tastes and self regarding concerns of individuals the public has no business to interfere.”

[FN28] Feinberg, Harm to Others, supra, note 3, 7 (emphasis in original).


classic observation that your right to swing your arm ends at the tip of my nose”).


[FN33]. See Mill, supra, note 1, 75 (asserting that “society is not founded on a contract, and . . . no good purpose is answered by inventing a contract in order to deduce social obligations from it”). See also Hilary Putnam, Ethics without Ontology (Cambridge, MA: Harvard University Press, 2004), 6. (“Although Dewey agrees with the seventeenth-and eighteenth-century Enlightenment thinkers that just government must have the consent of the governed, he differs . . . in utterly rejecting the idea that we should think of society as based upon a ‘social contract’.”).

[FN34]. I bracket here the question of paternalism, upon which even those in the Millian tradition may divide. See supra, note 11.

[FN35]. Hart, supra, note 2, 57 (emphasis added).


[FN38]. In the matter of Conservatorship of Groves, 109 S.W. 3d 317, 328 (Tenn. Ct. App. 2003) (citing Mill for the proposition that “[a]utonomy, an adult person’s right to live life consistent with his or her personal values, is one of the bedrock principles of a free society”).


[FN43]. Ibid., 575:

Perhaps the dissenters believe that “offense to others” ought to be the only reason for restricting nudity in public places generally, but there is no basis for thinking that our society has ever shared that Thoreauvian “you-may-do-what-you-like-so-long-as-it-does-not-injure-someone-else” beau ideal—much less for thinking that it was written into the Constitution. The purpose of Indiana’s nudity law would be violated, I think, if 60,000 fully consenting adults crowded into the Hoosier Dome to display their genitals to one another, even if there were not an offended innocent in the crowd. Our society prohibits, and all human societies have prohib-
ated, certain activities not because they harm others but because they are considered, in the traditional phrase, “contra bonos mores,” i.e., immoral.


[FN46] Robert George observes that “[m]any, . . . perhaps even most, think that Hart carried the day.” Robert George, Making Men Moral (Oxford: Clarendon Press, 1993), 65. Jeffrie Murphy likewise recalls that “[l]ike most good liberals I sided with Hart and [John Stuart] Mill against Devlin . . . . I believed, along with most of the people with whom I talked about legal philosophy, that legal moralism had been properly killed off, that liberalism had once again been vindicated against the forces of superstition and oppression.” Jeffrie G. Murphy, “Legal Moralism and Liberalism,” Arizona Law Review 37 (1995) 73, 74-75. Joel Feinberg reports that it is “fair to say” that Devlin’s position has been “discredited.” Joel Feinberg, Harmless Wrongdoing, supra, note 3, 136. That verdict is contestable, I think, but this is not the place to revisit the matter.

[FN47] Harcourt, supra, note 6, 131.


[FN49] See Mill, supra, note 1, 98 (observing that “there are many acts which . . . if done publicly, are a violation of good manners, and coming thus within the category of offences against others, may rightfully be prohibited”). See generally Joel Feinberg, Offense to Others, supra, note 3.


[FN51] See supra, note 5.

[FN52] Communal harm arguments make up the primary justification supporting obscenity regulation, for example, in Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

[FN53] For a similar though somewhat more elaborate example, see Feinberg, Harmless Wrongdoing, supra, note 3, 57-60.

[FN55] See Restatement of the Law (Second) of Torts (St. Paul, MN: American Law Institute Publishers, 1965-79), section 46 (recognizing claim for outrageous conduct causing severe emotional distress); section 905 (including "emotional distress" in the "nonpecuniary harm" for which compensatory damages are available).

[FN56] Arneson, supra, note 50, 374 (emphasis added).


[T]he accumulation of private decisions to use pornography affects-sometimes profoundly-the community as a whole. For example, where pornography flourishes, as it does in our own culture, it erodes important shared public understandings of sexuality and sexual morality on which the health of the institutions of marriage and family life in any culture depend. This is a classic case in which the accumulation of apparently private choices of private parties has big public consequences.

[FN58] Arneson, supra, note 50, 375.


Suppose that the community is persuaded such a right [to pornography] exists, and that in consequence it would be wrong to forbid the use of pornography in private. That decision would sharply limit the ability of individuals consciously and reflectively to influence the conditions of their own and their families' sexual experience are likely to have these qualities in less degree. They would not be free to campaign for the enforcement hypothesis in politics on the same basis as others would be free to campaign, for example, for programs of conservation or of state aid to the arts . . . . If we are concerned only with the power of individuals to influence the conditions in which they must try to thrive, any theory of self-development that forbids the majority the use of politics and the law, even the criminal law, is at least prima facie self-defeating.

[FN61] Robert George compares public morality to a kind of “community's 'moral ecology'-an ecology as vital to the community's well-being, and, as such, as integral to the public interest, as the physical ecology which is protected by environmental laws.” George, Public Morality, supra, note 57, 25. The comparison to pollution has been developed at length by John Nagle. See John Copeland Nagle, “Moral Nuisances,” Emory Law Journal 50 (2001) 265; and “Corruption, Pollution, and Politics” (review essay), Yale Law Journal 110 (2000) 293.


[FN63] In the final volume of his series, Feinberg considers a situation much like our earlier example of a highly moralistic community in which a few citizens want to watch pornographic movies at home. Feinberg, Harmless Wrongdoing, supra, note 3, 57. Feinberg concedes (revealingly?) that when he wrote his first volume, Harm to Others, it had not occurred to him that moralistic citizens might seek to justify a restriction by asserting—quite plausibly, as he now admits—that they are harmed by their neighbors’ practice because “their paramount interest in living in a community of a certain sort has definitely been set back.” Ibid., 58. “If that had occurred to me in time,” he forthrightly acknowledges, “I no doubt would have tried to control the damage to my liberalism by adding another ‘mediating maxim for the application of the harm principle,’ one which would place constraints on the way appeals to harm prevention can be made in those quite common circumstances in which interests are opposed.” Ibid. Having noticed the difficulty, Feinberg then goes on to propose just such a further refinement—one favoring “personal” interests over “external” ones. Ibid., 59-64.
Similar distinctions had been invoked by liberal theorists before Feinberg, of course, see, e.g., Dworkin, supra, note 60, 359-72--and (in my view, at least) decisively criticized by other liberal theorists. See, e.g., John Hart Ely, “Professor Dworkin's External/Personal Preference Distinction,” Duke Law Journal 1983, 959; Arneson, supra, note 50, 380.

[FN64] Cf. George, “Public Morality,” supra, note 57, 30 (observing that “there are often compelling prudential reasons for law to tolerate vices, lest efforts to eradicate them produce worse evils still”).

[FN65] See, e.g., Feinberg, Harm to Others, supra note 3, 12 (declaring that “harm” must be refined because otherwise the harm principle “might be taken to invite state interference without limit, for virtually every kind of human conduct can affect the interests of others to some degree, and thus would properly be the state's business”); ibid., 65 (arguing that a narrow definition of “harm” must be stipulated because “otherwise we shall find ourselves defending the legitimacy of state interferences with liberty that, preanalytically, we would find dubious or wrong”).

[FN66] I say “prima facie” respect to acknowledge complexities that arise in cases in which a subject inaccurately assesses, say, the causal consequences of some occurrence. You eat some delicious food, for instance, and sincerely report that you have been benefitted, not harmed, but that is because you do not realize that the food is poisonous and that tomorrow you will die from eating it. Many arguments about harm may in fact arise from this sort of uncertainty or ignorance of long-range possibilities and consequences. Conceptually, however, such cases do not call for any departure from the subjective approach to harm. That is because we can assume that the satisfaction you get from the food is still, in itself, a benefit not a harm; and we can also assume that you yourself will regard the unforeseen consequenc-death-as a harm.

[FN67] Mill, supra, note 1, 14. It need not follow, however, that a purely utilitarian conception of “harm” would be employed.

[FN68] See, e.g., Hart, supra, note 2, 82-83.


[FN73] Ibid., 56. The shift was likely motivated, it seems, by Mill's desire to justify the satisfaction of “higher pleasures” over lower ones, and even to justify valuing subjective dissatisfaction suffered by someone living according to his higher or intellectual nature over the coarser pleasures experienced by baser or more vulgar souls. Contrary to Bentham's well-known dictum, Mill did not agree that pushpin (substitute poker, or pornography, or professional wrestling?) should be preferred to poetry if more people think pushpin is fun and poetry is a bore. “It is better to be a human being dissatisfied than a pig satisfied,” Mill famously insisted; “better to be Socrates
dissatisfied than a fool satisfied.” Ibid., 57. Mill’s nobler (and perhaps less democratic) predilections are difficult to square with a hedonic utilitarianism emphasizing mere “pleasure” as the ultimate good, but refocusing on “preferences” seemed more promising: that is because Mill thought that “competent judges” would in fact prefer and choose “higher” pleasures over baser ones, and would prefer to be a morose Socrates rather than a contented pig.

[FN74] Since people usually prefer pleasure over pain, it seems that the “pleasure/pain” and “preference” versions of utilitarianism (with their corollary understandings of “harm”) would often lead to the same conclusions. But they might diverge in some situations. If I am a masochist, for instance, and accordingly prefer to be in pain, then the first version of utilitarianism suggests that you act morally by not inflicting pain on me; the second version implies that the moral course would be to indulge my preference for pain.

[FN75] Cf. Feinberg, Harm to Others, supra, note 3, 191 (“Every form of voluntary activity, of course, can be presumed to have some value for those who choose to engage in it.”).

[FN76] Arneson, supra, note 50, 377. “‘Utility’ here is a measure of the value of each individual’s life from that very individual's perspective. The preferences and values of each individual regarding how she wishes her life to go (corrected by hypothetical rational deliberation with full information) supply the proper measure of value for that individual’s life.” Ibid.

[FN77] Ibid., 378 (emphasis added).

[FN78] In referring to liberal “rigging,” I mean the term “rigging” in both of its familiar senses—as an intricate piece of (in this case conceptual) equipment that is attached to the main body of something (the ship, the harm principle) in order to enable to perform its intended function, and as a practice of setting up a contest or controversy in a skewed way so as to assure the desired result.


[FN80] Ibid., 35-36

[FN81] Ibid., 65-66.

[FN82] Ibid., 65 (emphasis added).

[FN83] Ibid., 64, 63.

[FN84] Ibid., 63, 67-68.

[FN85] Ibid., 64.

[FN86] Ibid., 70.

[FN87] Ibid., 63.

[FN88] Cf. James Fitzjames Stephen, Liberty, Equality, Fraternity (Indianapolis, IN: Liberty Fund, 1993), 33. (questioning “Mr. Mill’s enthusiasm for individual greatness” and criticizing “[t]he odd manner in which Mr. Mill worships mere variety, and confounds the proposition that variety is good with the proposition that goodness is various”).
[FN89]. Mill, supra, note 1, 75 (emphasis added). On the circularity created by this limitation, see infra note

[FN90]. Jorge Menezes Oliveira explains that in Mill's view “one can have a vital interest to which one does not have a right, for instance a medicine stolen can be a vital interest to me, but the fact that it was stolen does not in normal circumstances allow one to say I have a right to it.” Oliveira, supra, note 12, 5 n.4.

[FN91]. Mill, supra, note 1, 75 (emphasis added).

[FN92]. See Feinberg, Harm to Others, supra, note 3, 218-21 (discussing “competitive interests”).

[FN93]. Dripps, supra, note 13, 9.

[FN94]. The circularity that may result from defining “harm” in terms of “rights” and “rights” in terms of “harm” is discussed at infra, note 102.

[FN95]. Feinberg, Harmless Wrongdoing, supra, note 3, 11.

[FN96]. Ibid., 32.

[FN97]. Bentham, supra, note 71, 3.

[FN98]. Feinberg, Harm to Others, supra, note 3, 33-34.

[FN99]. Ibid., 46, 45-51.

[FN100]. Ibid., 46:

Physical pains include pangs, twinges, aches, stabs, stitches, cricks, and throbs, as caused by cuts, bruises, sores, infections, muscle spasms, over-dilated or contracted arteries, gas pressures, and the like. Roughly analogous to these are various forms of mental suffering (they “hurt” too): “wounded” feelings, bitterness, keen disappointment, remorse, depression, grief, “heartache,” despair. Nonpainful forms of physical unpleasantness include nausea (which can be even more miserable a condition than pain, but does not, strictly speaking, hurt), itches, dizziness, tension, hyperactivity, fatigue, sleeplessness, chills, weakness, stiffness, extremes of heat and cold, and other discomforts.

[FN101]. Ibid., 47.

[FN102]. Ibid., 34.

There is in this limitation of harm to rights--a limitation imposed by both Mill and Feinberg--an obvious risk of circularity. After all, what “rights” we have against governmental interference with our liberty was precisely the question--or at least one way of stating the question--that the harm principle was supposed to help us answer in the first place. So it seems that we cannot know whether something counts as a “harm” unless we know what “rights” people have, and we cannot know what “rights” we have unless we know what will count as “harm.”

Feinberg notices, and briefly responds to, this apparent circularity. Ibid., 109-14. He acknowledges that the circularity would be vitiating if the rights invoked to classify which interests can be the subject of “harm” were legal rights. But he argues that the circularity can be avoided by specifying that the rights used to classify interests are “moral rights merely.” Ibid., 111. This suggestion might seem to demote the harm principle into a minor corollary of some larger doctrine of moral or “natural rights,” but Feinberg eschews any such doctrine. In-
stead, he tries to explicate the notion of “moral rights” by asserting that “any indefensible invasion of another's interest (excepting of course the sick and wicked ones) is a wrong,” and hence an infringement of a “moral right.” Ibid., 111-12. A critic might object that far from resolving the circularity, this response merely complicates the problem with additional normative questions. Which among the interests people think they have are genuine and valid, as opposed to “sick and wicked”? Is this a judgment liberals have standing to make? Isn’t the very introduction of the distinction dangerously illiberal? And how do we know which invasions of interests are “indefensible.” It seemed that these were the sorts of questions that the harm principle was supposed to help us answer (or deflect), but it turns out that we cannot even use the principle unless we already have answers to these questions.

[FN103]. Feinberg, Harmless Wrongdoing, supra, note 3, 17-20.

[FN104]. Ibid., 18.

[FN105]. Ibid., 20. The nature of these “free floating” misfortunes is mysterious. Why should we call something an “evil” if it has no detrimental impact on human concerns? Of course, utilitarians and others might plausibly consider injury to nonhuman but sentient beings--in particular, animal--to be harms. See Peter Singer, Rethinking Life and Death (New York: St. Martin’s, 1994), 172-80, but Feinberg does not take this course. Instead, his conclusory (and seemingly circular) explanation is that although these misfortunes neither “harm” nor hurt or offend anyone, they are nonetheless “evils” in the sense that they are “rather seriously to be regretted” because “the universe would be a better place without [the evil].” Feinberg, Harmless Wrongdoing, supra, note 3, 18. Feinberg gives examples of what he regards as free-floating evils: these include violation of moral taboos, false belief, extinction of a species, and “the wanton, capricious squashing of a beetle (frog, worm, spider, wild flower) in the wild”). Ibid., 20-25.

[FN106]. Although Mill does make this claim, Mill, supra, note 1, 13, as noted, he arguably relaxes the requirement at times. See, e.g., ibid., 98 (suggesting that public violations of “good manners” might be prohibited to avoid offense).

[FN107]. Feinberg, Offense to Others, supra, note 3.

[FN108]. Feinberg, Harmless Wrongdoing, supra, note 3, 38.

[FN109]. See supra, note 50.

[FN110]. Feinberg acknowledges the loss. See Feinberg, Harm to Others, supra, note 3, 25 (observing that “as many of his critics have since pointed out, neither Mill's principle nor the principles he rejects are simple and unitary”).

[FN111]. See supra, Part I.B.

[FN112]. Feinberg, Harm to Others, supra, note 3, 46.

[FN113]. In this vein, Richard Arneson objects that “the trouble with Feinberg's liberalism is that its categories privilege certain preferences and values of individuals over others no less rational, no less innocent, and no less worthy of regard.” Arneson, supra, note 50, 378.

[FN114]. Mill, supra, note 1, 13 (emphasis added).
[FN115]. Ibid., 56 (“But if he refrains from molesting others in what concerns them, and merely acts according
to his own inclination and judgment in things which concern himself . . . .); 61 (“in what concerns only them-
selves”); ibid., 80 (“the part of a person's life which concerns only himself”); 94 (“so far as these concern the in-
terests of no person but himself”); 104 (“A person should be free to do as he likes in his own concerns . . . .”); 108 (“the freedom of the individual in things which concern only himself”) (emphasis added).

[FN116]. Ibid., 63.

[FN117]. Ibid., 15 (emphasis added).

[FN118]. Ibid., 87. See also ibid., 76 (no jurisdiction “when a person's conduct affects the interests of no person
besides himself, or needs not affect them unless they like . . . .”).

[FN119]. Ibid., 77 (emphasis added).

[FN120]. For present purposes, once again, I am bracketing the contested question of paternalistic restrictions. See supra, note 11.

[FN121]. See supra, note 63.

[FN122]. Feinberg, Harmless Wrongdoing, supra, note 3, 67 (emphasis added).

[FN123]. See supra, Part II.B.

[FN124]. Feinberg, Harmless Wrongdoing, supra, note 3, 67 (emphasis added).

[FN125]. Ibid., 79-80 (emphasis added).

[FN126]. Ibid., 122 (emphasis added).

[FN127]. Feinberg, Harm to Others, supra, note 3, 118.

[FN128]. Gerald Dworkin, supra, note 15, 939. See also George, supra, note 50, 1416-17:

[Feinberg] recognizes that “the liberal position” on the moral limits of the criminal law is not self-
evidently true, and that its truth must therefore be established by argument. Despite this recognition, however,
his offers little direct or affirmative argument to establish its truth. His method is one of dialectical, rather than
direct, argumentation.

[FN129]. Dworkin, supra, note 15, 946. James Stephen made a similar complaint about Mill. “There is hardly
anything in [Mill's] whole essay which can properly be called proof as distinguished from enunciation or asser-
tion of the general principles quoted.” Stephen, supra, note 89, 8.

[FN130]. See supra, note 50.

[FN131]. See, e.g., John Rawls, “The Idea of Public Reason Revisited,” in Law of Peoples (Cambridge, MA: Harvard University Press, 1999), 131, 132 (noting, with respect to those with a “zeal to embody the whole truth in politics,” that “[p]olitical liberalism does not engage those who think in this way”); ibid., 178 (“They assert that the religiously true, or the philosophically true, overrides the politically reasonable. We simply say that such a doctrine is politically unreasonable. Within political liberalism nothing more need be said.”).
[FN132]. Feinberg indicates early on that he hopes “to persuade the skeptical reader that liberalism is true doctrine.” Feinberg, Harm to Others, supra, note 3, 15. This ambition might suggest that he is speaking at least in part to people who do not already share his liberal assumptions. Shortly thereafter, however, he explains that his methodology relies on the “coherence” or “ad hominem” method, which “presupposes a great deal of common ground between arguer and addressee (reader) to begin with.” Ibid., 18. Perhaps the clearest indication of intention explains that “I hope to convince many who share my basic ideals and attitudinal outlook also to share less obvious specific judgments about the particular subject matter of the book.” Ibid., 19. Perhaps that somewhat select audience is presumed to accept in advance the harm principle more or less as Feinberg presents it?

[FN133]. Ibid., 187.


[FN135]. Feinberg, Harm to Others, supra, note 3, 65.

[FN136]. Ibid., 187.

[FN137]. See supra, note 63. As noted, the “personal/external” guideline was not part of Feinberg's original set of maxims, but was developed later in response to perceived difficulties.

[FN138]. Feinberg, Harm to Others, supra, note 3, 204 (emphasis added). See generally ibid., 188-93.

[FN139]. See supra, notes 27-35 and accompanying text.

[FN140]. See Part I.A., supra.

[FN141]. See Dripps, supra, note 13, 8:

Because the harm principle takes a categorical form, the principle allows the imposition of criminal liability upon a showing of any harm, however slight. The principle says nothing about how to balance benefits against harms.

Cf. Harcourt, supra, note 6, 193 (“The original harm principle was never equipped to determine the relative importance of harms. Once a non-trivial harm argument has been made, the harm principle itself offers no further guidance.”).

[FN142]. Mill, supra, note 1, 13, 76.

[FN143]. Feinberg, Harm to Others, supra, note 3, 4 (emphasis partly added).

[FN144]. Ibid., 187.

[FN145]. Ibid., 207


[FN147]. Ibid., 187, 214.

[FN148]. Cf. ibid., 202, 203 (“The harm principle as so far clarified is a clear and univocal guide to the legislator only for the range of cases where he has no need of a guide at all.”) (“Where the legislator urgently needs guidance, however, the harm principle as so far clarified, being largely an empty formula, lets him down.”).
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