1996

A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory

Joan C. Callahan
University of Kentucky

Dorothy E. Roberts
University of Pennsylvania Carey Law School

A Feminist Social Justice Approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory*

BY JOAN C. CALLAHAN**
AND DOROTHY E. ROBERTS***

INTRODUCTION

In recent years, child welfare agencies in the United States have seized thousands of infants who have been exposed prenatally to various illicit drugs.[1] A number of these seizures have resulted in the

---

* Portions of this Article have been adapted with permission from Joan C. Callahan, *The Contract Motherhood Debate*, 4 J. CLINICAL ETHICS 82 (1993); Joan C. Callahan & Patricia Smith, *Liberalism, Communitarianism, and Feminism*, *in* LIBERALISM AND COMMUNITY (Noel Reynolds et al. eds., forthcoming); Joan C. Callahan, *Professions, Institutions, and Moral Risk*, *in* DANIEL E. WUESTE, PROFESSIONAL ETHICS AND SOCIAL RESPONSIBILITY 243 (1994); *Feminism and Reproductive Technologies*, 5 J. CLINICAL ETHICS 75 (1994); *Editor's Introduction: Reproduction, Ethics, and the Law: Feminist Perspectives*, *in* REPRODUCTION, ETHICS, AND THE LAW: FEMINIST PERSPECTIVES 1 (Joan C. Callahan ed., 1995); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Dorothy E. Roberts, *Social Justice, Procreative Liberty, and the Limits of Liberal Theory: Robertson's* Children of Choice, 20 L. & SOC. INQUIRY 1005 (1995). Special thanks to Pat Smith for permission to adapt material here from her paper with Joan Callahan.

** Professor of Philosophy, University of Kentucky. Ph.D. 1982, University of Maryland.

*** Professor of Law, Rutgers University. B.A. 1977, Yale College; J.D. 1980, Harvard Law School.

[1] *See, e.g.*, Janet Gallagher, *Collective Bad Faith and Protecting the Fetus*, *in* REPRODUCTION, ETHICS, AND THE LAW: FEMINIST PERSPECTIVES 343 (Joan C. Callahan ed., 1995); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV.

prosecution of women for drug use during pregnancy as a form of child abuse.[2] Despite the fact that drug use during pregnancy seems to be equally prevalent among women of all races in the United States, studies are beginning to show that black women are nearly ten times more likely than other women to be reported to child welfare agencies for drug use during pregnancy, and that at least seventy percent of the prosecutions are of women of color.[3] Additionally, over eighty percent of court-ordered cesarean sections have been for women of color and non-native United States women. These women are virtually always dependent on public health care facilities.[4] What's wrong with this picture?

In December 1990, Norplant, the contraceptive implant, was approved in the United States.[5] Almost immediately, courts attempted to impose the implantation of Norplant as a condition of probation on women convicted of child abuse.[6] In seventy-five percent of these cases, the probationers have been minority women, and all of them have been welfare recipients.[7] What's wrong with this picture?

Liberals argue that women contracting into so-called surrogate mother arrangements should be held to their contracts.[8] Since these contracts are usually sought by men who want their own sperm used to progenerate, this would ensure that these men obtain children who are genetically

---

1419 (1991).

[2] Roberts, *supra* note 1, at 1421.

[3] *Id.* at 1434.

[4] Gallagher, *supra* note 1, at 354.

[5] Melissa Burke, Note, *The Constitutionality of the Use of the Norplant Contraceptive Device as a Condition of Probation*, 20 HASTINGS CONST. L.Q. 207, 207 (1992).

[6] *Id.*

[7] *See* Joan C. Callahan, *Contraception or Incarceration: What's Wrong with this Picture?*, 7 STAN. L. & POL'Y REV. 67 (1996); Burke, *supra* note 5, at 241.

[8] *See, e.g.*, JOHN ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES (1994). We take it that the term "surrogate mother" is no longer acceptable. Minimally, the term begs the question of who is the real mother of a child born as the result of a contract arrangement. Birth mothers are certainly biological mothers of the children they bear and birth, even when they are not genetic mothers. Contract motherhood arrangements between women and men usually involve progeneration from the man's sperm and the gestational mother's egg, making her as fully the child's genetic parent as the genetic father. To call such a woman a "surrogate" mother (as was done in the case of Baby M) is to elevate a man's genetic connection to a child over a woman's gestational *and* genetic connection to that child. The term "surrogate" is just one example of how deeply embedded male privilege is in our society.

related to them. Even without state enforcement of these contracts, in every case that has gone to court in the United States, men have succeeded in gaining custody of resulting children who are genetically related to them, whether or not the gestational mothers seeking custody were also the genetic mothers of the children at issue.[9] What's wrong with this picture?

Specialized fertility services (such as ovulation drugs,[10] in vitro fertilization ("IVF") and embryo transfer,[11] gamete intrafallopian transfer ("GIFT"),[12] zygote intrafallopian transfer ("ZIFT"),[13] artificial insemination,[14] surgery, or other treatment for blocked fallopian tubes[15]) are twice as likely to be obtained by non-Hispanic white women than by Hispanic or non-Hispanic black women seeking treatment for impaired fecundity, and three times more likely to be obtained by such women who have household incomes at least 149% above the poverty level than by those with lower household incomes.[16] What's wrong with this picture?

What is wrong with all of these pictures is that they suggest that there are systematic inequities along the axes of sex, race, and class in several areas of contemporary human reproduction. We find these inequities troubling. Our purpose in this paper is threefold: (1) to suggest how

---

[9] *See, e.g.*, Christine Overall, *The Case Against the Legalization of Contract Motherhood*, *in* CHRISTINE OVERALL, HUMAN REPRODUCTION: PRINCIPLES, PRACTICES, POLICIES 119 (1993); Rosemarie Tong, *Feminist Perspectives and Gestational Motherhood: The Search for a Unified Legal Focus*, *in* REPRODUCTION, ETHICS, AND THE LAW: FEMINIST PERSPECTIVES 55 (Joan C. Callahan ed., 1995); and several of the papers in SURROGATE MOTHERHOOD: POLITICS AND PRIVACY (Larry Gostin ed., 1990).

[10] Drugs that cause the maturation of several of a woman's eggs at one time.

[11] "In vitro fertilization" is fertilization of one or more of a woman's eggs outside of her body, e.g., in a petri dish. "Embryo transfer" is the removal of an embryo from one woman's uterus and placement of it in another woman's uterus.

[12] "Gamete intrafallopian transfer" is the transfer of gametes (i.e., eggs and/or sperm) into a woman's fallopian tube.

[13] "Zygote intrafallopian transfer" is the transfer of a newly fertilized egg or zygote into a woman's fallopian tube.

[14] "Artificial insemination" is the insemination of a woman with technological assistance, e.g., with a syringe.

[15] The fallopian tubes allow the transport of a woman's eggs from her ovaries to her uterus. Fertilization or conception usually occurs in the fallopian tubes.

[16] Lynne S. Wilcox & William D. Mosher, *Use of Infertility Services in the United States*, OBSTETRICS & GYNECOLOGY, July 1993, at 122, 124.

contemporary liberal theory leads to these inequities, (2) to contribute to a systematic articulation and illumination of a feminist social justice approach to questions of law and policy that addresses concerns about these systematic inequities, and (3) to show why this approach should be standard in any society that purports to take the interests of all its citizens equally seriously, no matter what their social location. In particular, we mean to show that a feminist social justice approach better serves the fundamental moral ideals embraced by liberalism, namely individual liberty and the moral equality of persons, than does contemporary liberal theory. We do this by focusing on contemporary reproduction-assisting technologies as a case study to help see where contemporary liberalism leaves us in regard to these technologies and why that position is deficient on each of the liberal's own axiological axes of liberty and equality.

I. THE FEMINIST SOCIAL JUSTICE REJECTION OF LIBERALISM

A. Liberal Individualism as Ideology

Liberal individualism is a set of general ideas that purports to explain the world and leads to the structuring of society and its political institutions according to a set of normative convictions that cohere with the explanatory beliefs internal to the system. That is, liberal individualism functions as an ideology with certain fundamental ontological commitments and consequent moral commitments. Liberal individualism operates according to methods that follow from these ontological and moral commitments. An examination of any ideology, such as liberal individualism, will concern itself with (1) how a particular system of beliefs conceptualizes human nature, (2) how that conceptualization of human nature is linked to normative beliefs regarding morally appropriate distributions of power and goods in society, and (3) what ontological commitments and moral values are embedded in the methods the system uses to interpret, construct, evaluate, and revise social and political institutions and practices, and to interpret, evaluate, and influence individual behaviors. In short, an ideology shapes the way a group looks at the world. It functions as a kind of perceptual screen or filter that interprets reality factually, evaluates it normatively, and leads to certain positions on what are considered social problems and how those problems should be resolved. As an ideology, liberal individualism presumes an ontology of persons which tends to lead to a particular set of substantive, normative, and methodological commitments. As we shall see, a feminist

social justice approach rejects these components of contemporary liberalism.

B. *The Liberal Ontology of Persons and the Liberal Morality of Rights*

Historically, liberalism arose in Europe between the Reformation and the French Revolution as a reaction to the power of kings, aristocrats, and the church. One of the first systematizers of liberal theory was John Locke, who inspired Thomas Jefferson, and whose *Second Treatise of Civil Government*[17] directly underpins the United States Bill of Rights. Locke conceived the human person as, fundamentally, an atomistic entity — a full-fledged human being existing prior to society, making up (to mix the metaphors) a kind of ontological moral space that cannot be transgressed without permission. Political authority, in Locke's view, can only be justified on the ground of consent of the governed. All "men" come into the world on an equal moral footing, with equal entitlements to goods and powers and equal entitlements to freedom. Now, Locke, of course, was systematizing a political theory for Whigs. When he said "all men" he did not actually mean that. What he meant was dictated by his own experience of who counted — propertied men, including landholders, merchants and industrialists, who should not be subject to an absolute monarch. This, of course, did not include women generally, or men or women of the underclass in particular.[18] So, from the very beginning of its systematization, liberalism was structured from a perspective that included some persons but not others. Indeed, Locke himself provides the first fully systematic argument for capitalism and the right to amass virtually unlimited amounts of property, a strange irony in a theory which starts out so unequivocally committed to the moral equality of all persons and the initial right of each person to have "as much and as good" as any other.

The atomistic ontology of persons underpinning Locke's theory continues to anchor liberalism in its several contemporary varieties, including liberal feminism, which we shall discuss shortly. Filled out, the fundamental social notion at work in liberal ontology is that persons are radically individualized agents, that the uniqueness of human beings is

---

[17] JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT (Lester DeKoster ed., 1978) (1689).

[18] *See, e.g.*, CAROLE PATEMAN, THE DISORDER OF WOMEN (1989); CAROLE PATEMAN, THE SEXUAL CONTRACT (1988).

characterized by the capacity for rationality and autonomy, and that the protection of individual autonomy is the keystone of a morally well-ordered society. The ontological understanding of human beings as radically discrete and autonomous tends to issue in a morality that rests fundamentally on rights that define the moral boundaries of these essentially unconnected individuals. Thus, Lockean liberalism finds itself committed to a morality that is preoccupied with respecting and negotiating these independent moral spaces. Such a world view starts out conceptualizing persons as adversarially related, and sets the stage for a political society that needs to be based on managing adversity. This human ontology and its consequent contemporary construction of fundamental morality as a morality of overriding rights to noninterference is central to feminist social justice rejections of liberalism.

C. *Feminism and Liberal Feminism*

Although all views appropriately characterized as feminist views are concerned with the position and flourishing of all women, it is crucially important to realize that feminism is not monolithic. Indeed, feminists disagree about a great many issues. Feminist perspectives can be found in moral and political theories as diverse as rights-based liberalism, Utilitarianism, and Marxism, and in ontologies that range from essentialist accounts that ascribe a unique nature to women, through pure social construction accounts of women's nature,[19] to positional feminisms that attempt to avoid the problems with essentialist and antiessentialist feminisms by leaving open the question of women's essential nature and concentrating instead on how the social position of women raises problems for women as such.[20]

At the same time, however, we understand all views that are coherently understood as feminist views to share certain features, namely:

---

[19] For extended discussions of variations in feminist thought, see, for example, JOSEPHINE DONOVAN, FEMINIST THEORY: THE INTELLECTUAL TRADITIONS OF AMERICAN FEMINISM (1985); ALISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE (1983); ROSEMARIE TONG, FEMINIST THOUGHT: A COMPREHENSIVE INTRODUCTION (1989).

[20] For an account of the problems with both essentialist and antiessentialist, or nominalist, feminisms, see Linda Alcoff, *Cultural Feminism Versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 SIGNS 405 (1988) (attempting to avoid these problems in a theory that rejects a commitment to essentialism but allows that, in fact, women as a class have a gendered identity that leads to certain characteristically "women's needs" in the present world).

(1) a recognition that women as a group have been and remain in a subordinate position in relation to men;

(2) an account of the source(s) of that subordination; and

(3) suggestions for how the subordination of women can be overcome.[21]

Recent feminist approaches, particularly in the work of women of color, frequently include:

(4) an account of the ways in which women have resisted oppression.[22]

It is also the case that contemporary feminist approaches are almost invariably:

(5) acutely aware that social subordination is not limited to women, and

(6) deeply committed to the elimination of centrisms that systematically place members of one group in a position of lesser value than persons of other groups (centrisms such as sexism, racism, heterosexism, regionalism, classism, ageism, and ableism).

It is also common for contemporary feminists to:

(7) understand these systems of subordination and oppression as interlocking in the sense that one cannot hope for the elimination of one without accomplishing the elimination of others.

These, then, are the features we take to be essentially (1-3) and commonly (4-7) associated with a feminist consciousness or perspective in any domain.

"Liberal feminists" were the first to recognize women as a sexual class, that is, to recognize women as in a collective position in relation to men. As Zillah Eisenstein points out: "Liberal feminism is not feminism merely added to liberalism. Rather, there is a real difference between liberalism and liberal feminism in that feminism requires a recognition, however implicit and undefined, of the sexual-class identification of women as women."[23] Liberal feminism is so called

---

[21] Alison M. Jaggar, *Feminist Ethics*, *in* ENCYCLOPEDIA OF ETHICS 361 (Laurence C. Becker & Charlotte B. Becker eds., 1992); *cf.* ROSEMARIE TONG, FEMININE AND FEMINIST ETHICS 10-11 (1993) (explaining Alison Jaggar's view that a feminist approach to ethics seeks to: "1. articulate moral critiques of actions and practices that perpetuate women's subordination; 2. prescribe morally justifiable ways of resisting such actions and practices; and 3. envision morally desirable alternatives that will promote women's emancipation").

[22] *See, e.g.*, PATRICIA H. COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF POWER (1991).

[23] ZILLAH R. EISENSTEIN, THE RADICAL FUTURE OF LIBERAL FEMINISM 6

because it at once shares the essential commitments that bind characteristically feminist views (i.e., minimally, features 1-3 above), while also sharing the fundamental ontological and normative commitments of liberalism — commitments that "postliberal feminists" have rejected. For example, like liberals *simpliciter*, liberal feminists assume that persons are radically individualized autonomous agents, that the uniqueness of human beings is located in the capacity for rationality and autonomy, and that the protection of individual autonomy is the keystone of a morally well-ordered society. The ontological and axiological commitment to individual autonomy that informs liberalism and liberal feminism tends to issue in a morality of rights. In addition to being the source of later feminisms,[24] the great contribution of liberal feminism has been its insistence that a political system that protects the interests of men but not of women will not bear moral scrutiny.

D. Postliberal Feminisms and the Feminist Social Justice Approach

Common to postliberal feminist positions is the rejection of the liberal ontology of the person as we have sketched it, and, with it, the liberal's extreme emphasis on individual liberty to the exclusion of values such as the nurturing of individuals and communities, the sustaining of relationships, the relief of suffering, and attention to appropriate substantive equality. In rejecting liberal feminism, postliberal feminists contend that liberal feminism has committed itself to a morality which emphasizes separation between persons rather than the connections and interdependencies between persons.[25] In other words, the charge is that liberal feminists have, with liberals, committed themselves to what Alison Jaggar calls "normative dualism"[26] and "political solipsism."[27] These commitments together lead to "political skepticism"[28] and, hence, the liberal's

---

(1981).

[24] *See* EISENSTEIN, *supra* note 23.

[25] *See* JAGGAR, *supra* note 19.

[26] Normative dualism is the view that what is especially valuable about human beings is their "mental" capacity for rationality. *Id.*

[27] Political solipsism is the view that human beings are essentially solitary or isolated, self-sufficient entities, with interests and needs essentially different and separate from, and often in opposition to, those of others. *Id.*

[28] Political skepticism is the view that questions pertaining to the well-being of individuals can have no common answers. *Id.*

placing an inordinate premium on the liberty of this rational, autonomous, solitary person to be and do what he or she desires.[29]

Postliberal feminists join in departing from the liberal's and liberal feminist's commitment to this atomistic view of persons and tend to insist that persons "arrive" in the world already inextricably imbedded in webs of relationships — in social contexts that in great part determine who they are and what they will become as individuals, as well as where their responsibilities will lie. The rejection here is of what is known as "abstract individualism,"[30] which treats persons for the purposes of political theory as individuals abstracted out of all social contexts. This abstraction is a familiar theme in the works of John Locke, Jean-Jacques Rousseau, Immanuel Kant, John Rawls, Ronald Dworkin, and other liberal moral and political theorists, but it fails to describe real persons. Rather, postliberal feminists conceive of persons more like knots in a net than like discrete balls that might be contained in a net — there is no knot in a net without connections to other knots.

This is the ontology of persons that the postliberal feminist position shares with communitarianism. But this feminist position is not directly subject to the central moral objection that liberals commonly bring against communitarians, namely, that they reject individual liberty as a central moral value. When the postliberal feminist challenges abstract individualism and the concept of autonomy as they work in liberal theory, she is concerned not to totally disregard the moral importance of individual liberty, but to direct attention to the real lives of real women with all the substantial impingements on liberty that characterize those lives. She wants to lay bare the social realities of women's lives that expose as mythology the doctrine of full autonomy upon which liberal theory rests. She wants society to see that characteristically male lives (in United States society, particularly economically privileged, white male lives) tend to fit the ontological assumptions of liberalism far better than characteristically female lives (particularly the lives of working class and poor non-white women). If we look carefully at our major social institutions and the social positions to which the most substantial social, political, and economic benefits attach, we shall find (virtually invariably) that they are structured by men, that their standards for success and

---

[29] JAGGAR, *supra* note 19, at 40-42; *see also* TONG, *supra* note 21, at 35.

[30] Naomi Scheman, *Individualism and the Objects of Psychology*, *in* DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY, AND THE PHILOSOPHY OF SCIENCE 225 (Sandra Harding & Merrill B. Hintikka eds., 1983).

reward in one way or another promote dominance and competition as fundamental values, and that those standards for success and reward often presume as the norm and best suit the realities of life for (particularly relatively privileged, white) men.[31]

For example, the expectations of the professional in the contemporary university, the contemporary corporation, or the professions of law and medicine are typically set by men and most easily met by men — men who are free to concentrate on their professional lives, often (indeed, usually) with women in the background to manage their households and serve as primary care providers for their children.[32] Privileged men have been the generators of liberalism and its individualistic ontology of persons. It cannot seriously be considered coincidental that men, who are so often most free to function autonomously (that is, relatively unimpaired by the requirements of households, children, and community) are also the primary creators and administrators of contemporary institutions that encourage an emphasis on extreme individualism, productivity, and competition between persons rather than an emphasis on community, nurturing, and connectedness between persons — an emphasis that is common — indeed, generally necessary — in characteristically female lives.[33]

These are among the hidden dimensions and implications of liberalism that the postliberal feminist seeks to reveal. Her purpose is to show that moral considerations other than just individual liberty should command our uncompromising allegiance. This is because the focus on individual liberty in liberalism, from its inception, detracts from concern for recognizing the basic moral equality of *all* persons by favoring those

---

[31] No claims about essentialism are presumed here. The point is just that men's lives commonly have certain characteristics, women's lives commonly have certain characteristics, and that these common characteristics are not the same for men and women. This point is compatible with essentialism, nominalism, and positionalism. For a number of views on sexual difference, see THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (Deborah L. Rhode ed., 1990). For a discussion of difference more generally, see MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990).

[32] This is an example of what we mean by a feature common to "characteristically male lives" — men commonly have spouses who bear primary responsibility for households and child care; women commonly do not.

[33] For just one discussion of how the features of characteristically male lives press away from nurturing, community, and connectedness, see Annette Baier, *Trust and Antitrust*, 96 ETHICS 231 (1986).

whose lives best match the liberal ontology of persons. Concerned about individual liberty, then, the postliberal feminist is also concerned about individual welfare and about the dismantling of systems that serve the welfare of some while ignoring the welfare, substantive freedom, and equitable treatment of others. The notion of respect for persons that so deeply informs liberal theory is construed more broadly on these accounts — respecting another person is not just limited to leaving her alone; respecting another person involves attending to the conditions that are necessary for her thriving. And it also means seeing that she has equally available to her the basic conditions of meaningful self-direction. On these accounts, then, liberalism's emphasis on individual liberty and, in particular, its conceptualization of individual liberty as negative liberty or noninterference, leads to the creation and continuation of social and political structures that do not take seriously enough the moral equality of all persons, regardless of their social location.

E. Liberalism as a Conservative Social and Political Theory

It is important to emphasize that feminists who reject liberalism as inadequate to address important questions of equity, need not fail to see the crucial contributions of liberal theory as it emerged in the West. Liberalism, compared to the systems against which it developed in reaction (feudalism, absolutism, aristocracy, and traditional patriarchy), is an enormous moral achievement, and feminists generally recognize this. The problem is that liberalism has exhausted its progressive potential. An alternative social and political theory needs to be developed to address the substantive questions of maldistribution of power among moral equals, an issue which liberalism has been unable to address.[34] Though once progressive because of its insistence on greater freedom and inclusion, liberalism today is conservative in the sense that it preserves the selective inclusion with which liberalism began, leaving intact systems that continue to subordinate some groups to others.

II. CONCERNS ABOUT HARM

It is a feature of traditional liberal rhetoric that the only ground on which the state might interfere with the liberty of individuals is to prevent

---

[34] *See, e.g.*, ELIZABETH FRAZER & NICOLA LACEY, THE POLITICS OF COMMUNITY: A FEMINIST CRITIQUE OF THE LIBERAL-COMMUNITARIAN DEBATE ch. 3 (1993).

harm. The classic statement of this view, of course, is in John Stuart Mill's *On Liberty*.[35] Although Mill is a Utilitarian and Locke is a rights-based theorist, Utilitarians such as Mill share with Lockeans an atomistic ontology of persons. In Mill's theory, this ontology is combined with a psychology that leads to the claim that happiness must be the fundamental ground of morality, and the general happiness the fundamental ground of the just state. According to Mill, in order for this to be achieved, people must be left as free as possible.[36] Stated in other terms, this view requires that individuals not be interfered with except to prevent (unjustifiable) harm to others.

This tenet of liberal theory informs one objection that has been raised against a feminist social justice approach to reproduction-assisting technologies. The most thorough treatment to date of the liberal position on these technologies has been offered by John Robertson.[37] An objection he brings against feminist social justice approaches is that the harms that feminists argue are associated with reproduction-assisting technologies are merely symbolic — they are not real, tangible harms. Thus, for example, Robertson says feminist concerns that contract motherhood arrangements commodify women and children amount to no more than "a perception of the symbolic effects of treating gestation as

---

[35] JOHN S. MILL, *On Liberty*, *in* UTILITARIANISM AND OTHER WRITINGS 126 (Mary Warnock ed., 1974) (1859).

[36] See JOHN S. MILL, UTILITARIANISM 37-41 (Samuel Gorovitz ed., 1971) (1861), where he argues that human beings are constructed psychologically so that the only thing we can recognize as intrinsically good is happiness. Since we cannot recognize anything else as being good in itself, and since "ought" implies "can," the only reasonable ground for morality is the production of happiness. By parity of reasoning, the only justification for state authority is the production of happiness. Since everyone counts as one and no more than one, and since the community/citizenry is no more than the sum of its parts, the state should select that set of rules and practices (including that set of laws) which will tend to produce the greatest amount of happiness for the greatest number. Mill also holds that each individual will (in general) be the best judge of his or her own interest and happiness. Thus, people should be left free to govern their own lives, and should be limited only to prevent them from harming others. For Mill, too, then, atomistic individualism leads to a political theory that emphasizes individual liberty. Liberalism as we understand it here, and as it is commonly understood in political theory, includes both rights-based theorists such as Locke and goal-based theorists such as Mill. *See infra* notes 47-48 and accompanying text.

[37] ROBERTSON, *supra* note 8.

a product to be sold for money."[38] There are at least three problems lurking in this logical woodpile.

A. Harm as the Only Morally Relevant Concern

The first problem with liberal arguments such as Robertson's is that they presume, without argument, that interferences with individual liberty can only be justified if they are undertaken to prevent harm to others. This is certainly what Mill explicitly committed himself to in *On Liberty* when he said that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."[39] But political theorists know that Mill himself departed from this "one very simple principle,"[40] even within *On Liberty*.

Even if Mill had not so departed from the harm principle, moral agents in contemporary society simply do not accept the harm principle. That is, the prevention of harm does not constitute the *only* justification for *any* interference with individual liberty. Consider, for example, mandatory education, mandatory payment into social security, or property laws that disallow someone's use of another's property, even though that use would not in any way harm the owner (e.g., a homeless person's sleeping during winter in someone's unoccupied summer cottage, perhaps leaving it in better condition than she found it). Society allows all sorts of interferences with individual liberty for reasons other than the prevention of harm; in particular, restraints on liberty are allowed for reasons having to do with the public good and the protection of rights, irrespective of considerations of harm. Therefore, liberals cannot simply presume that the prevention of harm is the *only* reason that could justify restricting the development, application, and/or acceptance of reproduction-assisting technologies.[41] There may be other sound policy reasons

---

[38] *Id.* at 141. Liberal feminist law professor Lori Andrews makes a similar claim regarding a number of the arguments that feminists have used to argue for the moral unacceptability of commercial so-called surrogate mother arrangements. *See* Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 167, 171-78 (Larry Gostin ed., 1990).

[39] Mill, *supra* note 35, at 135.

[40] *Id.*

[41] Liberals do not take this rhetoric to heart, either; Robertson himself disallows certain uses of reproductive technologies for what he would have to term "symbolic" reasons. ROBERTSON, *supra* note 8.

for introducing some restrictions on these practices. That much said, however, it needs to be pointed out that feminist social justice proponents generally are not subject to the objection that they support interference with individual liberty in most of these matters.

B. Interfering with Liberty: A Bright Red Herring

Liberals such as Robertson make the (unacceptable) claim that only prevention of harm can justify interference with individual liberty.[42] But more often than not, feminists simply are not arguing for interference with individual liberty. Virtually all existing versions of a feminist social justice approach would allow access to anyone desiring to use reproduction-assisting technologies. Much of the feminist discussion on reproduction-assisting technologies can be understood as engagement in moral suasion. Even though many feminists disagree with the development and deployment of reproduction-assisting technologies, ranging from IVF to contract motherhood, few argue that it should be illegal for individuals to develop, apply, and/or personally use these methodologies. In general, the objection that feminist social justice theorists are calling for severe interferences with reproductive liberty attacks a "straw man." Although a number of postliberal feminists have argued for a prohibition on brokering commercial surrogacy contracts and for the courts' refusal to enforce these contracts,[43] the argument for prohibition of brokering commercial surrogacy contracts is a far cry from the claim that all such arrangements should be absolutely prohibited by law, which would make individual parties who set up nonenforceable forms of these arrangements liable to legal sanction. No feminist that we have read has supported this position. To argue that the development and deployment of these technologies are harmful to women and children (which feminists have frequently argued and which we shall argue in a moment) is not equivalent to arguing that the development, application, or use of any of these methodologies should be prohibited by law. Discussions, such as Robertson's,[44] that present the position of feminist social justice theorists this way grossly misrepresent most versions of this kind of position.

---

[42] *See supra* notes 39-41 and accompanying text.

[43] *See, e.g.*, OVERALL, *supra* note 9; CHRISTINE OVERALL, ETHICS AND HUMAN REPRODUCTION: A FEMINIST ANALYSIS 111-36 (1987); Margaret Radin, *Market Inalienability*, 100 HARV. L. REV. 1849, 1921-36 (1987).

[44] *See supra* notes 39-41 and accompanying text.

C. *Symbolic Versus Tangible Harms*

The final problem with the liberal position on the matter of harm is that it characterizes the harms of concern to feminist social justice theorists as merely symbolic. First, by characterizing the harms at issue as "symbolic," liberals try to do away with a problem by manipulating the label for it. "Symbolic" harms, by definition, are not real harms. But the harms that concern feminist social justice theorists are very real. That they are often insidious makes them no less tangible.

The harms that concern feminist social justice theorists are those that result from deeply entrenched, continuing social centrisms, such as racism, ethnocentrism, sexism, heterosexism, classism, ableism, and ageism. Who could reasonably deny that in a society where women still do not receive pay equal to men's for the same work,[45] women are not harmed by institutions and practices that contribute to their subordinate position to men? Who could reasonably deny that people of color are harmed by their systemic exclusion from the social, political, and economic mainstream? Who could reasonably deny that when our public spaces are inaccessible to those who are not of "normal" ability that such people are deprived of important goods available to the rest of us — that is, they are harmed? Who could reasonably deny that gay men and lesbians are harmed by social systems that refuse to assure them the same protections and benefits that are provided for heterosexuals? That we cannot say in advance what precise individual will suffer what precise harm is not a reason to deny that the harms in question are real harms.

Women are harmed by attitudes, institutions, and practices that serve to keep women in a position subordinate to the position of men. Insofar as reproduction-assisting technologies contribute to the subordinate position of women, they are harmful. There is nothing symbolic about that. Feminists have extensively argued that reproduction-assisting technologies *do* contribute to the subordination of women by continuing to tie the value of women to reproduction. The point is that if a system serves to privilege members of some groups over members of others, the system harms those in the subordinate groups. Because reproduction-assisting technologies contribute to the privileging of some over others, then, they are harmful. And the concrete harms associated with subordination of groups in our society are substantial. Therefore, even if it were the case that prevention of harm alone could justify restrictions on

---

[45] Grace Schneider, *Women to Raise Financial Fists for Equal Pay*, COURIER-JOURNAL (Louisville), Oct. 29, 1995, at B1.

individual liberty, feminist social justice theorists have (and have used) an argument based on tangible harm to deploy against the development, application, and personal use of reproduction-assisting technologies. Indeed, the moral centerpiece of feminist social justice approaches to reproduction-assisting technologies is that these technologies privilege some (namely, well-off white men) over others, and that they are, therefore, harmful in virtue of this contribution to a system of social subordination.

D. Contemporary Liberalism as a Deontological Theory

There is a final point which needs to be made about the liberal objection that feminist social justice theorists are concerned only about symbolic harms. This view is sometimes expressed as a complaint about "deontological . . . reverence," to use the words of John Robertson.[46] This is a strange objection, however, coming from a rights-based liberal theorist such as Robertson. Robertson's own liberal view begins with a rock-bottom commitment to strong moral rights, especially the right of individuals to be at liberty. In making moral rights foundational to morality and the construction of a just society, contemporary liberals follow Locke rather than Mill, who espoused a goal-based view of rights.[47] Robertson's approach to rights follows that put forward by Ronald Dworkin. Dworkin asserts that basic moral rights have priority over ends-based considerations. Thus, Dworkin holds that whenever moral rights come into play, they "trump" other considerations.[48] This is precisely the language Robertson uses throughout his discussions of reproductive liberty; but such a view is paradigmatically deontological.

Deontological views are conceptually opposed to teleological views. The deontologist denies the teleologist's claim that consequences (real or probable) are the whole of the moral story. Some deontologists (Kant, for example) hold that consequences never affect the moral value or disvalue

---

[46] John A. Robertson, *The Rightness of Rights Analysis: A Response to Dorothy Roberts*, 20 L. & SOC. INQUIRY 1023, 1027 (1995).

[47] Lockean liberalism is a rights-based view; that is, this form of liberalism takes strong moral rights to be foundational. Millean liberalism, on the other hand, is a goal-based view: it recognizes rights only insofar as they are thought to maximize the general good. Thus, from Mill's Utilitarian viewpoint, rights are not foundational — they are derivative from utility. This makes for crucial differences in these classical liberal views. Most contemporary liberals are of the rights-based variety.

[48] *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 259-65 (1978).

of an action (or practice). Others admit consequences as morally relevant considerations; they just deny that consequences alone invariably determine the rightness or wrongness of actions and/or practices. And so it is that rights-based moral theorists are deontologists, since they hold that rights, rather than consequences, sit at the foundations of morality and must sit at the foundations of a just society. Feminist social justice theorists are concerned that social and political systems take seriously the moral equality of persons. Such concerns are, by their very nature, deontological. But that is no criticism of them, particularly from a rights-based perspective. To place the liberty of individuals at the foundations of morality and the just state is equally deontological; and so complaints about "deontological reverences" are applicable (if they are applicable at all) to rights-based liberal views, such as Robertson's itself.

Our general points on the matter of harm, then, are these: (1) considerations other than harm should command our moral allegiance and may justify interference with individual liberty; (2) feminist social justice theorists generally do not argue for interference with individual liberty as regards reproduction-assisting technologies, except in the case of brokering contract mother arrangements, which a number of feminists have argued should not be lawful; and (3) individuals suffer very real and substantial harms by being in socially subordinate positions; thus any practices that contribute to the subordination of some groups by others are harmful. Since reproduction-assisting technologies contribute to a system of social subordination they are harmful.

III. THE MYTH OF LIBERAL NEUTRALITY AND THE MATTER OF HARM REVISITED

A. The Charge of Legal Moralism

Liberals also object to a feminist social justice approach on the ground that it is a form of legal moralism. The rhetoric of liberal political theory requires that the government remain neutral among competing conceptions of morality to protect citizens against the imposition of state orthodoxy. Liberals therefore try to "set aside or 'bracket' controversial moral and religious conceptions for purposes of justice."[49] The liberal notion of procreative liberty allows each individual to choose her own moral understanding of procreation for herself, so long as she causes no

---

[49] Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 521 (1989).

harm to others. The United States Supreme Court applies this approach to questions of reproductive rights, defending the right to an abortion as an aspect of "freedom of choice in the basic decisions of one's life . . . ."[50]

Under this view, a feminist social justice approach to assisted reproduction improperly reflects a particular moral view about reproduction which individuals in a pluralistic society should remain free to reject. Liberals understand the feminist concern that contract pregnancy arrangements devalue women's role in reproduction, for example, as a moral position that is entitled to no more government deference than the moral position that these arrangements further women's autonomy. As Robertson explains, "reasonable people have different moral perceptions about paid surrogacy, with many not finding the symbolic demeaning of motherhood that others see as so glaringly wrong."[51] By asking the government to choose between these competing moral views, liberals argue, feminists violate the neutrality requirement.

Liberals, of course, must demonstrate that their notion of procreative freedom does not rely on similar moral judgments. This is attempted by trying to distinguish between personal conceptions of morality that are irrelevant to government decisionmaking and tangible harms to individuals, which may properly be weighed against procreative interests. This distinction, however, cannot withstand careful scrutiny, for liberal defenses of procreative liberty reduce to a moral position about the value of procreation.

The primacy liberals accord procreation, based partly on the importance to personal identity of genetic transmission, reflects a particular and contested view of reproduction. Liberals contend that procreative liberty deserves privileged status because of its importance to personal conceptions of identity and the meaning of life. In what sense is the decision to procreate central to personal identity? Answering this question involves moral judgments about the meaning and importance of reproduction.

In responding for liberals, Robertson centers on the human desire for genetic connection with offspring. Although he concedes that this desire is at least partly socially constructed, Robertson explains it in biological terms: "[A]t the most basic level transmission of one's genes through reproduction is an animal or species urge closely linked to the sex

---

[50] Doe v. Bolton, 410 U.S. 179, 211 (1973) (Douglas, J., concurring).

[51] ROBERTSON, *supra* note 8, at 141.

drive."[52] But, of course, the fact that animals have a natural urge to have sex in no way whatever entails that they have a natural urge to transmit their genes. Robertson's claim here is an example of what used to be called "anthropomorphism," and is now known as an example of "the social construction of biology."

Further, this belief in the importance of genetic destiny to personal identity seems to contradict the liberal image of the autonomous, self-choosing individual. An examination of the role the genetic tie plays in defining personal identity, creating children, and determining legal parentage demonstrates the striking indeterminacy of its legal and social meaning.[53] The *importance* of genetic relatedness is not determined by biology, but by culture. Even within our legal system, its meaning varies depending on the context. Although we generally assume that the genetic tie creates an enduring bond between parents and their children, the law often disregards it, for example, in the cases of contract mothers, sperm donors, and unwed fathers.[54]

A comparison of liberals' defense of procreative choices and feminists' identification of harms reveals a striking similarity in their moral explanations of the significance of procreation. Consider, for example, Robertson's refutation of Margaret Radin's argument that paid pregnancy arrangements commodify women and children.[55] Radin contends that childbearing should not be traded on the market because "commodification of women's reproductive capacity is harmful for the identity aspect of personhood and . . . the closeness of paid surrogacy to baby-selling harms our self-conception too deeply."[56] Robertson criticizes Radin for failing to show why payment for gestation is

---

[52] *Id.* at 24. Robertson posits as the motivation for couples' use of infertility treatment, for example, the frustration of "their normal species urge to procreate." *Id.* at 98.

[53] Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 210 (1995). For another argument contesting the understanding of parenthood based on genetic relatedness, see ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING (1993); REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD AND MEDICINE (Michelle Stanworth ed., 1987).

[54] In custody disputes, courts typically discount the contract mother's genetic claim to legal maternity and the unwed father's genetic claim to legal paternity in cases where the child's mother is married to another man. In most states, the sperm donor is not considered the legal father of his genetic offspring.

[55] *See* Dorothy E. Roberts, *Social Justice, Procreative Liberty, and the Limits of Liberal Theory: Robertson's* Children of Choice, 20 L. & SOC. INQUIRY 1005, 1010-11 (1995).

[56] *See* Radin, *supra* note 43, at 1932.

particularly objectionable "since one could just as reasonably argue that the physical and mental attributes that drive the market for models, professional athletes, and computer scientists are also essential to 'our deepest understanding of what it is to be human.'"[57] Yet Robertson himself rests his defense of paid pregnancy on the view that "procreative liberty should enjoy presumptive primacy . . . because control over whether one reproduces or not is central to personal identity, to dignity, and to the meaning of one's life."[58] Although Radin and Robertson reach opposite conclusions about the implications of reproduction's importance, they both ultimately rely on a similarly normative conception of procreation.

Liberals' contention that their concept of procreation does not serve to limit the reproductive choices of some individuals (as the feminist social justice approach purportedly does) is also erroneous. Despite their rhetoric, most liberals would probably concede that there must be some limits to the use of reproduction-assisting technologies, even in the absence of a showing of tangible harm to another individual. For example, should procreative liberty permit a parent to clone her offspring, creating an exact genetic replica of another human genome? The only way to restrict such practices is to resort to some moralistic judgment about the proper use of these technologies. Thus, Robertson posits "a core view of the goals and values of reproduction" that encompasses only "actions designed to enable a couple to have normal, healthy offspring whom they intend to rear."[59] Robertson, therefore, opposes cloning and the use of prenatal genetic screening to produce a disabled child.[60] Procreative liberty does not protect these insidious forms of selection of offspring characteristics, according to Robertson, because they "pass beyond the central experiences of identity and meaning that make reproduction a valued experience."[61] But liberals' own argument from their core understanding of reproduction rests on a fundamental moral position about the proper role of reproduction.

In short, liberals such as Robertson rely on conceptions of reproduction to outweigh individuals' interest in personal choice that are no less

---

[57] ROBERTSON, *supra* note 8, at 142.

[58] *Id.* at 24.

[59] *Id.* at 167.

[60] *Id.* at 171 (Robertson refers to the use of genetic testing to produce a disabled child as "intentional diminishment." As an example of intentional diminishment, Robertson offers a set of hypothetical deaf parents who wish to use genetic screening to ensure that their child will also be deaf.).

[61] *Id.* at 169.

"moralistic" than feminist social justice approaches. Recognizing the impossibility of avoiding these moral questions demolishes liberals' repudiation of feminist criticism of unlimited procreative liberty on the ground that it reflects a moral perspective.

B. Liberal Inequality

Moreover, liberals' exclusion of social justice concerns on the ground that they constitute legal moralism does not promote government neutrality as liberals claim. Liberals defend the bracketing of moral arguments as a prerequisite for neutral government decisionmaking with respect to individuals' personal choices. But liberalism in practice tends to favor the choices of the privileged and to maintain current distributions of wealth and power. This bias is reflected, for example, in liberals' resolution of disputes between couples and birth mothers who have entered into paid pregnancy contracts. When a birth mother decides she does not wish to relinquish her child, both sides have procreative interests at stake. But liberals insist on the enlistment of the government's affirmative assistance in enforcing paid pregnancy contracts to protect the wealthier and more powerful contracting man's interest in having a genetically-related child. Thus, enforcing these contracts would establish in advance of any particular case the state's unequivocal preference for the reproductive interests of contracting men over contracted women.[62]

Further, courts in our existing liberal society are far more likely to recognize the rights of married couples to use reproduction-assisting technologies to create or complete nuclear families than to uphold their use by single heterosexual women, lesbians, or gay men.[63] The disproportionate use of these technologies by white people, despite higher infertility rates among people of color, suggests as well the probability of racial bias in fertility and genetic counselling.[64]

---

[62] *See, e.g.*, Joan C. Callahan, *Procreative Liberty: Whose Reproduction? Whose Liberty?*, 6 STAN. L. & POL'Y REV. 121, 121-25 (1995).

[63] *See, e.g.*, MARTHA A. FIELD, SURROGATE MOTHERHOOD 116-21 (1988); Joan C. Callahan, *The Contract Motherhood Debate*, 4 J. CLINICAL ETHICS 82 (1993); Roberts, *The Genetic Tie*, *supra* note 53, at 252-57; Carol Smart, *"There Is of Course the Distinction Dictated by Nature": Law and the Problem of Paternity*, *in* REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD AND MEDICINE 98 (Michelle Stanworth ed., 1987).

[64] Patricia A. King, *The Past as Prologue: Race, Class and Gene Discrimination*, *in* GENE MAPPING: USING LAW AND ETHICS AS GUIDES 94, 103 (George J. Annas & Sherman Elias eds., 1992) (suggesting that the racial disparity in the

The choices of the poor and people of color (and, particularly, women in these groups), on the other hand, often remain unfulfilled or even overridden under liberal notions of procreative liberty. Liberal theory offers no support to people who cannot afford the cost of reproductive health services. Nor does liberal theory necessarily recognize as state intrusion conditions placed on government benefits to poor women that restrict their reproductive decisions. Liberal theory leaves market biases to operate freely against less powerful groups because these forces do not constitute *state* interference with procreative choices. Thus, in the case of abortion, liberal theory, with its noninterference interpretation of liberty, can (and does) allow the state to refuse to make abortion services available to all women who need those services to safely exercise their choice not to reproduce. The liberals' formal understanding of political freedom as noninterference with seeking an abortion is a virtually meaningless freedom for a woman who cannot afford to purchase a safe procedure. In just this sort of way, liberal theory protects the interests of the economically privileged while ignoring meaningful freedom for the least well off.

C. *Harm Revisited*

Having established that liberals' core view of reproduction has no presumptive advantage over one that takes into account social justice concerns, we may turn again to the harms that are at the center of feminist concerns. A feminist social justice approach understands the value of procreation and the harms stemming from reproduction-assisting technologies in their social surroundings. Such an approach recognizes that it is impossible to comprehend the welfare of individuals apart from the context of their social positions. This perspective contrasts markedly with the liberal presumption that individuals' procreative choices may be isolated from unjust social structures. Individuals are not atomistic beings who create their identities, make choices, and determine their interests apart from their specific communities and general social locations. An individual's ability to make autonomous decisions is circumscribed by the

---

use of clinical genetic services may be related to physician referrals); 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, 95-102, 109-11 (Kathryn S. Ratcliff et al. eds., 1989) (discussing barriers that restrict access by poor women and women of color to genetic counselling and reproduction-assisting technologies).

material conditions of her life, including her social position and group membership; her social location helps to determine her life prospects. Membership in a dominant group affords an automatic privilege, while membership in a subordinate group materially harms people.[65] The harm of membership in a subordinate group is manifested in countless ways and reflected in a myriad of statistics. The inferior social position of women, generally, and black women, in particular, exemplify the harm caused by unjust social structures.

Women experience more poverty and violence in their homes than men because of their gender. A labor market and system of child care structured against working mothers leads to increasingly high rates of female poverty.[66] The proportion of poor white families maintained by women rose from twenty percent in 1959 to forty-two percent in 1987.[67] Over one-half of black families headed by women live in poverty; and black families headed by women are three times as likely to be poor or near poor than those with an adult male present.[68] Experts estimate that half of all married women will be beaten by their husbands at some point in their marriage.[69] Between fifteen and forty percent of all women are victims of attempted or completed rapes, most committed by acquaintances.[70] Who could reasonably deny that these are real, tangible harms?

Consider homosexual people as a subordinated group. Gay men and lesbians are increasingly victims of hate crimes, perpetrated by straight white men.[71] It is currently thought that thirty percent of gay male and lesbian teenagers attempt suicide, with their sexual orientation a major

---

[65] *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (discussing the concept of whiteness as a form of property that brings with it benefits and privileges ratified by law).

[66] *See generally* MARTHA FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995).

[67] Audrey Rowe, *The Feminization of Poverty: An Issue for the 90's*, 4 YALE J.L. & FEMINISM 73, 74 (1991).

[68] Margaret C. Simms, *Black Women Who Head Families: An Economic Struggle*, *in* SLIPPING THROUGH THE CRACKS: THE STATUS OF BLACK WOMEN 141, 143 (Margaret C. Simms & Julianne M. Malveaux eds., 1986).

[69] LENORE WALKER, THE BATTERED WOMAN 19 (1979); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

[70] CRIME VICTIMS RESEARCH AND TREATMENT CTR., RAPE IN AMERICA 3-5 (1992).

[71] Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1462 (1992).

causal factor.[72] Who could reasonably deny that these are real, tangible harms?

Blacks, too, continue to be victims of hate crimes; and despite decades of civil rights struggle, blacks in America still occupy a social position drastically inferior to that of whites. For example, blacks are twice as likely to be unemployed and three times more likely to be poor than whites.[73] Black infants, half of whom are born into poverty, die at a rate twice that of whites, and overall life expectancy is significantly lower for blacks than for whites.[74] Who could reasonably deny that these are real, tangible harms?

This social positioning is buttressed by negative cultural images that affect how others view and treat members of these groups, even unconsciously.[75] Although we may not be able to predict the precise harm a particular individual will suffer because of group membership, we have more than ample evidence to show that all members of subordinated groups are worse off than they would be if the group were not oppressed. This is the result of subordination: the life prospects of the subordinated never equal those of the privileged, dominant group.[76] Since people in these groups are worse off than they would be without social dominance and social subordination, even the Lockean must agree that they are harmed.

The claim that reproduction-assisting technologies contribute to the subordinate status of oppressed groups is, then, a claim of tangible harm. A feminist social justice approach recognizes that policies governing procreation not only affect individual interests; they also shape the way we value the members of social groups. Trading genetic material and women's reproductive capacity on the market misvalues women's reproductive labor, exalts the importance of genetic relatedness, and

---

[72] *See, e.g.*, Chris Bull, *Suicidal Tendencies: Is Anguish over Sexual Orientation Causing Gay and Lesbian Teens to Kill Themselves?*, ADVOCATE, Apr. 5, 1994, at 34-42.

[73] David H. Swinton, *The Economic Status of African Americans: "Permanent" Poverty and Inequality*, *in* THE STATE OF BLACK AMERICA 25 (1991).

[74] *Mortality Patterns — United States, 1992 from the Centers for Disease Control and Prevention*, 273 JAMA 100 (1995).

[75] *See* Charles R. Lawrence, III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (demonstrating the prevalence of unconscious racism).

[76] *Id.* at 326.

devalues the genetic contribution of people of color. It therefore reinforces gender, class, and racial inequality.

For these reasons, feminist social justice approaches call for the inclusion of harms arising from unjust social relationships in deliberations about the government's role in the development and use of reproduction-assisting technologies. Feminists need not abandon, however, the liberal concern about government abuse of power and the danger to individual autonomy posed by legislative majorities. We may be willing to permit certain harms because attempting to prevent them would itself be substantially more harmful. The degree of government intrusion into individuals' procreative decisions required to regulate every use of reproduction-assisting technologies may itself be too great a harm to justify this regulation. Thus, as we pointed out earlier, a feminist social justice approach need not support the absolute prohibition of noncoital means of reproduction. But such an approach means to make clear that insofar as these means of reproduction add to the privileging of men over women, the privileging of white people over people of color, the privileging of heterosexual people over homosexual people, the privileging of the economically well-off over the poor, and the commodification of children, these means are harmful and they should not be endorsed or in any way supported by a government that purports to take the interests of *all* its citizens equally seriously. Part of what this means is that no public monies should be expended on the development of these technologies unless they are equally available to all citizens, and "contracts" for so-called surrogate motherhood arrangements should not be enforceable.

IV. CONCERNS ABOUT EXPLOITATION AND VOLUNTARINESS

Liberals also challenge the feminist contention that "contracts" for so-called surrogate motherhood arrangements should not be enforced because they are demeaning to women. Once again, Robertson serves as an example when he argues that if a birth mother in one of these arrangements wishes to keep the child, "[p]rivileging the surrogate's wishes over the reliance wishes of the couple assumes that women cannot make rational decisions about reproduction and child rearing prior to conception."[77] Ruth Macklin makes the same objection, saying that "[f]eminists who oppose surrogacy presume to speak for all women. But what they are really saying is that those who elect to enter surrogacy arrangements

[77] ROBERTSON, *supra* note 8, at 132.

are incompetent to choose and stand in need of protection."[78] Versions of this argument have been put forward by liberal feminists as well, for example, Lori Andrews, Barbara Berg, and Christine Sistare.[79]

But this objection is just too quick. First, worries about exploitation in contract pregnancy arrangements need not come from some particularly feminist view. They may come from a certain view of the power differentiations between races, ethnic groups, and classes that pays no special attention to the position of women as such. Second, anyone who opposes these arrangements need not hold that women entering into them are incompetent to make such judgments for themselves and need not hold that these women need special protection because of some special vulnerability.

A. Exploitation

It is often argued that contract pregnancies are likely to exploit poor women, and particularly poor women of color. But it needs to be remembered that in general, at least, it is acceptable to select public policies that attempt to limit the activities of *exploiters*, even if fully competent people might choose to be exploitees. That is, one may coherently argue that the state's enforcement of these arrangements contributes substantially to societal attitudes toward women and children that simply ought not to be encouraged, in general, and ought not to be encouraged by the state, in particular. Such an argument undermines Macklin's claims that "the feminist charge that the practice of surrogacy exploits women is paternalistic"[80] and "the charge of exploitation contradicts the moral stance that women have the ability and the right to control their own bodies."[81] After all, jurisdictions commonly refuse to allow people to assent to being maimed or to engage in dueling, even though people might make such assents voluntarily.

---

[78] Ruth Macklin, *Is There Anything Wrong with Surrogate Motherhood? An Ethical Analysis*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 136, 141 (Larry Gostin ed., 1990).

[79] Andrews, *supra* note 38; Barbara J. Berg, *Listening to the Voices of the Infertile*, *in* REPRODUCTION, ETHICS, AND THE LAW: FEMINIST PERSPECTIVES 80 (Joan C. Callahan ed., 1995); Christine T. Sistare, *Reproductive Freedom and Women's Freedom: Surrogacy and Autonomy*, 19 PHIL. F. 227 (1988).

[80] Macklin, *supra* note 78, at 141.

[81] *Id.*

Christine Overall makes one version of this feminist social justice argument to Canadians with regard to commercial forms of these arrangements:

> Merely mitigating the exploitive aspects of contract motherhood while making it legal begs the general question whether the practice as a whole is justified, whether the Canadian state should be fostering the work of women as breeders and whether this is a "job" for women that Canadian society should endorse and support through state mechanisms. The legalization of contract motherhood would present reproduction for money as an acceptable, even desirable, aspect of women's place in Canadian society. But this path is incompatible with the vision of women as equal, autonomous, and valued members of this culture.[82]

Similarly, Joan Mahoney provides a non-paternalistic argument for nonenforcement by showing the problems with the law's requiring specific performance of terms governing a woman's conduct during a contract pregnancy and requiring relinquishment of a child after birth.[83] Since liberals often argue for the enforcement of contract motherhood arrangements on the ground of an analogy to sperm "donation," Mahoney distinguishes genetic and gestational mothers: she argues that women who donate oocytes are analogous to sperm donors, but that these donors are not analogous to women who carry pregnancies to term, and that the law should not treat gestational mothers as analogous to gamete providers who do not participate in gestation.[84] Refusing to enforce an agreement to relinquish parental rights of a gestational mother, then, does not constitute a worrisome kind of special treatment for women. Using several precedents in labor law, Mahoney argues that precluding gestational contract mothers from contracting away their parental rights amounts to just one more provision among many that restrict the freedom of employees. The fact that only women can become pregnant does not mean that such restrictions treat women as less competent and more in need of protection from their decisions than men.

At the same time, Mahoney argues that men and women *are* different in some important ways, and that justice might well require recognizing

---

[82] Overall, *supra* note 9, at 131.

[83] Joan Mahoney, *An Essay on Surrogacy and Feminist Thought*, *in* SURROGATE MOTHERHOOD: POLITICS AND PRIVACY 183 (Larry Gostin ed., 1990).

[84] *Id.* at 188.

some of these differences. That women alone can be and are gestational mothers may make a difference that is appropriately recognized in law.[85] Following feminist jurists such as Ruth Colker, Ann Scales, and Catharine MacKinnon, Mahoney distinguishes what she calls the "anti-subordination perspective" from what she calls the "equality model" found in liberal feminist positions like Lori Andrews', which include the worry that special treatment of women in these arrangements (i.e., by nonenforcement) will only work against women.[86] The anti-subordination perspective that Mahoney takes asks whether the policy or practice in question helps to maintain an underclass based on gender. If the law's refusal to recognize gestational mothers' prenatal contracts to relinquish parental rights helps do away with the second-class status of women generally, then feminists should support nonenforcement of these contracts.

B. Voluntariness

It is sometimes argued by feminists that contract motherhood arrangements should not be enforced because women cannot voluntarily decide before the birth of a child whether they will be willing to give up that child once it is born. Similar concerns about voluntariness are often heard in regard to other reproduction-assisting technologies. For example, it has sometimes been argued that pronatalist attitudes exert a subtle but extremely strong influence on women to reproduce, and women who have access to these technologies are under enormous pressure to seek them.[87] The pressure on women to become mothers is so great that some question

---

[85] *Id.* at 190.

[86] *See id.* at 192; CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986).

[87] *See, e.g.*, GENA COREA, THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS 166-85 (1985); Judith Lorber, *Choice, Gift or Patriarchal Bargain? Women's Consent to In Vitro Fertilization in Male Infertility*, *in* FEMINIST PERSPECTIVES IN MEDICAL ETHICS 169 (Helen B. Holmes & Laura M. Purdy eds., 1992). Pronatalism, of course, is not uniform in society. Economically well-off white women may be pressured by general pronatalist attitudes to seek these technologies, but those general attitudes do not extend to black women or poor women of any racial or ethnic group.

whether the decision to use these technologies is a genuinely voluntary choice.[88] Indeed, some views come close to holding that socially constructed pronatalism is so strong that women, even under typical conditions that do not require technological assistance, cannot really choose freely whether to take on motherhood.[89]

It is important to address these concerns directly. On the one hand, societal pronatalism for favored groups does result in enormous pressure on some women to reproduce. There is no question about this. Our society does not think it is just fine for people to remain single and childless deliberately or for married people to remain childless deliberately. Infertility is constructed as a nearly unbearable tragedy; deliberate childlessness is constructed as nearly unimaginable selfishness.[90] Under such conditions, what might be said on the question of voluntariness in seeking reproductive assistance?

It needs first to be noted that voluntariness is not an all-or-nothing matter; voluntariness is a characteristic of human activity which admits of degrees. Further, questions about the voluntariness of an individual's action are necessarily contextual. For example, the criteria for making an acceptably voluntary purchase of an automobile are very different from the criteria for giving an acceptably voluntary consent to a major surgery. So, highly general discussions of voluntariness will always be limited in their usefulness, much as highly general discussions of causality are always limited in their usefulness. For example, Joel Feinberg argues that the

> point of a causal citation is to single out one of the certified causal candidates that is especially *interesting* to us, given our various practical purposes and cognitive concerns. . . . Explanatory citations single out abnormal interferences with the normal course of events or hitherto unknown missing links in a person's understanding. They are designed

---

[88] *See, e.g.*, Lorber, *supra* note 87.

[89] *See, e.g.*, Martha E. Gimenez, *Feminism, Pronatalism, and Motherhood*, *in* MOTHERING: ESSAYS IN FEMINIST THEORY 287, 293 (Joyce Trebilcot ed., 1984).

[90] Of course, and as we have mentioned previously, we do not see proponents of reproductive liberty worrying about the infertility of those who are not white and/or who are poor. And many of those for whom the society does not have pronatalist ambitions, particularly blacks, are in a most peculiar position — the dominant white society is not invested in the reproduction of blacks, but a married black couple deliberately childless is even more unthinkable an instance of selfishness.

> simply to remove puzzlement by citing the causal factor that can shed the most light. Hence we can refer to the criterion of selection in explanatory contexts (for short) as *the lantern criterion*. Causal citations made from the "engineering standpoint" are made with a view to facilitating control over future events by citing the most efficiently and economically manipulable causal factor. The criterion for selection [here] . . . can thus be called (for short) *the handle criterion*. The point of causal citations in purely blaming contexts is simply to pin the label of blame on the appropriate factor for further notice and practical use. These judgments cite a causal factor that is a human act or omission "stained" (as an ancient figure of speech would have it) with fault. The criterion [here] . . . can be called (for short) *the stain criterion*. When we look for "the cause," then, we may be looking for the causal factor that has either a lantern, a handle or a stain on it.[91]

There is, then, no such thing as "the cause" which can be cited in any case independent of purpose and context. In much the same way, there is no such thing as a completely free action. Indeed, any action that was completely free or uninfluenced would be completely random, and this is surely not what we mean by voluntary human action. Analogous to making an appropriate causal citation, whether an action is to be considered appropriately or acceptably voluntary will necessarily be a function of our purposes and the context of the action.

Suppose our purpose in asking about the voluntariness of a woman's choice in seeking reproduction assistance is to decide whether she ought to be prevented from obtaining assistance. When we are talking about voluntariness from the perspective of potential interference, we need to ask what is at stake and whether someone has viable alternatives. Pronatalist attitudes certainly do put pressure on women to seek assistance in reproducing; but the pressure here is not analogous to compulsion (e.g., being swept up and carried off) or coercion (e.g., being forced at gunpoint). In cases of genuine compulsion or coercion, it would be completely unreasonable to expect someone to resist, either because she is being overpowered physically or because the threat to her is so substantial.[92] In these cases, it makes sense to say that someone is completely a victim — that she had no real choice but to "act" as she did. If our question is whether women should be precluded from seeking

---

[91] JOEL FEINBERG, HARM TO OTHERS 177 (1984).

[92] *See* Joan C. Callahan, *Paternalism and Voluntariness*, 16 CANADIAN J. PHIL. 199 (1986).

reproduction assistance because their choice to do so is unfree in a pronatalist society like our own, the answer has to be no; such interference would not be justified on the basis of women's choices being unfree to the relevant degree in the relevant sense.

On the other hand, if our purpose in asking about the voluntariness of women's seeking reproduction assistance is to determine whether there are worrisome influences at work that need to be noticed and addressed, it is reasonable to conclude that pronatalist social attitudes do exert a troubling, often insidious, influence on women's choices to reproduce in general, and to seek potentially painful, risky, and expensive reproduction assistance in particular. Feinberg, for example, argues:

> [A] person's consent is fully voluntary only when he is a competent and unimpaired adult who has not been threatened, misled, or lied to about relevant facts, nor manipulated by subtle forms of conditioning. It is worth giving emphasis here to two points: that both force and fraud can invalidate consent, and that "force" can be very subtle indeed.[93]

Feinberg's use of "scare quotes," of course, is to alert us that "force" regarding human action is being used here in a way other than its usual way. The meaning of "force" in this context is not analogous to "compulsion" or "coercion," but is more like the meaning of "force" in science, where forces are understood to have greater and lesser power. The point (for our discussion) is that we all grow up in a society that subjects us to various subtle forms of conditioning, and, depending on the force or influence of that conditioning on our actions, the voluntariness of our choices can be impaired.

When feminists question women's voluntariness in electing reproduction assistance, part of the intent is to direct attention to these subtle forms of conditioning and to point out that they do raise legitimate concerns about the reasons women might have for being so intent on reproducing. One way to put this point is to say that if we did not live in a society which put such relentless pressure on (at least some) women to reproduce, we could have complete confidence that a woman's reproductive choices were not the result of manipulation by conditioning, subtle and often not-so-subtle.

Feminists are also often concerned that women might be misled regarding the safety and efficacy of some reproduction-assisting technologies. There are dangers associated with these technologies that

---

[93] FEINBERG, *supra* note 91, at 116.

often go unmentioned. For example, a number of these technologies involve inducing superovulation, which involves giving high doses of fertility drugs to perfectly healthy, fertile, fully functional women who are "donating" eggs for others' use or whose male partners are subfertile. The long-term effects of superovulation are not known; and egg collection has led to several deaths and a number of injuries with potential for causing permanent infertility. There is a grim irony in the use of procedures that risk the fertility of a healthy woman to assure reproduction for an infertile or subfertile man or an infertile woman.

It is also the case that the more elaborate and more expensive forms of these technologies frequently fail, and reporting systems have not required clear reports of failure rates. Robyn Rowland, for example, suggests that the most honest and helpful reporting would include failure rates instead of so-called success rates.[94] She discusses a survey of IVF clinics in America:

> Many clinics were quoting a 20 per cent success rate, using what they saw as the worldwide average; yet of the fifty-four clinics which responded to the questionnaire, half had never sent a client home with a baby. . . . Statistics were manipulated, so that some of the so-called pregnancies were in fact just chemical changes which might or might not have been an early sign of pregnancy. Hospitals would cite pregnancies as a success rate, as opposed to live births, and many hospitals counted their twins and triplets in the reported totals of live births. Ectopic pregnancies were also rated in the "success" category. Most clinics use pregnancy rates because these are much higher than the live birth rates due to the high rates of ectopic pregnancies, stillbirths and spontaneous abortions.[95]

One set of recent figures shows that of 19,079 treatment cycles, 16,405 (eighty-six percent) involved successful egg retrievals, 14,150 (seventy-four percent) involved successful transfers leading to 3057 (sixteen percent) pregnancies, which culminated in 2345 (twelve percent) deliveries.[96] Of these deliveries, 673 (twenty-eight percent) were multi-

---

[94] ROBYN ROWLAND, LIVING LABORATORIES: WOMEN AND REPRODUCTIVE TECHNOLOGIES 44 (1992).

[95] *Id.*

[96] John F. Randolph, Jr. (Director of the Division of Reproductive Endocrinology, Department of Obstetrics and Gynecology, University of Michigan Medical Center), public lecture sponsored by the GTE Foundation Lectureship Program in Technology and Ethics at Transylvania University (Apr.

ple gestations.[97] If each of these multiple births involved only twins (which they did not), that would mean that *at most* 1346 treatment cycles of 19,079 (seven percent) could be counted as successful.[98] On Rowland's suggestion for giving figures, that's a ninety-three percent failure rate. The statistics for GIFT and ZIFT are even worse.[99] Rowland puts it baldly: "[I]n any other technological area [this] would be considered a gross failure and immediately discontinued."[100]

Add to this that roughly thirty-five percent of couples "diagnosed" as infertile ultimately succeed in achieving pregnancy with no treatment,[101] and the wisdom of applying these technologies becomes highly questionable, at best. Yet, despite the discomforts, risks, financial costs, and dismal success rates of these programs, women who have the financial means to afford them continue to enroll in them.[102] If enrolling women do not understand the failure rates of these programs, their participation in them is not acceptably voluntary. On the other hand, if women do understand the high failure rates of these programs, yet they continue to take on the discomfort, risk, and expense of them, this raises pertinent questions about their desperation for children genetically connected to them and/or their male partners as well as questions about the source of that desperation. We do not want to suggest that women entering these programs are so desperate that their choices to do so are so involuntary that they should not be permitted to make these choices, but we do want to suggest that when a woman is so "desperate" to have a child genetically related to her and/or her partner that she seeks special reproduction-assisting services that are painful, often humiliating,[103] risky, tremendously expensive, and, at the same time, highly unlikely to yield the child

---

29, 1993).

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] ROWLAND, *supra* note 94, at 48.

[101] *See, e.g.*, John A. Collins et al., *Treatment-independent Pregnancy Among Infertile Couples*, 309 NEW ENG. J. MED. 1201, 1202 (1983).

[102] Developers and providers of these technologies continue to utilize public funds (in the form of research support and the utilization of public facilities, such as state universities) and to press for private insurance carriers to cover their costs. At the same time, and not surprisingly, none of these proponents press for Medicaid or Medicare funding for applying these technologies to those without the ability to pay for them.

[103] See, for example, ROWLAND, *supra* note 94, at 29-30, who includes testimony from women who have participated in these programs.

she seeks, she is acting on a motive that is socially constructed and that may well compromise the voluntariness of her choice.

Many feminists have argued that the so-called desperation of the infertile is a social construction.[104] Indeed, it is a social construction twice over. First, women's experience of desperation in wanting a "genetically appropriate" child is largely the result of social attitudes toward infertility. Second, even if an infertile woman does not experience desperation for a "genetically appropriate" child, she is constructed as desperate and as someone who should be willing to do all that she can to produce such a child. As Naomi Pfeffer says, "What is required of the infertile is that they submit in silence to the claim that they *are* desperate."[105] The groundwork for such a requirement is clearly laid in liberal discussions of the value of genetic reproduction, such as John Robertson's, which assume without argument a fundamental connection between reproduction of one's genes and one's self-identity.[106] But this is not a claim likely to be made by a woman; and it is a claim quite likely to be rejected by a feminist. Indeed, feminists have often argued that the emphasis on genetic connections is intimately tied to patriarchy, both historically and contemporarily,[107] particularly in its racist manifestation.[108] Women may well be deeply invested in experiencing pregnancy, childbirth, nursing, and parenting — experiences that accompany ordinary reproduction in the ordinary way — but this is emphatically not equivalent to being deeply invested in having a child genetically related to them and/or their male spouses. The whole emphasis on genetically-related children that informs Robertson's view, then, is found by social justice feminists to be suspect as a perspective that is characteristic of women; and if it is not characteristic of women, this is just one more occasion on

---

[104] *See, e.g.*, Naomi Pfeffer, *Artificial Insemination, In-vitro Fertilization and the Stigma of Infertility*, *in* REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD AND MEDICINE 81 (Michelle Stanworth ed., 1987).

[105] *Id.* at 91.

[106] ROBERTSON, *supra* note 8.

[107] *See, e.g.*, *id.* at 24, 98; BARBARA K. ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY (1989); Joan Mahoney, *Adoption as a Feminist Alternative to Reproductive Technology*, *in* REPRODUCTION, ETHICS, AND THE LAW: FEMINIST PERSPECTIVES 35 (Joan C. Callahan ed., 1995); Patricia Smith, *Selfish Genes and Maternal Myths: A Look at Postmenopausal Pregnancy*, *in* MENOPAUSE: A MIDLIFE PASSAGE 92 (Joan C. Callahan ed., 1993).

[108] *See* Roberts, *The Genetic Tie*, *supra* note 53.

which liberalism has left out the perspective of women, taking the perspective of men as the norm.

In sum, then, a feminist social justice approach is an antisubordination perspective that is no more a form of legal moralism than is liberalism, and a proponent of this perspective can argue against the deployment of reproduction-assisting technologies and against the state's enforcing contract motherhood arrangements without assuming that women are incompetent or in need of special protection simply because they are women. At the same time, (selective) pronatalism in a society can and does put women under considerable, if often subtle, pressure to produce children genetically related to themselves and/or their male partners. Although this does not render women incompetent to decide whether to use these technologies, it does raise important questions about possible compromises of voluntariness on the part of women who seek these technologies, particularly those technologies that are painful, risky, very expensive, and highly prone to failure.

CONCLUSION: THE STATE'S PROPER ROLE IN PROTECTING AND ENHANCING PROCREATIVE LIBERTY

The liberal notion of procreative liberty encompasses only the right against state interference with personal decisions about reproduction. As we have mentioned, this view follows the prevailing jurisprudence that the Constitution protects only an individual's "negative" right to be free from unjustified intrusion, rather than the "positive" right actually to lead a free life.[109] Consistent with its predominant concern with government neutrality, liberal theory does not recognize an affirmative entitlement to the resources needed to procreate. As Robertson explains, procreative liberty "means that a person violates no moral duty in making a procreative choice, and that other persons have a duty not to interfere with that choice" but "does not imply the duty of others to provide the resources or services necessary to exercise one's procreative liberty despite plausible moral arguments for government assistance."[110] Thus,

---

[109] *See generally* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION (1994); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990) (arguing that obligations to act, provide or protect have not been held to be enforceable constitutional rights); Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990) (positing that a conservative construction of the Constitution has prevailed under both conservative and liberal courts).

[110] ROBERTSON, *supra* note 8, at 23.

the definition of procreative liberty as a purely negative right exempts the state from any obligation to ensure the social conditions and resources necessary for autonomous decisionmaking about reproduction.[111]

The Supreme Court elaborated the distinction between the negative and positive protection of reproductive rights in a series of cases concerning the government's obligation to subsidize the poor woman's right to an abortion.[112] In these cases, the Court refused to require the state or federal government to pay for the cost of abortion services for poor women, even though it pays for the expenses incident to childbirth. The *Harris* Court reasoned: "[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. . . . [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation."[113]

Feminist legal scholars have pointed to the abortion-funding cases as a prime example of the limits of constitutional privacy doctrine.[114] They note that framing the abortion right as a right merely to be shielded from state intrusion into private choices provides no basis for a constitutional claim to public support for abortions. Catharine MacKinnon, for example, concludes that abortion as a private privilege serves to perpetuate gender inequality because it fails to recognize the ways in which social forces constrain women's reproductive decisions: "The point is that [women's] alternatives are precluded *prior* to the reach of the chosen legal doctrine. They are precluded by conditions of sex, race, and class — the very conditions the privacy frame not only leaves tacit but exists to *guarantee*."[115] Like the liberal view of harm and voluntariness, the liberal view of the state's role ignores the role that social position plays in determining individuals' reproductive choices.

A feminist social justice critique of the negative interpretation of liberty demonstrates a serious flaw in liberal theorizing about rights. But we need not abandon the liberal model of rights and adopt a positive notion of liberty to minimize the government's facilitation of reproduc-

---

[111] *See* Roberts, *Punishing Drug Addicts*, *supra* note 1, at 1478.

[112] *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 509 (1989); Harris v. McRae, 448 U.S. 297, 315 (1980); Maher v. Roe, 432 U.S. 464, 474 (1977).

[113] *Harris*, 448 U.S. at 316.

[114] *See, e.g.*, RUTH COLKER, ABORTION AND DIALOGUE (1992); CATHARINE MACKINNON, FEMINISM UNMODIFIED 101 (1987); *see also* ROSALIND PETCHESKY, ABORTION AND WOMEN'S CHOICE 295-302 (1984).

[115] MACKINNON, *supra* note 114, at 101.

tion-assisting technologies. The prohibition of unjustified state interference with liberty does not prevent the state from refusing to support reproduction-assisting technologies. Even the negative view of liberty leaves the state free to decide *not* to lend affirmative assistance to individuals who choose to use these technologies.

According to the liberal noninterference model, the state is not required to support individuals' use of these technologies in any way. Liberals who argue that the state must facilitate the use of these technologies, by enforcing paid pregnancy contracts for instance, are thus caught in a serious internal inconsistency. Although failing to enforce these contracts may discourage couples from entering into these arrangements, liberal theory does not require the state to promote procreative arrangements in this way. As we noted above, enforcing these contracts privileges the procreative interests of more powerful men over the procreative interests of poorer gestational mothers. Liberals seem willing to depart from the noninterference model only for the sake of the most privileged members of society. But this, of course, is patently unfair.

A feminist social justice approach not only highlights this inconsistency in the liberal position but also supports state refusal to encourage the development and deployment of reproduction-assisting technologies. These technologies' contribution to the subordination of women, poor people, and people of color justifies the government's decision to refrain from facilitating them. The state should not lend its affirmative support to practices that demean members of society and deepen already existing social inequities. Under this view, the state should refuse to enforce paid pregnancy contracts because they commodify children, degrade all women's reproductive labor, and, particularly, devalue women and children of color. Indeed, the state could refuse to spend any public resources for the development or deployment of reproduction-assisting technologies on the basis of their harmful effects. The government's total departure from this field, on the other hand, like the total prohibition of non-coital means of procreation, may also be substantively harmful. Rather than lead to a ban of public spending on reproduction-assisting technologies, a feminist social justice approach might call for public funding strategies designed to reduce the concentration of the use of these technologies among the most affluent, thereby addressing the problem of privilege and subordination.

How is the feminist argument that the state should not support reproduction-assisting technologies any different from the liberal argument that the state need not support women's access to abortion services? The difference lies in feminists' attention to social power. A

feminist social justice approach rejects certain state facilitation of these technologies because of their contribution to an unjust social structure. Thus, a feminist social justice approach takes more seriously the moral equality of persons than does liberalism, since liberalism leaves this structure intact, and uses methods that continue to sustain it. A feminist social justice approach also calls for state assistance of women's right to an abortion because the abortion right is essential to eliminating women's social subordination and to ensuring that a woman's choice not to be a parent can always be realized. Both these positions are consistent with a predominant concern for dismantling unjust arrangements of race, class, and gender power and both are consistent with ensuring substantive liberty for all in our society, not just for those in privileged groups. Unlike the liberal view of liberty, the feminist social justice approach does not hinge on the false dichotomy between state interference and noninterference.[116] Rather, it seeks to achieve a society free of invidious hierarchies that materially impair certain individuals' reproductive autonomy.

An examination of contemporary reproduction-assisting technologies, then, shows that a feminist social justice approach is superior to liberalism on the two axiological axes that undergird liberal theory itself. That is, a feminist social justice approach is better able than liberalism to serve as a social and political theory on which to base a political society that takes the liberty and moral equality of *all* its citizens equally seriously.

---

[116] For feminist critiques on the false dichotomy between state interference and noninterference, see Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 18 (1989) (noting that the market "is not a freestanding, natural phenomenon, but consists of rules defined by law and backed by the power of the state"); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835 (1985).