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Race and the New Reproduction

by
DOROTHY E. ROBERTS*

Introduction

New means of procreating are heralded by many legal scholars and social commentators as inherently progressive and liberating. In this view, in vitro fertilization (IVF), embryo donation, and contract pregnancy expand the procreative options open to individuals and therefore enhance human freedom. These innovations give new hope to infertile couples previously resigned to the painful fate of childlessness. In addition, this view holds that the new reproduction creates novel family arrangements that break the mold of the traditional nuclear family. A child may now have five parents: a genetic mother and father who contribute egg and sperm, a gestational mother who carries the implanted embryo, and a contracting mother and father who intend to raise the child.¹ A proponent of new means of reproduction, John Robertson opens his book *Children of Choice* by proclaiming that these "powerful new technologies" free us from the ancient subjugation to "the luck of the natural lottery" and "are challenging basic notions about procreation, parenthood, family, and children."²

My impression of these technologies, however, is that they are more conforming than liberating: they more often reinforce the status quo than challenge it. True, these technologies often free outsiders from the constraints of social convention and legal restrictions. They have helped single heterosexual women, lesbians, and gay men, whom

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1. See generally John L. Hill, *What Does It Mean To Be a "Parent"?: The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 355 (1991); Andrea E. Stumpf, Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 192-94 (1986).

2. John Robertson, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 3 (1995).

society regards as unqualified to raise children, to circumvent legal barriers to parenthood.³ Informal surrogacy arrangements between women, for example, may provide a means of self-help for women who wish to have children independently of men; moreover, they have the advantage of requiring no government approval, medical intervention, or even sexual intercourse.⁴

But these technologies rarely serve to subvert conventional family norms. Most often they complete a traditional nuclear family by providing a married couple with a child.⁵ Rather than disrupt the stereotypical family, they enable infertile couples to create one. Most IVF clinics only accept heterosexual married couples as clients,⁶ and most physicians have been unwilling to assist in the insemination of single women.⁷ The new reproduction's conservative function is often imposed by courts and legislatures, as well. Laws regulating artificial insemination contemplate use by a married woman and recognition of her husband as the child's father,⁸ and recent state legislation requiring insurance coverage of IVF procedures applies only when a wife's eggs are fertilized using her husband's sperm.⁹ On the other hand, as Martha Field observes, courts have been willing to grant parental rights to sperm donors "when no other man is playing the role of father for the child," such as when the mother is a lesbian or unmarried.¹⁰

3. See Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 466 (1990); Sharon E. Rush, *Breaking with Tradition: Surrogacy and Gay Fathers*, in *KINDRED MATTERS: RETHINKING THE PHILOSOPHY OF THE FAMILY* 102, 132-33 (Diana Tietjens Meyers et al. eds., 1993).

4. Juliette Zipper & Selma Sevenhuijsen, *Surrogacy: Feminist Notions of Motherhood Reconsidered*, in *REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD AND MEDICINE* 118, 137-38 (Michelle Stanworth ed., 1987). Under this arrangement, a fertile woman would informally promise an infertile woman who wants a child to impregnate herself with a man's sperm and to give the baby to the infertile woman for adoption.

5. Robertson, *supra* note 2, at 145 (noting that assisted reproduction furthers the "primary aim to provide a couple with a child to live and rear in a two-parent family").

6. Thomas A. Shannon, *In Vitro Fertilization: Ethical Issues*, in *EMBRYOS, ETHICS, AND WOMEN'S RIGHTS: EXPLORING THE NEW REPRODUCTIVE TECHNOLOGIES* 155, 163 (Elaine Hoffman Baruch et al. eds., 1988).

7. Daniel Wikler & Norma J. Wikler, *Turkey-baster Babies: The Demedicalization of Artificial Insemination*, 69 MILBANK Q. 5, 13-16 (1991).

8. Bartha M. Knoppers & Sonia LeBris, *Recent Advances in Medically Assisted Conception: Legal, Ethical and Social Issues*, 17 AM. J.L. & MED. 329, 332-33, 346-47 (1991); Lisa C. Ikemoto, *Destabilizing Thoughts on Surrogacy Legislation*, 28 U.S.F. L. REV. 633, 636-37 (1994).

9. See, e.g., MD. CODE ANN., Art. 48a, § 354 DD(3) (West 1995); HAW. REV. STAT. § 431:10A-116.5(3) (West 1995).

10. MARTHA FIELD, *SURROGATE MOTHERHOOD* 116 (1988).

Feminists have powerfully demonstrated that the new reproduction enforces traditional patriarchal roles that privilege men's genetic desires and objectify women's procreative capacity.¹¹ They make a convincing case that IVF serves more to help married men produce genetic offspring than to give women greater reproductive freedom.¹² In this essay I will explore how these technologies reflect and reinforce the racial hierarchy in America. I will focus primarily on in vitro fertilization because it is the technology least accessible to Black people and most advantageous to those concerned about genetic linkages.¹³ The salient feature of in vitro fertilization that distinguishes it from other means of assisted reproduction is that it enables an infertile couple to have a child who is genetically-related to the husband.¹⁴

I. The Role of Race in the New Reproduction

A. Racial Disparity in the Use of Reproductive Technologies

One of the most striking features of the new reproduction is that it is used almost exclusively by white people. Of course, the busiest fertility clinics can point to some Black patients; but they stand out as rare exceptions.¹⁵ Only about one-third of all couples experiencing infertility seek medical treatment at all; and only 10 to 15 percent of infertile couples use advanced techniques like IVF.¹⁶ Blacks make up a disproportionate number of infertile people avoiding reproductive technologies.

When I was recently transfixed by media coverage of battles over adopted children, "surrogacy" contracts, and frozen embryos, a friend

11. See, e.g., Janice G. Raymond, *WOMEN AS WOMBES: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM* (1993); Barbara Katz Rothman, *RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY* (1989); *REPRODUCTION, ETHICS, AND THE LAW: FEMINIST PERSPECTIVES* (Joan C. Callahan ed., 1995).

12. See, e.g., Susan Sherwin, *NO LONGER PATIENT: FEMINIST ETHICS AND HEALTH CARE* 127 (1992).

13. I capitalize the "B" in Black Americans because I believe that Black Americans consider themselves to be an ethnic group, like Asian-Americans, whereas I believe that white Americans do not see themselves in that way.

14. As I explain below, many women who could conceive through artificial insemination prefer the more expensive and risky IVF because it can produce a baby with a genetic link to their husband. See *infra* note 28 and accompanying text.

15. See Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L.REV. 623, 646 (1991); F.P. Haseltine et al., *Psychological Interviews in Screening Couples Undergoing In Vitro Fertilization*, 442 ANNALS N.Y. ACAD. SCI. 504, 507 (1985); Martha Southgate, *Coping with Infertility*, ESSENCE, Sept. 1994, at 28, 28.

16. OFFICE OF TECHNOLOGY ASSESSMENT, *INFERTILITY: MEDICAL AND SOCIAL CHOICES* (OTA-BA-358) 7, 49-60 (1988).

questioned my interest in the new methods of reproduction. "Why are you always so fascinated by those stories?" he asked. "They have nothing to do with Black people."¹⁷ Think about the images connected with reproduction-assisting technologies: They are almost always of white people. And the baby in these stories often has blond hair and blue eyes—as if to emphasize her racial purity. A "Donahue" show featured the family of the first public surrogacy adoption. Their lawyer Noel Keane describes the baby, Elizabeth Anne, as "blonde-haired, blue-eyed, and as real as a baby's yell."¹⁸ He concludes, "The show was one of Donahue's highest-rated ever and the audience came down firmly on the side of what Debbie, Sue, and George had done to bring Elizabeth Anne into the world."¹⁹

In January, 1996, the New York Times launched a prominent four-article series entitled *The Fertility Market*, and the front page photograph displayed the director of a fertility clinic surrounded by seven white children conceived there while the continuing page featured a set of beaming IVF triplets, also white.²⁰

When we do read news accounts involving Black children created by these technologies they are always sensational stories intended to evoke revulsion at the technologies' potential for harm. In 1990, a white woman brought a lawsuit against a fertility clinic which she claimed had mistakenly inseminated her with a Black man's sperm, rather than her husband's, resulting in the birth of a Black child.²¹ Two reporters covering the story speculated that "[i]f the suit goes to trial, a jury could be faced with the difficult task of deciding the damages involved in raising an interracial child."²² Although receiving the wrong gametes was an injury in itself, the fact that the gametes were of the wrong race added a unique dimension of harm to the error.

In a similar, but more bizarre, incident in the Netherlands in 1995, a woman who gave birth to twin boys as a result of IVF realized when the babies were two months old that one was white and one was

17. I first recounted this story in Roberts, *supra* note *, at 209.

18. Noel P. Keane & Dennis L. Breo, *THE SURROGATE MOTHER* 96 (1981).

19. *Id.*

20. Trip Gabriel, *High-Tech Pregnancies Test Hope's Limit*, N.Y. TIMES, Jan. 7, 1996, at 1, 10.

21. Robin Schatz, "Sperm Mixup" *Spurs Debate: Questioning Safeguards, Regulations*, N.Y. NEWSDAY, Mar. 11, 1990, at 3; Ronald Sullivan, *Mother Accuses Sperm Bank of a Mixup*, N.Y. TIMES, Mar. 9, 1990, at B1.

22. Barbara Kantrowitz & David A. Kaplan, *Not the Right Father*, NEWSWEEK, Mar. 19, 1990, at 50, 50.

Black.²³ A Newsweek article subtitled "A Fertility Clinic's Startling Error" reported that "while one boy was as blond as his parents, the other's skin was darkening and his brown hair was fuzzy."²⁴

It is easy to conclude that the stories displaying blond-haired blue-eyed babies born to white parents are designed to portray the positive potential of the new reproduction, while the stories involving the mixed-race children reveal its potential horror.

These images and the predominant use of IVF by white couples indisputably reveal that race in some way helps to shape both the use and popularity of IVF in America. What are the reasons underlying this connection between race and the new reproduction?

First, the racial disparity in new reproduction has nothing to do with rates of infertility. Married Black women have an infertility rate one and one-half times higher than that of married white women.²⁵ In fact, the profile of people most likely to use IVF is precisely the opposite of those most likely to be infertile. The people in the United States most likely to be infertile are older, poorer, Black and poorly educated.²⁶ Most couples who use IVF services are white, highly educated, and affluent.²⁷

Besides, the new reproduction has far more to do with enabling people (mostly men) to have children who are genetically related to them than with helping infertile people to have children.²⁸ The well-known "surrogacy" cases such as *Baby M* and *Anna J.* involved fertile white men with infertile wives who hired gestational mothers in order to pass on their own genes. Moreover, at least half of women who undergo IVF are themselves *fertile*, although their husbands are not.²⁹ These women could conceive a child far more safely and inexpensively by using artificial insemination although the child would not be genet-

23. Dorinda Elliott & Friso Endt, *Twins—With Two Fathers; The Netherlands: A Fertility Clinic's Startling Error*, NEWSWEEK, July 3, 1995, at 38, 38.

24. *Id.*

25. Laurie Nsiah-Jefferson & Elaine J. Hall, *Reproductive Technology: Perspectives and Implications for Low-Income Women and Women of Color*, in HEALING TECHNOLOGY: FEMINIST PERSPECTIVES 93, 108 (Kathryn Strother Ratcliff et al. eds., 1989).

26. Sevgi O. Aral & Willard Cates, Jr., *The Increasing Concern With Infertility: Why Now?*, 250 JAMA 2327, 2327 (1983).

27. Andrews & Douglass, *supra* note 15, at 646.

28. Joan C. Callahan, *Introduction to Reproduction, Ethics and the Law: Feminist Perspectives*, *supra* note 11, at 24-25.

29. Raymond, *supra* note 11, at 6; Judith Lorber, *Choice, Gift, or Patriarchal Bargain?: Women's Consent to In Vitro Fertilization in Male Infertility*, in FEMINIST PERSPECTIVES IN MEDICAL ETHICS 169, 171 (Helen Bequaert Holmes & Laura M. Purdy eds., 1992).

ically-related to the husband. Underlying their use of IVF, then, is often their husbands' insistence on having a genetic inheritance. In short, use of reproduction-assisting technologies does not depend strictly on the physical incapacity to produce a child.

Instead, the reason for the racial disparity in fertility treatment appears to be a complex interplay of financial barriers, cultural preferences, and more deliberate professional manipulation. The high cost of the IVF procedure places it out of reach of most Black people whose average median income falls far below that of whites. The median cost of one procedure is about \$8,000; and, due to low success rates, many patients try several times before having a baby or giving up.³⁰ Most medical insurance plans do not cover IVF, nor is it included in Medicaid benefits.³¹ IVF requires not only huge sums of money, but also a privileged lifestyle that permits devotion to the arduous process of daily drug injections, ultrasound examinations and blood tests, egg extraction, travel to an IVF clinic, and often multiple attempts—a luxury that few Black people enjoy. As Dr. O'Delle Owens, a Black fertility specialist in Cincinnati explained, "For White couples, infertility is often the first roadblock they've faced—while Blacks are distracted by such primary roadblocks as food, shelter and clothing."³² Black people's lack of access to fertility services is also an extension of their more general marginalization from the health care system.

There is evidence that some physicians and fertility clinics may deliberately steer Black patients away from reproductive technologies. For example, doctors are more likely to diagnose white professional women with infertility problems such as endometriosis that can be treated with in vitro fertilization.³³ In 1976, one doctor found that over 20 percent of his Black patients who had been diagnosed as having pelvic inflammatory disease, often treated with sterilization, actually suffered from endometriosis.³⁴

30. Gabriel, *supra* note 20, at 10-11.

31. Annetta Miller et al., *Baby Makers Inc.*, NEWSWEEK, June 29, 1992, at 38, 38; Gabriel, *supra* note 20, at 10; George J. Annas, *Fairy Tales Surrogate Mothers Tell*, 16 L. ED. HEALTH CARE 27, 28 (1988). Only 10 states require insurance coverage of IVF. Gabriel, *supra* note 20, at 10.

32. Monique Burns, *A Sexual Time Bomb: The Declining Fertility Rate of the Black Middle Class*, EBONY, May 1995, at 74, 76.

33. Lisa C. Ikemoto, *Destabilizing Thoughts on Surrogacy Legislation*, 28 U.S.F. L. REV. 633, 639 (1994).

34. Donald L. Chatman, *Endometriosis in the Black Woman*, 125 AM. J. OBSTETRICS & GYNECOLOGY 987, 987 (1976).

Screening criteria not based specifically on race tend to exclude Black women, as well. Most Black children in America today are born to single mothers, so a rule requiring clients to be married would work disproportionately against Black women desiring to become mothers. One IVF clinic addresses the high cost of treatment by offering a donor oocyte program that waives the IVF fee for patients willing to share half of their eggs with another woman.³⁵ The egg recipient in the program also pays less by forgoing the \$2000 to \$3000 cost for an oocyte donor.³⁶ I cannot imagine that this program would help many Black patients, since it is unlikely that the predominantly white clientele would be interested in donations of *their* eggs.

The racial disparity in the use of reproductive technologies may be partially self-imposed. The myth that Black people are overly fertile may make infertility especially embarrassing for Black couples.³⁷ One Black woman who eventually sought IVF treatment explained, "Being African-American, I felt that we're a fruitful people and it was shameful to have this problem. That made it even harder."³⁸ Blacks may find it more emotionally difficult to discuss their problem with a physician, especially considering the paucity of Black specialists in this field. Blacks may also harbor a well-founded distrust of technological interference with their bodies and genetic material at the hands of white physicians.

Finally, Blacks may have an aversion to the genetic marketing aspect of the new reproduction. Black folks are skeptical about any obsession with genes. They know that their genes are considered undesirable and that this alleged genetic inferiority has been used for centuries to justify their exclusion from the economic, political and social mainstream. Only last year Richard Herrnstein & Charles Murray's *The Bell Curve* was a national bestseller, and it reopened the public debate about racial differences in intelligence and the role genetics should play in social policy.³⁹

Blacks have understandably resisted defining personal identity in biological terms. Blacks by and large are more interested in escaping the constraints of racist ideology by defining themselves apart from inherited traits. They tend to see group membership as a political and

35. COOPER CENTER FOR IVF, *Cooper Center for IVF Responds to the Fertility Market*, N.Y. TIMES, Jan. 14, 1996, at 16 (advertisement).

36. *Id.*

37. Martha Southgate, *Coping with Infertility*, ESSENCE, Sept. 1994, at 28, 28.

38. *Id.*

39. See Richard J. Herrnstein & Charles Murray, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994).

cultural affiliation. Their family ties have traditionally reached beyond the bounds of the nuclear family to include extended kin and non-kin relationships.

My experience has been that fertility services simply are not a subject of conversation in Black circles, even among middle-class professionals. While I have recently noticed stories about infertility appearing in magazines with a Black middle-class readership such as *Ebony* and *Essence*, these articles conclude by suggesting that childless Black couples seriously consider adoption.⁴⁰ Black professional women I know are far more concerned about the assault that recent welfare reform efforts are inflicting on our poorer sisters' right to bear children—an assault that devalues all Black women and children in America.⁴¹

Moreover, Black women are also more concerned about the higher rates of sterilization in our community, a disparity that cuts across economic and educational lines. One study found that 9.7 percent of college-educated Black women had been sterilized, compared to 5.6 percent of college-educated white women.⁴² The frequency of sterilization increased among poor and uneducated Black women. Among women without a high school diploma, 31.6 percent of Black women and 14.5 percent of white women had been sterilized.⁴³

B. The Importance of the Genetic Tie

Race also influences the importance we place on IVF's central aim—having genetically-related children.

Of course sharing a genetic tie with children is important to people of different races and in racially homogeneous cultures. Most parents I know take great satisfaction in having children who “take after them.” It seems almost natural for people to want to pass down their genes to their children, as if they achieve a form of immortality by continuing their “blood line” into future generations.

Yet we also know that the desire to have genetically-related children is influenced, if not created, by our culture. A number of feminists have advocated abandoning the genetic model of parenthood because of its origins in patriarchy and its “preoccupation with male

40. See, e.g., Burns, *supra* note 32, at 148; Southgate, *supra* note 37, at 28.

41. See Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 *YALE L.J.* 1563, 1582 (1996) (book review).

42. LEVIN & TAUB, *Reproductive Rights, in WOMEN AND THE LAW* sec. 10A.07[3][b], 10A-28 (C. Lefcourt ed., 1989).

43. *Id.*

seed."⁴⁴ We should add to these concerns the tremendous impact that the inheritability of race has had on the meaning of the genetic tie in American culture.

The social and legal meaning of the genetic tie helped to maintain a racial caste system that preserved white supremacy through a rule of racial purity.⁴⁵ The contradiction of slavery existing in a republic founded on a radical commitment to liberty required a theory of racial hierarchy. Whites took the hereditary trait of race and endowed it with the concept of racial superiority and inferiority;⁴⁶ they maintained a clear demarcation between Black slaves and white masters by a violently enforced legal system of racial classification and sexual taboos.⁴⁷

The genetic tie to a slave mother not only made the child a slave and subject to white domination; it also passed down a whole set of inferior traits. Children born to a slave, but fathered by the white master, automatically became slaves, not members of the master's family. To this day, one's social status in America is determined by the presence or absence of a genetic tie to a Black parent. Conversely, the white genetic tie—if free from any trace of blackness—is an extremely valuable attribute entitling a child to a privileged status, what Cheryl Harris calls the "property interest in whiteness."⁴⁸

For several centuries a paramount objective of American law and social convention was keeping the white bloodline free from Black contamination. It was only in 1967 that the United States Supreme Court in *Loving v. Virginia*⁴⁹ ruled antimiscegenation laws unconstitutional. Thus, ensuring genetic relatedness is important for many reasons, but, in America, one of those reasons has been to preserve white racial purity.

44. Joan C. Callahan, *Introduction to REPRODUCTION, ETHICS, AND THE LAW: FEMINIST PERSPECTIVES*, *supra* note 11, at 1, 11. See, e.g., Rothman, *supra* note 11, at 39; Christine Overall, *ETHICS AND HUMAN REPRODUCTION: A FEMINIST ANALYSIS* 149 (1987) (noting that "the need for a genetic connection with one's offspring seems to be of particular importance to men").

45. Roberts, *supra* note *, at 223-30.

46. See Stephen Jay Gould, *THE Mismeasure of Man* (1981).

47. Barbara K. Kopytoff & A. Leon Higginbotham, Jr., *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 *GEORGETOWN L.J.* 1967, 1967-68 (1989).

48. Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1707, 1713 (1993).

49. 388 U.S. 1 (1967).

C. Value of Technologically Created Children

Finally, the new reproduction graphically reflects and reinforces the disparate values placed on members of social groups.

The monumental effort, expense and technological invention that goes into the new reproduction marks the children produced as especially valuable. It proclaims the unmistakable message that white children are precious enough to devote billions of dollars towards their creation. Black children, on the other hand, are the primary object of welfare reform measures designed to discourage poor women from procreating.

III. Implications for Policy Regarding the New Reproduction

What does it mean that we live in a country in which white women disproportionately use expensive technologies to enable them to bear children, while Black women disproportionately undergo surgery that prevents them from being able to bear any? Surely this contradiction must play a critical part in our deliberations about the morality of these technologies. What exactly does race mean for our own understanding of the new reproduction?

Let us consider three possible responses. First, we might acknowledge that race influences the use of reproductive technologies, but decide this does not justify interfering with individuals' liberty to use them. Second, we could work to ensure greater access to these technologies by lowering costs or including IVF in insurance plans. Finally, we might determine that these technologies are harmful and that their use should therefore be discouraged.

A. The Liberal Response: Setting Aside Social Justice

The liberal response to this racial disparity is that it stems from the economic and social structure, not from individuals' use of reproductive technologies. Protection of individuals' procreative liberty should prohibit government intervention in the choice to use IVF, as long as that choice itself does not harm anyone.⁵⁰ Currently, there is little government supervision of reproduction-assisting technologies, and many proponents fear legal regulation of these new means of reproduction. In their view, financial and social barriers to IVF are unfortunate but inappropriate reasons to interfere with the choices of those fortunate enough to have access to this technology. Nor, ac-

50. See generally ROBERTSON, *supra* note 2, at 22-42.

ording to the liberal response, does the right to use these technologies entail any government obligation to provide access to them. And if for cultural reasons Blacks choose not to use these technologies, this is no reason to deny them to people who have different cultural values.

Perhaps we should not question infertile couples' motives for wanting genetically-related children. After all, people who have children the old-fashioned way may also practice a form of genetic selection when they choose a mate. The desire to share genetic traits with our children may not reflect the eugenic notion that these particular traits are *superior* to others; rather, as Barbara Berg notes, "these characteristics may simply symbolize to the parents the child's connection to past generations and the ability to extend that lineage forward into the future."⁵¹ Several people have responded to my concerns about race by explaining to me, "White couples want white children not because of any belief in racial superiority, but because they want children who are like them."

Moreover, the danger of government scrutiny of people's motives for their reproductive decisions may override my concerns about racism. This danger leads some feminists who oppose the practice of using abortion as a sex selection technique, for example, nevertheless to oppose its legal prohibition.⁵² As Tabitha Powledge explained:

To forbid women to use prenatal diagnostic techniques as a way of picking the sexes of their babies is to begin to delineate acceptable and unacceptable reasons to have an abortion I hate these technologies, but I do not want to see them legally regulated because, quite simply, I do not want to provide an opening wedge for legal regulation of reproduction in general.⁵³

It would be similarly unwise to permit the government to question individuals' reasons for deciding to use reproduction-assisting technologies.

B. The Distributive Solution

The distributive solution does not question individuals' motives in order to question the societal impact of a practice.⁵⁴ This approach to

51. Barbara J. Berg, *Listening to the Voices of the Infertile*, in REPRODUCTION, ETHICS, AND THE LAW: FEMINIST PERSPECTIVES, *supra* note 11, at 80, 82.

52. Joan C. Callahan, *Introduction, Part II: Prenatal and Postnatal Authority to REPRODUCTION, ETHICS, AND THE LAW: FEMINIST PERSPECTIVES*, *supra* note 11, at 133-134.

53. Tabitha M. Powledge, *Unnatural Selection: On Choosing Children's Sex*, in THE CUSTOM-MADE CHILD?: WOMEN-CENTERED PERSPECTIVES 193, 197 (Helen B. Holmes et al. eds., 1981).

54. See Overall, *supra* note 44, at 17-39.

procreative liberty places more importance on reproduction's social context than does the liberal focus on the fulfillment of individual desires.⁵⁵ Policies governing reproduction not only affect an individual's personal identity; they also shape the way we value each other and interpret social problems. The social harm that stems from confining the new reproduction largely to the hands of wealthy white couples might be a reason to demand equalized access to these technologies.

Obviously the unequal distribution of wealth in our society prevents the less well off from buying countless goods and services that wealthy people can afford. But there may be a reason why we should be especially concerned about this disparity when it applies to reproduction.

Reproduction is special. Government policy concerning reproduction has tremendous power to affect the status of entire groups of people. This is why the Supreme Court in *Skinner v. Oklahoma* declared the right to bear children to be "one of the basic civil rights of man."⁵⁶ "In evil or reckless hands," Justice Douglas wrote, the government's power to sterilize "can cause races or types which are inimical to the dominant group to wither and disappear."⁵⁷ This explains why in the *Casey* opinion Justices O'Connor, Kennedy, and Souter stressed the importance the right to an abortion had for women's equal social status. It is precisely the connection between reproduction and human dignity that makes a system of procreative liberty that privileges the wealthy and powerful particularly disturbing.

Procreative liberty's importance to human dignity is a compelling reason to guarantee the equal distribution of procreative resources in society. Moreover, the power of unequal access to these resources to entrench unjust social hierarchies is just as pernicious as government interference in wealthy individuals' expensive procreative choices. We might therefore address the racial disparity in the use of reproductive technologies by ensuring through public spending that their use is not concentrated among affluent white people. Government subsidies, such as Medicaid coverage of IVF, and legislation mandating pri-

55. For a more extended critique of the liberal approach to reproduction-assisting technologies, see Dorothy E. Roberts, *Social Justice, Procreative Liberty, and the Limits of Liberal Theory: Robertson's Children of Choice*, 20 L. & SOC. INQUIRY 601 (1995); Joan C. Callahan & Dorothy E. Roberts, *A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory*, ___ KY. L. REV. ___ (forthcoming 1996).

56. 316 U.S. 535, 541 (1942).

57. *Id.*

vate insurance coverage of IVF would allow more diverse and widespread enjoyment of the new reproduction.

C. Should We Discourage the New Reproduction?

If these technologies are in some ways positively harmful, will expanding their distribution in society solve the problem? The racial critique of the new reproduction is more unsettling than just its exposure of the maldistribution of fertility services. It also challenges the importance that we place on genetics and genetic ties.

But can we limit individuals' access to these technologies without critically trampling our protection of individual freedom from unwarranted government intrusion? After all, governments have perpetrated as much injustice on the theory that individual interests must be sacrificed for the public good as they have on the theory that equality must be sacrificed for individual liberty. This was the rationale justifying eugenic sterilization laws enacted earlier in this century.⁵⁸

Even for liberals, individuals' freedom to use reproductive technologies is not absolute. Most liberals would place some limit on their use, perhaps by defining the legitimate reasons for procreation.⁵⁹ If a core view of reproduction can limit individuals' personal procreative decisions, then why not consider a view that takes into account reproduction's role in social arrangements of wealth and power? If the harm to an individual child or even to a core notion of procreation can justify barring her parents from using the technique of their choice, then why not the new reproduction's potential for worsening group inequality?

Some have concluded that the harms caused by certain reproduction-assisting practices justify their prohibition. In 1985, for example, the United Kingdom passed the Surrogacy Arrangements Act banning commercial contract pregnancy arrangements and imposing fines and/or imprisonment on the brokers who negotiate these agreements.⁶⁰ Some Marxist and radical feminists agree that paid preg-

58. See Mark H. Haller, *Eugenics: Hereditarian Attitudes in American Thought* (1963).

59. See, e.g., Robertson, *supra* note 2, at 167 (positing "a core view of the goals and values of reproduction" that limits an individual's right to shape offspring characteristics).

60. Rosemarie Tong, *Feminist Perspectives on Gestational Motherhood: The Search for a Unified Focus*, in REPRODUCTION, ETHICS, AND THE LAW: FEMINIST PERSPECTIVES, *supra* note 11, at 55, 58 (citing Surrogacy Arrangements Act, 1985, United Kingdom, Chapter 49, p.2 (1)(a)(b)(c)).

nancy contracts should be criminalized to prevent their exploitation and commodification of women and children.⁶¹

On the other hand, the government need not depart at all from the liberal noninterference model of rights in order to discourage or refuse to support practices that contribute to social injustice.⁶² Even the negative view of liberty that protects procreative choice from government intrusion leaves the state free to decide not to lend assistance to the fertility business or its clients.

We may therefore question a practice that channels millions of dollars into the fertility business, rather than spending similar amounts on programs that would provide more extensive benefits to infertile people. *New York Times* writer Trip Gabriel describes IVF clinics as “[a] virtually free-market branch of medicine, the \$350 million-a-year business has been largely exempt from government regulation and from the downward pressure on costs that insurance companies exert.”⁶³

Indeed, we can no longer avoid these concerns about the social costs and benefits of IVF. Such calculations are now part of the debate surrounding the advisability of state laws requiring insurance companies to include the cost of fertility treatment in their coverage. A study recently reported in the *New England Journal of Medicine* calculated the real cost of IVF at approximately \$67,000 to \$114,000 per successful delivery.⁶⁴ The authors concluded that the debate about insurance coverage must take into account these economic implications of IVF, as well as ethical and social judgments about resource allocation.⁶⁵

Black women in particular would be better served by a focus on the basic improvement of conditions that lead to infertility, such as occupational and environmental hazards, diseases, and complications following childbirth and abortion.⁶⁶

61. *Id.* at 64-68.

62. Callahan & Roberts, *supra* note 55.

63. Gabriel, *supra* note 20, at 10.

64. Peter J. Neuman et al., *The Cost of a Successful Delivery with In Vitro Fertilization*, 331 *NEW ENG. J. MED.* 239, 239 (1994). Unlike the \$8,000 cost per IVF cycle mentioned above, the figures quoted in this study refer to the cost involved in the *birth* of at least one live baby as a result of an IVF cycle.

65. *Id.*

66. See Nadine Taub, *Surrogacy: A Preferred Treatment for Infertility?*, 16 *L. MED. & HEALTH CARE* 89 (1988).

Taking these social justice concerns more seriously, then, might justify government efforts to reallocate resources away from expensive reproductive technologies.

Conclusion

These are thorny questions. It is extremely difficult to untangle white couples' reasons for using reproduction-assisting technologies and Black couples' reasons for avoiding them. Evidence is hard to come by: what doctor or fertility clinic will admit (at least publicly) to steering Black women away from their services? Few people seem to want to confront the obvious complexion of this field. Moreover, the problems raised by the racial disparity in the use of these technologies will not be solved merely by attempting to expand their distribution. Indeed, the concerns I have raised in this essay may be best addressed by placing restrictions on the use and development of the technologies, restrictions imposed by the government or encouraged by moral persuasion. This possibility is met by a legitimate concern about protection of our private decisions from government scrutiny. Indeed, Black women are most vulnerable to government efforts to control their reproductive lives.

Nonetheless, we cannot ignore the negative impact that the racial disparity and imagery of the new reproduction can have on racial inequality in America. Our vision of procreative liberty must include the eradication of group oppression, and not just a concern for protecting the reproductive choices of the most privileged. It must also include alternative conceptions of the family and the significance of genetic relatedness that truly challenge the dominant meaning of family.

