

LET IVF TAKE ITS COURSE: RECONCEIVING PROCREATIVE LIBERTY FOR THE TWENTY-FIRST CENTURY

By Christine E. White*

INTRODUCTION

In 1981, three years after the birth of the world's first "test-tube baby,"¹ a series of events occurred that forever linked the reproductive technology experiences of the United States and Victoria, Australia. Mario and Elsa Rios, a married couple from Los Angeles, California, traveled to Victoria, Australia, to undergo an in vitro fertilization ("IVF") procedure at the Queen Victoria Medical Center in Melbourne.² The Rios' ten-year-old daughter Claudia died from an accidental gunshot wound in 1978.³ Mr. and Mrs. Rios "tried desperately to soften the tragedy of Claudia's death with the happiness of another child," but Mrs. Rios, who was thirty-seven years old, was ineligible to undergo IVF in the United States due to her age.⁴

* Law Clerk to Judge Marvin J. Garbis, U.S. District Court for the District of Maryland, J.D., University of Maryland Francis King Carey School of Law, 2013; B.S., Georgetown University School of Foreign Service, 2005. The views expressed in this Article are solely the author's and do not reflect those of Judge Garbis. The author expresses special gratitude to Professor Leslie Meltzer Henry of the University of Maryland Francis King Carey School of Law for her invaluable instruction and guidance throughout the development of this Article. She also wishes to thank Roben Walters for his unwavering encouragement and support.

¹ In July 1978, two British doctors, Patrick C. Steptoe and Robert G. Edwards, reported the birth of Louise Brown, the first "in vitro fertilized baby." See Keith Alan Byers, *Infertility and In Vitro Fertilization: A Growing Need for Consumer-Oriented Regulation of the In Vitro Fertilization Industry*, 18 J. LEGAL MED. 265, 273 (1997).

² George P. Smith, Jr., *Australia's Frozen 'Orphan' Embryos: A Medical, Legal and Ethical Dilemma*, 24 J. FAM. LAW 27, 27 (1985). IVF involves fertilization of a woman's eggs outside of her body. After the eggs are fertilized with a sample of sperm and allowed to incubate for two to three days, the fertilized ova are transferred into the woman's uterus. Byers, *supra* note 1, at 274 (citation omitted). See Glenn Cohen & Daniel L. Chen, *Trading-Off Reproductive Technology and Adoption: Does Subsidizing IVF Decrease Adoption Rates and Should it Matter?*, 95 MICH. L. REV. 485, 490-91 (2010) (describing the "four stages" of IVF).

³ *Embryo Story Was Born with a Tragedy*, MILWAUKEE J., June 24, 1984, at 1; John Schauble, *Dilemma Over Orphaned Embryos*, SYDNEY MORNING HERALD, June 18, 1984, at 3. Mr. Rios was "fifty years old and infertile," so the couple used an anonymous sperm "donor from Melbourne to" fertilize Mrs. Rios's eggs. Smith, *supra* note 2, at 28. Doctors implanted one embryo into Mrs. Rios and froze the other two through cryopreservation for possible future use. *Id.*

⁴ Schauble, *supra* note 3.

The IVF procedure in Australia was successful and resulted in a pregnancy, but Mrs. Rios soon suffered a miscarriage and was unable to start another cycle. In 1983, before Mrs. Rios could undergo another cycle, she and Mr. Rios died in a plane crash, leaving behind two "orphan embryos."⁵ The Waller Committee, a body created by the Parliament of Victoria to examine the social, ethical, and legal implications of IVF,⁶ recommended that the embryos be destroyed, apparently reasoning that "since [Mr. and Mrs. Rios] had not specified what should be done [with the embryos], no one else had the right to do so and the embryos should just be thawed."⁷ After intense public outcry, the Parliament of Victoria amended the state's infertility legislation and required donation of the embryos to another couple.⁸ The ultimate fate of the embryos, however, is unknown.⁹

The Rios' story is significant for its influence on the development of assisted reproductive technologies ("ARTs"), namely, the cryopreservation of embryos for later use in IVF procedures. For example, the recommendations from the Waller Committee included ensuring "that clear agreement about the disposition of the embryos be reached before they are frozen."¹⁰ In addition, in 1984, the year that the Waller Committee released its recommendations, the world's first baby born through embryo cryopreservation was born in Australia.¹¹ ARTs include procedures other than IVF, such as artificial insemination ("AI"), which is "the oldest and most widely used [form] of assisted reproductive techniques."¹² An estimated 20,000 to 30,000 children are born each year in the United States" through AI from donor sperm ("AID") or from the husband's sperm ("AIH").¹³ Other ARTs include inserting eggs and sperm into a woman's fallopian tubes ("GIFT") and inserting sperm directly into a woman's uterus

⁵ Smith, *supra* note 2, at 28. Mr. and Mrs. Rios were on their way back from Argentina, where they had recently adopted a three-week-old baby boy. The baby also died in the plane crash. *Melbourne Man Feathered the Rios Embryos*, SYDNEY MORNING HERALD, June 21, 1984, at 1.

⁶ Loane Stone, *An Overview of Assisted Reproductive Technology Regulation in Australia and New Zealand*, 35 TEX. INT'L L.J. 31, 33 (2000).

⁷ Panel in *Australia Urges That Orphaned Embryos be Destroyed*, N.Y. TIMES, Sept. 4, 1984, at C6.

⁸ ALBERT R. JONSEN, *THE BIRTH OF BIOETHICS* 309 (1998).

⁹ VALERIE HARTOUNI, *CULTURAL CONCEPTIONS: ON REPRODUCTIVE TECHNOLOGIES AND THE REMAKING OF LIFE* 29 (1997).

¹⁰ THOMAS C. SHEVORY, *BODY/POLITICS: STUDIES IN REPRODUCTION, PRODUCTION, AND (RE)CONSTRUCTION* 81 (2000).

¹¹ Byers, *supra* note 1, at 273.

¹² JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 8 (1994).

¹³ *Id.* For an interesting discussion of the historical relationship between AI and the law, including efforts to criminalize AI and judicial treatment of AI cases, see WILFRED J. FIBROULD, *ARTIFICIAL INSEMINATION* 63-75 (1964).

("IUI"). IVF, however, is still "[b]y far the most visible, dramatic, and important assisted reproductive technique."¹⁴

The Rios' story also serves as an important guidepost in the evolution of the ethical and legal discourse on IVF. Most importantly, though, the account of the orphaned Rios embryos provides a starting point for evaluating the divergent regulatory systems for ARTs in the United States and Victoria and for understanding why the virtually unregulated system in the United States is preferable to the Victorian system, which affirmatively provides assistance in accessing ARTs. This inquiry necessarily begins with an examination of the meaning and extent of procreative liberty.

It has been almost two decades since the height of the reproductive revolution,¹⁵ when John Robertson wrote his groundbreaking book, *Children of Choice*.¹⁶ Examining ARTs "through the lens of procreative liberty," Robertson advocated for a "strong normative commitment" that would give procreative liberty "presumptive priority in all conflicts."¹⁷ His claim of the "presumptive primacy" of procreative liberty garnered much attention shortly after publication and has continued to factor into legal scholarship on ARTs.¹⁸ This Article contributes to the extensive dialogue on procreative liberty and ARTs by reexamining the value of Robertson's "presumptive primacy" framework in light of the experiences of the United States and Victoria with regulating ARTs.

Robertson's approach to procreative liberty provides a means of understanding the largely unregulated ART landscape in the United States,¹⁹ but Victoria has pursued a vastly different course and developed one of the world's broadest regimes for regulating ARTs.²⁰ Part I of this Article explores Robertson's radical approach to procreative liberty and discusses two trajectories of Supreme Court cases that demonstrate how the Court has "given life" to Robertson's theory of a right to procreate. Part II examines the different regulatory frameworks for ARTs between the United States and Australia. More specifically, Part II demonstrates how the right to access ARTs in the United States is a negative right against

¹⁴ ROBERTSON, *supra* note 12, at 8. For a discussion of the different types of ARTs, see Vera Terry & Cedric D. Soboty, *Artificial Reproductive Technologies in Australia - Legislation for the New Millennium?*, 19 MED. & L. 209, 210-11 (2000).

¹⁵ See Radhika Rao, *Contraceptive Microreceptives*, 93 MICH. L. REV. 1473, 1474 (1995) (citing ROBERTSON, *supra* note 12) ("The reproductive revolution originated in the 1960s when the development of the pill made possible sex without procreation. This revolution has culminated in the 1990s with the development of technology that allows procreation without sex.")

¹⁶ ROBERTSON, *supra* note 12.

¹⁷ *Id.* at 16, 18.

¹⁸ See Gregory Dolin, *A Defense of Embryonic Stem Cell Research*, 84 IND. L.J. 1203, 1220 (2009) (referencing Robertson's view "that the right to [use ARTs] is just as . . . constitutionally protected as a right to procreate the old-fashioned way"); Symposium on John A. Robertson's *Children of Choice*, 52 WASH. & LEE L. REV. 133 (1995).

¹⁹ See *infra* Parts I-II.A.

²⁰ See *infra* Part II.B.

government interference, while partial reimbursement from the government for ARTs in Australia suggests that there is a positive right to access assisted reproduction. In the state of Victoria, this reimbursement has led to extensive regulation, which reflects the recognition of a positive right, but also has the potential to arbitrarily limit procreative liberty. This Article concludes that the optimal way to address the complex issues surrounding access to ARTs is to protect the expansive notion of procreative liberty that Robertson espouses, subject to limitations only when the use of ARTs could result in substantial harms that justify limiting reproductive choice.

I. PROCREATIVE LIBERTY—THE FREEDOM TO HAVE AND TO AVOID HAVING CHILDREN

John Robertson coined the phrase "procreative liberty" in *Children of Choice* as a way to address the controversies and conflicts surrounding the emergence of new reproductive technologies.²¹ That these technologies have "become available in an era of rapid change in sexual practices, gender roles, divorce rates, family structure, and economic life," characterized by an "increase in single-parent families, the emergence of a gay rights movement, and the ongoing fight for equal rights for women,"²² is as true today as it was in 1994 when Robertson published *Children of Choice*. Compounding these issues is the medical reality of infertility. Nearly twelve percent of the sixty-two million women of reproductive age in the United States experience "impaired fecundity, representing a 21% increase from 1995 to 2002."²³ In addition, roughly 7.4% of married couples are infertile.²⁴ The percentage of the "infertile" is even higher when taking into account the "single individuals and same-sex couples whose infertility does not necessarily stem from impaired fecundity."²⁵ This combination of advancing technology and infertility, and the social context in which they are developing, calls for a discussion of procreative

²¹ ROBERTSON, *supra* note 1212, at 3-4.

²² *Id.* at 15.

²³ Joseph C. Isaacs, *Infertility Coverage is Good Business*, 89 FERTILITY AND STABILITY 1049, 1049 (2008); NAT'L CTR. FOR HEALTH STATISTICS, CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEPT. OF HEALTH AND HUMAN SERVS., FERTILITY, FAMILY PLANNING, AND REPRODUCTIVE HEALTH OF U.S. WOMEN: DATA FROM THE 2002 NATIONAL SURVEY OF FAMILY GROWTH 29, 106 (2005), available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_025.pdf (hereinafter NAT'L CTR FOR HEALTH STATISTICS); see NAT'L CTR FOR HEALTH STATISTICS, *supra*, at 154 (defining "impaired fecundity" as including women "who reported that (a) it was physically impossible for them . . . to have a baby . . . ; (b) it was physically difficult or dangerous to carry a baby to term . . . ; or (c) they had been continuously married or cohabiting, had not used contraception, and had not had a pregnancy for 3 years or longer . . .").

²⁴ NAT'L CTR FOR HEALTH STATISTICS, *supra* note 23, at 108, 155 (defining as infertile those couples who for at least one year "were continuously married or cohabiting, had not used contraception, and had not become pregnant").

²⁵ Cohen & Chen, *supra* note 2, at 490.

liberty to evaluate the scope of reproductive choice, particularly the right to access ARTs. An analysis of Robertson's notion of procreative liberty provides an understanding of the legal and theoretical framework against which the U.S. system of regulating ARTs has unfolded.

The United States Supreme Court "has dealt for the most part only with a subset of reproductive issues, most notably liberty claims to avoid reproduction through birth control and abortion."²⁶ As a result, the Court's procreative liberty jurisprudence centers primarily on the right to avoid reproduction. Robertson takes a different, more radical approach to procreative liberty.²⁷ For him, procreative liberty means "the freedom to decide whether or not to have offspring."²⁸ Despite these seemingly divergent contours, dicta in the Court's procreative liberty cases suggest that there is a constitutional right to procreate, and two trajectories of cases indicate that the Court would recognize this right to the positive side of procreative liberty.²⁹ An expansive right to procreative liberty does not, however, mean that the right is absolute. Robertson's work and the Court's jurisprudence differ in the extent to which they support limiting procreative liberty, but their common feature is the acknowledgment that procreative liberty does yield to certain competing interests.³⁰

A. John A. Robertson's radical approach to procreative liberty

Robertson's conception of procreative liberty is bifurcated into (1) the freedom to avoid having children and (2) the freedom to have children.³¹ The freedom to avoid having children includes the pre-conception right to access contraception and the post-conception right to an abortion. The freedom to have children involves issues of gestation and reproduction, including the right to use ARTs, gamete donation, and surrogacy arrangements.³² Robertson acknowledges that these freedoms are often discussed in the context of couples, but points out that procreative liberty "is first and foremost an individual interest."³³ He argues that this individual interest in the freedom to have children should apply to all individuals, regardless of marital status or sexual orientation, and therefore, does not believe that a majoritarian view of what is morally "right" is sufficient justification to limit reproductive choice.³⁴

²⁶ John A. Robertson, *Gay and Lesbian Rights to Procreate and Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 326 (2004).

²⁷ See *infra* Part I. A.

²⁸ ROBERTSON, *supra* note 12, at 4.

²⁹ See *infra* notes 45-74 and accompanying text (discussing "liberty as dignity" cases), 75-90 and accompanying text (discussing procreative liberty as privacy cases).

³⁰ See *infra* notes 91-100.

³¹ ROBERTSON, *supra* note 12, at 22.

³² *Id.* at 26.

³³ *Id.* at 22.

³⁴ *Id.* at 38, 41 ("If an unmarried person's right to procreate is not constitutionally recognized, states could limit access to infertility treatments on the basis of marital status [or] sexual orientation . . .").

One of the more controversial features of Robertson's theory is the "better to be born" argument. He regards life as a "net benefit" to offspring and does not consider reproduction to be "irresponsible solely because children are born in undesirable circumstances."³⁵ In Robertson's view, individuals do not violate a moral duty when they make procreative choices.³⁶ Furthermore, Robertson believes that the state has a duty not to interfere with those choices. He views procreative liberty as a "right against state interference with choices to procreate or to avoid procreation," meaning that individuals should be free to engage in "efforts to reproduce with the willing assistance of physicians and collaborators" and without government interference in those efforts.³⁷ This freedom is not, however, a right against private interference; individuals "may have a right against a state that denies them access to IVF[,] . . . but they would not have the same right to services from private actors unless civil rights or antidiscrimination laws apply."³⁸

Robertson concludes that the negative side—the freedom not to have children—and the positive side—the freedom to have children—of procreative liberty both deserve "presumptive primacy when conflicts about [their] exercise arise because control over whether one reproduces or not is central to personal identity, to dignity, and to the meaning of one's life."³⁹ This acknowledgment of the significance of procreative liberty is prominently reflected in U.S. Supreme Court jurisprudence.⁴⁰ The Court's procreative liberty jurisprudence has focused primarily on the right to avoid reproduction through contraception and abortion.⁴¹ In fact, the Court "has not yet dealt with legal claims of infertile persons to procreate,"⁴² presumably "[b]ecause there have been few attempts by the government to limit reproduction."⁴³ Powerful dicta from two distinct trajectories of the Court's "privacy and family jurisprudence," however, persuasively support Robertson's conception of the positive side of procreative liberty.⁴⁴

³⁵ *Id.* at 76. These "undesirable circumstances" can include children who are born with a genetic handicap, to abusive parents, into poverty, or even with HIV. *Id.* For example, Robertson contends that "[a] child infected with HIV who has no other way to be born disease-free has not been harmed." *Id.* at 37.

³⁶ *Id.* at 23. In certain situations, however, "one may still morally condemn giving birth to offspring in [undesirable] circumstances." *Id.* at 76.

³⁷ *Id.* at 23, 241 n.55 (ch. 3). This conception of procreative liberty is a negative right against state interference, not "a positive right to have the state . . . provide the means or resources necessary to have or avoid having children." *Id.* For a detailed analysis of procreative liberty as a negative right in the United States, see *infra* Part I.A.

³⁸ ROBERTSON, *supra* note 12, at 23, 254 n.53.

³⁹ *Id.* at 24.

⁴⁰ *Id.* at 326.

⁴¹ ROBERTSON, *supra* note 26, at 326.

⁴² ROBERTSON, *supra* note 12, at 38.

⁴³ *Id.* at 35. See *infra* notes 54–55 and accompanying text for a significant exception.

⁴⁴ ROBERTSON, *supra* note 26, at 326–28.

B. Reflections of Robertson's View in U.S. Supreme Court Jurisprudence

I. "Liberty as Dignity" Cases Respect the Autonomy of Reproductive Choice

The strongest grounding in Supreme Court jurisprudence for Robertson's approach to procreative liberty is found in the cases in which "liberty as dignity has played a critical role in securing the choices that individuals make to further their identity and personal goals."⁴⁵ "Liberty as dignity" arises out of "America's deeply held values of freedom, individualism, and autonomy," and therefore, "commands respect" for individual choice and individuals' capacity for choice.⁴⁶ The Supreme Court's clearest use of liberty as dignity is in cases that "protect individuals' personal choices with regard to abortion and same-sex sodomy."⁴⁷ The appropriate starting point, however, for an understanding of the Court's recognition of the positive side of procreative liberty illustrated in its liberty as dignity cases is *Skinner v. Oklahoma*.⁴⁸ *Skinner* is not a true liberty as dignity case, because the Court's opinion did not actually invoke the word "dignity,"⁴⁹ but the Court's use of "liberty" suggests that *Skinner* has come to stand for the proposition of liberty as dignity later featured in *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁵⁰ and *Lawrence v. Texas*.⁵¹

In striking down Oklahoma's Habitual Criminal Sterilization Act, which effectively prevented procreation of certain classes of individuals based on the particular crimes they had committed, the *Skinner* court noted that the statute "deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring."⁵² The *Skinner* decision is significant because only fifteen years earlier in *Buck v. Bell*,⁵³ the Court upheld a Virginia statute that authorized the compulsory sterilization of "mental defectives" against due process and equal protection challenges brought by Carrie Buck, an eighteen-year-old woman who had been committed to the Virginia State Colony for Epileptics and Feeble

⁴⁵ Leslie Mezzes Healy, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 209 (2011); see *id.* at 176-77 (proposing a typology of dignity "that captures the range of ways in which the Court invokes dignity [and] explore[s] dignity's judicial function in contemporary constitutional jurisprudence").

⁴⁶ *Id.* at 208.

⁴⁷ *Id.* at 190.

⁴⁸ 316 U.S. 535 (1942).

⁴⁹ In his concurring opinion, Justice Jackson did use "dignity." See *id.* at 546 (Jackson, J., concurring) ("There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority . . .").

⁵⁰ 505 U.S. 833 (1992).

⁵¹ 539 U.S. 558 (2003).

⁵² *Skinner*, 316 U.S. at 536.

⁵³ 274 U.S. 200 (1927), *abrogated* recognized by *Fieger v. Thomas*, 74 F.3d 740 (6th Cir. 1996).

Minded.⁵⁴ The Court relied on a finding that Carrie Buck was "the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child," and Justice Oliver Wendell Holmes, Jr. famously wrote, "It is better for all the world, if . . . society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough."⁵⁵ The *Buck* court's strong "anti procreation" language makes the subsequent decision in *Skinner* that much more meaningful for its influence on the development of a broad conception of procreative liberty.

The Court ultimately decided *Skinner* on equal protection grounds, holding that Oklahoma's compulsory sterilization statute unconstitutionally discriminated against those who committed larceny by exempting individuals convicted of embezzlement.⁵⁶ However, *Skinner* is noteworthy because it is the Court's first indication of the existence of a fundamental right to procreate. This is most evident in the Court's "stirring endorsement of the right to reproduce as 'one of the basic civil rights of man."⁵⁷ Specifically, the Court noted that "[m]arriage and procreation are fundamental to the very existence and survival of the race," emphasizing that the Oklahoma statute "forever deprive[s individuals] of a basic liberty."⁵⁸ This language seems to support an expansive definition of reproductive rights, which was further strengthened in the Court's later decisions addressing the right to access an abortion and the right to engage in same-sex sodomy.

Forty-five years later, in *Casey*, the Supreme Court affirmed the fundamental nature of procreation when it reviewed "five provisions of the Pennsylvania Abortion Control Act of 1982."⁵⁹ *Casey* is noteworthy because the Court overturned the trimester framework established in *Roe v. Wade*⁶⁰ in favor of an undue burden test for determining the extent of permissible limitations on a woman's right to access an abortion.⁶¹ Applying the newly crafted undue burden test, a plurality of the Court

⁵⁴ *Buck*, 274 U.S. at 205, 208.

⁵⁵ *Id.* at 205, 207. Compulsory sterilization was not limited to Virginia; nearly three dozen states had eugenics programs that sterilized people in the first half of the twentieth century. See, e.g., Kim Severson, *Payments Set for Those Sterilized in Program*, N.Y. Times, Jan. 11, 2012 at A13 ("Certainly, many of the nearly three dozen other states that once had eugenics programs sterilized more people [than North Carolina did]. In California, about 20,000 people were sterilized by the state. But the program in North Carolina, which may have included as many as 7,600 people, lasted the longest and was one of the most aggressive.");

⁵⁶ See *Skinner*, 316 U.S. at 541 ("When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.");

⁵⁷ See Robertson, *supra* note 26, at 327 (quoting *Skinner*, 316 U.S. at 541).

⁵⁸ *Skinner*, 316 U.S. at 541 (emphasis added).

⁵⁹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992).

⁶⁰ 410 U.S. 113, 164-65 (1973).

⁶¹ *Casey*, 505 U.S. at 872-76. The basic holding of *Casey* is that a woman has a right "to choose to have an abortion before viability and to obtain it without undue interference from the State." *Id.* at 846.

upheld four of the five provisions of the Pennsylvania statute. The majority overturned only the spousal notification requirement on the grounds that the threat of domestic violence facing two million families in the United States posed a substantial obstacle to a woman's ability to obtain an abortion.⁶² More importantly for the development of procreative liberty jurisprudence and the Court's recognition of a right to procreate, *Casey* equated the right to obtain an abortion with the constitutional protection afforded "to personal decisions relating to marriage, procreation, [and] contraception" and recognized that decisions to engage in such activities are part of "a realm of personal liberty [that] the government may not enter."⁶³ In language foreshadowing Robertson's position on the impermissibility of using a majoritarian perception of morality to limit reproductive choice, the Court reasoned, "Our obligation is to define the liberty of all, not to mandate our own moral code."⁶⁴

The most powerful liberty as dignity language from *Casey* appeared in the three-justice plurality opinion. The plurality conceded that the undue burden test departed from the *Roe* trimester framework, but noted that "the Court's interest in protecting liberty as dignity was unwavering."⁶⁵ Taking the concept of liberty in reproductive decisions a step further, the plurality wrote:

These matters, involving the most intimate and personal choices a person may make in a lifetime, *choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.*⁶⁶

This famed "mystery of life" passage "[b]ear[s] a striking resemblance to the treatment of liberty subsequently expressed in *Lawrence*, [and] restores an expansive view of liberty in a tone that extols the evolving aspirations of self-governance," strengthening the claim that the Court has

⁶² *Id.* at 841-44, 887-88, 893-95, 899, 901. The four provisions of the Pennsylvania statute that the plurality upheld were that: (1) a woman be required to give her informed consent before being able to obtain an abortion, (2) a woman receive the information at least twenty-four hours before the procedure, (3) at least one of a minor's parents consent to her being able to obtain an abortion, provided a judicial bypass mechanism is in place, and (4) facilities that provide abortions follow certain reporting requirements. *Id.* at 844.

⁶³ *Id.* at 847, 851.

⁶⁴ Compare *supra* note 34 and accompanying text, with *Casey*, 505 U.S. at 850.

⁶⁵ *Henry*, *supra* note 45, at 210 (citing *Casey*, 505 U.S. at 874-79).

⁶⁶ *Casey*, 505 U.S. at 851 (emphasis added). This is the famed "mystery of life" passage, as termed by Justice Scalia. See *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (writing, "if the Court is referring not to the holding of *Casey*, but to the dictum of its famed sweet-mystery-of-life passage"). For a discussion of the claim that Justice Kennedy wrote the "mystery of life" passage, see Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Cornell*, 117 *YALE L.J.* 1694, 1740 & nn.131-33 (2008).

adopted an approach to procreative liberty that accords with Robertson's formulation.⁶⁷

In *Lawrence v. Texas*, the Court evaluated equal protection and due process challenges to a Texas statute that criminalized same-sex sodomy after police officers in Houston, Texas arrested John Geddes Lawrence and Tyron Garner for engaging in "deviate sexual intercourse" in violation of the statute.⁶⁸ The Court held the statute unconstitutional under the Due Process Clause of the Fourteenth Amendment, concluding that Mr. Lawrence and Mr. Garner were "free as adults to engage in the private conduct in the exercise of their liberty."⁶⁹ Justice Kennedy, the purported author of Casey's "mystery of life passage," began the landmark opinion with a striking pronouncement—"Liberty protects the person from unwarranted government intrusions into a dwelling or other private places"—reminiscent of its treatment of liberty in earlier privacy cases that involved abortion and contraception rights.⁷⁰

The Court then went on to invoke liberty as dignity, putting its jurisprudence on an even firmer ground with Robertson's expansive notion of procreative liberty. Expanding on the discussion from *Casey*, the Court suggested that liberty is at the heart of determining one's identity because it "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."⁷¹ The Court declared that anti-sodomy laws seek to criminalize personal relationships that are within the liberty of individuals to choose and "acknowledge[d] that adults may choose to enter upon this relationship . . . and still retain their dignity as free persons."⁷² As several legal scholars have noted, "[t]he most telling use of dignity in *Lawrence*, however, appears in the Court's recitation of the so-called 'mystery of life' passage from *Casey*."⁷³ Relying on the

⁶⁷ Lisa K. Pershall, *Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights*, 69 ALB. L. REV. 237, 243 (2006) (emphasis added).

⁶⁸ *Lawrence*, 539 U.S. at 562-64 (majority opinion). For an in-depth discussion of the history and litigation strategy behind *Lawrence*, including the claim that the arresting officers did not witness any sexual activity, see DALE CARPENTER, *FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS* (2012). In his book, Professor Carpenter discusses "the civil disobedience, heroism, and deep prejudices that animated those involved at every level of the case" and "the presence of gender, race, age, and class pulsing in the background." *Id.* at xii.

⁶⁹ *Lawrence*, 539 U.S. at 564. *Lawrence* overruled *Bowers v. Hardwick*, in which fifteen years earlier, the Court held that a Georgia statute criminalizing sodomy did not violate the fundamental rights of homosexuals because there is no constitutional right to engage in same-sex sodomy. 478 U.S. 186, 188-89, 192 (1986).

⁷⁰ *Lawrence*, 539 U.S. at 562.

⁷¹ *Id.* at 562.

⁷² *Id.* at 567.

⁷³ Henry, *supra* note 45, at 211; see, e.g., Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 241 (2008) ("While theories of dignity linked to individual autonomy have been expressed in other substantive due process cases, the focus on human dignity and the freedom from stigma emphasized in *Lawrence* takes the Court further than in any previous decision").

"mystery of life" passage, the *Lawrence* court concluded that homosexual individuals have the same rights as heterosexual individuals to engage in those activities that are central to "definit[ing] one's own concept of existence, of meaning, of the universe, and of the mystery of human life."⁷⁴

2. Liberty as Privacy Cases Protect the Privacy of Procreative Decision-Making

The triumvirate of liberty as dignity cases, beginning with *Skinner* and becoming progressively stronger in *Casey* and *Lawrence*, suggests that the Supreme Court would recognize a constitutional claim of the freedom to procreate. In addition to the liberty as dignity cases, ROBERTSON's conception of the positive side of procreative liberty finds support in another trajectory of Supreme Court cases—the "procreative liberty as privacy" cases. ROBERTSON argues in favor of the "presumptive primacy of procreative liberty" to guard against "the highly intrusive measures that governmental control of reproduction usually entails,"⁷⁵ a view that is similarly reflected in the Court's contraception and abortion jurisprudence focusing on individual privacy rights.

In *Griswold v. Connecticut*, the Court struck down a Connecticut statute as applied to married couples that prohibited the use of contraceptives.⁷⁶ The Court cited *Skinner* as one of the "cases [that] bear witness that the right of privacy which presses for recognition [in the instant case] is a legitimate one."⁷⁷ *Griswold*, however, recognized a narrow right to privacy, the "privacy surrounding the marriage relationship,"⁷⁸ with the opinion placing particular emphasis "on the marriage relation and the protected space of the marital bedroom."⁷⁹

Subsequently, in *Eisenstadt v. Baird*, the Supreme Court "established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship."⁸⁰ The Court held that a Massachusetts law that permitted distribution of contraception to married individuals but banned distribution to unmarried individuals violated the Equal Protection Clause of the Fourteenth Amendment.⁸¹ In so holding, the Court remarked, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear

⁷⁴ *Lawrence*, 539 U.S. at 574 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

⁷⁵ ROBERTSON, *supra* note 12, at 24-25.

⁷⁶ 381 U.S. 479, 480, 46 (1965).

⁷⁷ *Id.* at 45.

⁷⁸ *Id.* at 486.

⁷⁹ *Lawrence*, 539 U.S. at 564-65.

⁸⁰ *Id.* at 565.

⁸¹ 405 U.S. 438, 453-54 (1972).

or beget a child."⁸² This language represents a transformative moment in the Court's contraception jurisprudence and a re-characterization of the right to privacy, from the narrow *Griswold* focus on the privacy of the marital bedroom to the broader *Eisenstadt* focus on a right to privacy that allows for control over reproductive decisions.

Eisenstadt thus seems to provide substantial support for the claim that the right to privacy protects decisions about how an individual chooses to procreate. This is evident in the Court's reliance on *Eisenstadt* in its decision in *Cleveland Board of Education v. LaFleur*, which invalidated the school district's requirement that a pregnant teacher take mandatory maternity leave without pay beginning five months before the expected child's birth as an impermissible burden on the "freedom of personal choice in matters of marriage and family life."⁸³ The Court's decision to link the teachers' desire not to take maternity leave with the right announced in *Eisenstadt* "to be free from unwarranted governmental intrusion into . . . the decision whether to bear or beget a child"⁸⁴ highlights the use of "contraception cases (dealing with the right not to procreate) to imply support for an expansive positive constitutional concept of procreative liberty."⁸⁵

In *Roe v. Wade*, the final case in the procreative liberty as privacy trajectory, the Supreme Court concluded that the right of privacy encooed in the Fourteenth Amendment's guarantee of personal liberty "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."⁸⁶ The Court invalidated Texas's criminal abortion statute, which made it a crime to "procure an abortion," except when doing so was necessary to "sav[e] the life of the mother."⁸⁷ The Court cited *Griswold* and *Eisenstadt* approvingly for their protections of "personal marital, familial, and sexual privacy."⁸⁸ *Roe* extended the conceptions of privacy developed in *Griswold* and *Eisenstadt* by finding constitutional protection for a particular procedure related to reproductive choice. The Court was careful to point out, however, that the right to obtain an abortion was not absolute.⁸⁹ It developed the trimester framework to reconcile the State's interest in the "potentiality of human life" with the fundamental right to an abortion and to delineate the permissible extent of limitations on that right.⁹⁰ The generation of an expansive right to privacy in reproductive

⁸² *Id.* at 453 (emphasis added).

⁸³ 414 U.S. 632, 639-40 (1974).

⁸⁴ *Id.* at 640 (citing *Eisenstadt*, 405 U.S. at 453).

⁸⁵ Ann MacLean Massie, *Regulating Choice: A Constitutional Law Response to Professor John A. Robertson's Children of Choice*, 52 WASH. & LEE L. REV. 135, 151 (1995).

⁸⁶ 410 U.S. 113, 153 (1973).

⁸⁷ *Id.* at 117-18, 164.

⁸⁸ *Id.* at 129.

⁸⁹ *Id.* at 155.

⁹⁰ *Id.* at 164-66.

choices outlined in *Griswold*, *Eisenstadt*, and *Roe*, the avoidance of reproduction cases, implies a counter-right that encompasses the right to reproduce. This bolsters the claim that the Supreme Court's jurisprudence recognizes the two component parts of Robertson's conception of procreative liberty.

Both Robertson and the Supreme Court make it clear that procreative liberty is not absolute, but they differ as to the extent of their willingness to limit reproductive choice. Robertson believes that laws restricting the right to procreate should be subject to the same standard of "strict scrutiny applied to interference with fundamental constitutional rights," with the burden falling on the party who seeks to restrict procreation "to establish the compelling harm that would outweigh the couple's procreative liberty."⁹¹ Under Robertson's view, the autonomy of the individual who wishes to exercise the right to procreate deserves presumptive primacy; this procreative liberty will only yield to competing interests concerned with "effects on embryos, families, women, and other participants" when opponents of a procedure can demonstrate that such effects are harmful enough to justify limitations on procreative choice.⁹²

The Supreme Court, however, has taken a much broader view of what constitutes acceptable limitations on procreative liberty. In its initial abortion jurisprudence, the Court addressed abortion regulations through the trimester framework, holding that during the first trimester, the only relevant interests were those of the woman and her physician, but that during the second and third trimesters, the State's interests in "the health of the mother" and "the potentiality of human life," respectively, justified regulation, and even proscription, of abortions.⁹³ *Casey* retreated from the trimester framework, with the plurality acknowledging that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."⁹⁴ When the Court handed down its decision in *Gonzales v. Carhart*, which upheld the federal Partial-Birth Abortion Ban Act, it dispelled any lingering suggestion that abortion regulations are subject to strict scrutiny, explaining that when the State "has a rational basis to act, and it does not impose an undue burden, [it] may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests . . . to promote respect for life."⁹⁵ Although Robertson and the Supreme Court both acknowledge that procreative liberty is not absolute, Robertson's claim

⁹¹ ROBERTSON, *supra* note 12, at 36, 40.

⁹² *Id.* at 17, 24.

⁹³ *Roe*, 410 U.S. at 164-65.

⁹⁴ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846, 871 (1992) (noting that "[post-*Roe*] cases decided that any regulation touching upon the abortion decision must survive strict scrutiny, [but they cannot] be reconciled with the holding in *Roe* itself that the State has legitimate interests . . . in protecting the potential life").

⁹⁵ *Gonzales v. Carhart*, 550 U.S. 124, 158, 168 (2007) (emphasis added).

that any limitations should be subject to strict scrutiny conflicts with Supreme Court precedent limiting procreative choice in the abortion context.

An analysis of the liberty as dignity and privacy cases that comprise the Supreme Court's procreative liberty jurisprudence reveals powerful language that suggests there is a well-established right to the positive side of procreative liberty, albeit a right that will likely yield to competing interests in certain circumstances.⁹⁶ This right to procreate presumably extends to ARTs, even though the "Court has never addressed the issue of procreation in the context of *in vitro* fertilization."⁹⁷ Robertson argues that the right to procreate should include the right to use ARTs because "the principles that underlie a constitutional right to reproduce would seem to apply to the infertile as well."⁹⁸ Thus, it is reasonable to infer that "the courts [would] protect the right of infertile persons to use noncoital means of reproduction," such as AI and IVF, to enable them to exercise their constitutional right to procreate.⁹⁹ Ultimately, if "bearing, begetting, or parenting children is protected as part of personal privacy or liberty," as the Court's procreative liberty jurisprudence suggests, then "those experiences should be protected whether they are achieved coitally or noncoitally."¹⁰⁰

⁹⁶ See Brandon K. Moore, Note, *Yi Ni v. Holder: Forced Abortion's Impact on A Husband's Right to Reproduce*, 71 MD. L. REV. 1294, 1299-1301 & nn. 52-67 (2012) (discussing *Skinner*, *Griswold*, *Eisenstadt*, *Roe*, and *Casey* and concluding that "[t]he Court has thus held for decades that women in intimate relationships, especially marriage, have a fundamental right to decide whether to bear children").

⁹⁷ *Devis v. Devis*, 342 S.W.2d 588, 601 (Tenn. 1992). The Court did, however, grant certiorari in a case involving implications of IVF to determine "[w]hether a child who was conceived after the death of a biological parent, but who cannot inherit personal property from that biological parent under applicable state intestacy law, is eligible for child survivor benefits under Title II of the Social Security Act." Petition for Writ of Certiorari at 1, *Asrue v. Capato*, No. 11-199 (petition for cert. filed 2011), 2011 WL 3511023. In *Asrue v. Capato*, the Supreme Court held that the posthumously conceived children were not entitled to survivor benefits from the Social Security Administration because they did not "qualify for inheritance from the decedent under state intestacy law, or satisfy one of the statutory alternatives to that requirement." 132 S. Ct. 2021, 2025-26 (2012). For a review of the constitutional implications of the Supreme Court's decision in *Capato*, see generally Nicole M. Barnard, Note, *Asrue v. Capato: Relegating Posthumously Conceived Children to Second-Class Citizens*, 72 MD. L. REV. 1039 (2013).

⁹⁸ ROBERTSON, *supra* note 12, at 38. But see MICHELLE N. MEYER, NELSON A. ROCKEFELLER INST. OF GOVT, STATES' REGULATION OF ASSISTED REPRODUCTIVE TECHNOLOGIES: WHAT DOES THE U.S. CONSTITUTION ALLOW? 4 (July 2009), available at http://www.rockinst.org/pdf/health_care/2009-07-States_Regulation_ART.pdf. ("[T]he Court's abortion jurisprudence cannot, by extension, stand for the proposition that the government may not interfere with individuals' private decisions regarding other reproductive choices, including choices to use ARTs.")

⁹⁹ See ROBERTSON, *supra* note 26, at 328. But see MEYER, *supra* note 98, at 1 ("[U]nder the best interpretation of the Supreme Court's existing case law, states have ample room to [use of] ARTs").

¹⁰⁰ ROBERTSON, *supra* note 12, at 39; see ROBERTSON, *supra* note 26, at 328 (proposing that infertile couples deserve a "presumptive freedom" to have and rear children, "subject to limitation [only] if use of [ARTs] impair[s] important state interests" (emphasis added)).

II. REGULATION OF ARTS IN THE UNITED STATES AND VICTORIA, AUSTRALIA—A "NEGATIVE" AND "POSITIVE" RIGHTS DISTINCTION

The divergent regulatory frameworks for ARTs in the United States and Victoria, Australia prompt an examination of another equally important aspect of Robertson's formulation—the view that procreative liberty is a negative right.¹⁰¹ The legal and theoretical framework of the U.S. approach to regulating ARTs indicates not only that there is a right to the positive side of procreative liberty, but also that it is a negative right that imposes no affirmative obligation on the government to ensure access to assisted reproduction. The scheme for regulating ARTs in Victoria, Australia stands in stark contrast to the U.S. system because the Australian government partially reimburses the costs associated with ARTs,¹⁰² which implies that there is a right to the means necessary to procreate. Government coverage of ARTs has led to extensive regulation in Victoria, but IVF case law from Victoria suggests that there is a positive right to access assisted reproduction. Although the Victorian scheme generally provides for broad access to ARTs, such a highly regulated system has the potential to negatively impact procreative liberty.

A. United States

1. *Procreative Liberty in the United States Is a Negative Right to Use ARTs*

The case law of the Supreme Court indicates that there is a constitutional right to the positive side of procreative liberty, the freedom to have children and the right to use ARTs to exercise that freedom.¹⁰³ Importantly, the right to use ARTs is a negative right, which accords with Robertson's approach to procreative liberty and the Court's treatment of constitutional rights. The Supreme Court has not specifically addressed claims of procreation through IVF,¹⁰⁴ but the limitations that the Court has imposed on other forms of procreative liberty, namely, the right to procure an abortion, in addition to lower court cases involving prisoners' claims of a right to procreate through AI, strongly suggest that the right to access ARTs is a negative right.

Robertson views the two component parts of procreative liberty as negative rights, which means that (1) individuals have the right to make procreative choices without interference from others, and (2) no one,

¹⁰¹ See *infra* notes 105–106 and accompanying text.

¹⁰² See *infra* notes 178–183 and accompanying text.

¹⁰³ See *supra* Part I.

¹⁰⁴ See *supra* note 97 and accompanying text.

including the government, has a positive duty to provide the means necessary for individuals to undertake particular procreative choices.¹⁰⁵ Under Robertson's conception of procreative liberty, a negative right to reproduce "does not give [individuals] a right to demand from the state or others the services or funds that they need to achieve their reproductive goals."¹⁰⁶ According to Robertson, even though one's right to reproduce may be limited, or even "severely constrained," by certain circumstances, such as access to medical care, financial means, and other socioeconomic factors, these are issues of social justice that fall outside the scope of procreative liberty.¹⁰⁷

Robertson's construction of procreative liberty as a negative right is consistent with the Supreme Court's formulation of constitutional rights in general because "there is no obligation on the government to provide the means necessary to exercise constitutional rights."¹⁰⁸ The Supreme Court's Fourteenth Amendment due process jurisprudence illustrates this notion of a "negative constitution."¹⁰⁹ In *DeShaney v. Winnebago County Department of Social Services*, the case that is considered the "metonym for the Negative Constitutional State,"¹¹⁰ the Court held that the Department of Social Services did not violate the due process rights of ten-year-old Joshua DeShaney when it failed to remove Joshua from his father's custody, despite repeated reports of child abuse, which culminated in a beating so severe that Joshua suffered permanent brain damage.¹¹¹ Writing for a six Justice majority, Chief Justice Rehnquist famously noted:

[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. *The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security.*¹¹²

In *Town of Castle Rock v. Gonzales*, a case with even more tragic facts, the Court held that Ms. Gonzales did not have a property interest in police enforcement of a restraining order issued by a Colorado state trial court against her estranged husband.¹¹³ Mrs. Gonzales brought a § 1983 action

¹⁰⁵ See ROBERTSON, *supra* note 12, at 23 ("[T]he negative right to procreate or not does not imply the duty of others to provide the resources or services necessary to exercise one's procreative liberty . . .").

¹⁰⁶ *Id.* at 241 n.55 (ch. 2).

¹⁰⁷ *Id.* at 23.

¹⁰⁸ *Id.* at 238 n.3 (ch. 2).

¹⁰⁹ See Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2273 (1990) (noting that "[i]ndividually, the protections of the Constitution have been viewed largely as prohibitory constraints on the power of government, rather than affirmative duties with which governments must comply").

¹¹⁰ Marc Spindelman, *Death, Dying, and Dominance*, 106 MICH. L. REV. 1641, 1648 (2008).

¹¹¹ 489 U.S. 18, 191-93 (1989).

¹¹² *Id.* at 195 (emphasis added).

¹¹³ 54 U.S. 748, 768 (2005).

against the Town of Castle Rock after her husband violated the restraining order and murdered the couple's three daughters.¹¹⁴ The Court determined that "[t]he procedural component of the Due Process Clause does not protect everything that might be described as a 'benefit,'" and, citing *DeShaney* favorably, concluded that "the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause."¹¹⁵ *DeShaney* and *Castle Rock* thus clearly demonstrate "that the Constitution is a charter of negative rather than positive liberties."¹¹⁶

This notion of the U.S. Constitution as a "charter of negative liberties"¹¹⁷ finds support in the Supreme Court's abortion jurisprudence. In a pair of cases decided three years apart, the Court affirmed the right to procure an abortion, yet acknowledged that the right is not a constitutional entitlement to the means necessary to access the procedure. *Maier v. Roe* involved an equal protection challenge to a Connecticut regulation that prohibited state Medicaid benefits from being used to fund nontherapeutic abortions but permitted coverage of the medical costs of pregnancy and childbirth.¹¹⁸ The Court upheld the regulation on the grounds that *Roe* protected women from "unduly burdensome interference" with the freedom to choose to have an abortion, but "implied no limitation on the authority of a State to make a value judgment favoring childbirth over abortion."¹¹⁹ The Court emphasized that the regulation did not restrict indigent women's ability to obtain an abortion, but rather "made childbirth a more attractive alternative."¹²⁰ In language evoking the notion of a negative constitution, the Court noted that "the Constitution does not provide judicial remedies for every social and economic ill."¹²¹

In *Harris v. McRae*, the Court upheld the constitutionality of the Hyde Amendment, which prohibited federal reimbursement of abortions performed under the Medicaid program, including most medically necessary abortions.¹²² The Court concluded that states participating in Medicaid are not required to fund medically necessary abortions if federal reimbursement is unavailable.¹²³ Analogizing the Hyde Amendment to the Connecticut regulation at issue in *Maier*, the Court noted that the amendment "places no governmental obstacle in the path of a woman who

¹¹⁴ *Id.* at 751-54.

¹¹⁵ *Id.* at 756, 768.

¹¹⁶ *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 812 F.2d 298, 301 (7th Cir. 1987), *aff'd*, 489 U.S. 189 (1989).

¹¹⁷ *Wanders*, *supra* note 109, at 2273.

¹¹⁸ 432 U.S. 464, 466, 468, 470 (1977).

¹¹⁹ *Id.* at 473-74.

¹²⁰ *Id.* at 474.

¹²¹ *Id.* at 479 (citation omitted).

¹²² *Harris v. McRae*, 448 U.S. 297, 302, 326 (1980).

¹²³ *Id.* at 326.

chooses to terminate her pregnancy."¹²⁴ The *Harris* court again focused on the Constitution as a guarantor of negative rights, reasoning that although the Constitution protects against "unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom."¹²⁵ Furthermore, citing *Griswold*, the Court extended the negative rights reasoning to contraception, reasoning that although the government cannot prohibit the use of contraceptives, there is no "affirmative constitutional obligation" to provide individuals with the financial resources necessary to obtain contraception.¹²⁶

¹²⁴ *Id.* at 315.

¹²⁵ *Id.* at 317-18.

¹²⁶ *Id.* at 318. The negative right to access contraception is visible in the current debate over the contraception coverage mandate of the Patient Protection and Affordable Care Act. On January 20, 2012, the Department of Health and Human Services announced a final rule that requires most health insurance plans to provide coverage for all FDA-approved forms of contraception and provides a narrow exemption for religious employers. News Release, U.S. Dept. of Health and Human Servs., "A Statement by U.S. Department of Health and Human Services Secretary Kathleen Sebelius" (Jan. 20, 2012), available at <http://www.hhs.gov/news/press/2012pres/01/20120120a.html>. In response to strong opposition, the Obama Administration refined the rule to allow women who work for non-exempt religious organizations to receive contraception coverage directly through their insurance companies, rather than through their employer plans. THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, FACT SHEET: WOMEN'S PREVENTIVE SERVICES AND RELIGIOUS INSTITUTIONS (Feb. 10, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions>. The U.S. Conference of Catholic Bishops continues to oppose the contraception mandate. See U.S. CONFERENCE OF CATHOLIC BISHOPS, BISHOPS RENEW CALL TO LEGISLATIVE ACTION ON RELIGIOUS LIBERTY (Feb. 10, 2012), available at <http://www.usccb.org/issues-and-action/religious-liberty/communion-protection/bishops-call-to-legislative-action-on-religious-liberty.cfm> (contending that the "lack of clear protection for key stakeholders . . . is unacceptable and must be corrected"). The debate has prompted numerous federal lawsuits challenging the constitutionality of the contraception mandate. See, e.g., Complaint, Nebraska v. U.S. Dept. of Health and Human Servs., No. 12CV0035 (D. Neb. Feb. 23, 2012); Complaint, Eternal World Television Network, Inc. v. Sebelius, No. 2:12-cv-00501 (N.D. Ala. Feb. 9, 2012); Complaint, Colorado Christian Univ. v. Sebelius, No. 1:2011cv03550 (D. Colo. Dec. 22, 2011). For example, in June 2013, the U.S. Court of Appeals for the Tenth Circuit held that a craft store chain and a Christian bookstore chain, "are entitled to bring claims under [the Religious Freedom Restoration Act], have established a likelihood of success that their rights under this statute are substantially burdened by the [contraception coverage requirement] [of the Patient Protection and Affordable Care Act], and have established an irreparable harm." Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1121 (10th Cir. 2013), cert. granted, 134 S. Ct. 678 (2013). On remand, the U.S. District Court for the Western District of Oklahoma granted the Plaintiffs' request for a preliminary injunction and, per the parties' agreement, stayed proceedings in the case until October 1, 2013 to allow the federal government to decide whether to seek review of the Tenth Circuit's decision in the Supreme Court. See Hobby Lobby Stores, Inc. v. Sebelius, No. CIV-12-1000-HE, 2013 WL 3869832 (W.D. Okla. July 19, 2013). The case, *Sebelius v. Hobby Lobby Stores, Inc.*, is set for oral argument before the Supreme Court on March 25, 2014. See *Sebelius v. Hobby Lobby Stores, Inc.*, SCOTUSblog, <http://www.scotusblog.com/case-files/cases/sebelius-v-hobby-lobby-stores-inc/> (last visited Jan. 12, 2014). On December 31, 2013, in a separate case, Justice Sonia Sotomayor of the Supreme Court signed an order that temporarily enjoins the federal government "from enforcing against [the Little Sisters of the Poor Home for the Aged] the contraceptive coverage requirements imposed by the Patient Protection and Affordable Care Act, 42 U.S.C. § 300gg-11(a)(4), and related regulations," pending a response from the government and further order from the Supreme Court. *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius*, Order, No. 13A691

While "[n]either the Supreme Court nor lower courts have [sic] directly addressed the existence of fundamental rights to use assisted reproduction and genetic screening technologies,"¹²⁷ lower federal courts have indirectly faced such issues in the context of prisoners' claims of a constitutional right to use AI to impregnate their spouses. These cases demonstrate that the right to procreate in the United States is limited as a negative right. In *Goodwin v. Turner*, Steven Goodwin filed a petition for writ of habeas corpus, claiming that the refusal to let him give his wife a semen sample for AI while he was in prison violated his constitutional right to procreate.¹²⁸ Mr. Goodwin filed his petition in 1987, four years before the earliest date on which he would be released and eight years before his latest possible release date. He wanted to use AI because his wife would be between thirty-one and thirty-five years old upon his release, and they did not want to delay conception out of concern for the possibility of increased risk of birth defects that results from increased maternal age.¹²⁹

The U.S. Court of Appeals for the Eighth Circuit acknowledged the fundamental right to procreate, but declined to address Mr. Goodwin's argument that the constitutional right to procreate survives incarceration.¹³⁰ Rather, the Eighth Circuit reasoned that, assuming Mr. Goodwin was correct about the primacy of the right to procreate, the "restriction is reasonably related to [the] legitimate penological interest of treating all prisoners equally."¹³¹ The court concluded that, under the Bureau of Prisons' administrative policy, if the prison accommodated Mr. Goodwin's request, then it would have to provide female inmates with additional medical services, which would "tak[e] resources away from . . . legitimate penological interests."¹³²

In *Gerber v. Hickman*, the U.S. Court of Appeals for the Ninth Circuit faced a similar claim to the one posed in *Goodwin*, albeit with slightly different facts. William Gerber brought a § 1983 action alleging that the Warden of the Mule Creek State Prison in California violated his constitutional right to procreate by not allowing Mr. Gerber to artificially

(Dec. 31, 2013), available at <https://www.becketfund.org/wp-content/uploads/2014/01/13A691-Little-Sisters-v-Sebelius-Order.pdf>.

¹²⁷ ROBERTSON, *supra* note 26, at 327.

¹²⁸ 908 F.2d 1395, 1396 (8th Cir. 1990).

¹²⁹ *Id.* at 1396–98. For an overview of Mr. Goodwin's petition, from requesting that the sample be collected under sanitary conditions, to requesting that his wife be permitted to inseminate herself in a prison bathroom, see *id.*

¹³⁰ *Id.* at 1398.

¹³¹ *Id.* at 1396, 1398.

¹³² *Id.* at 1400. John Robertson has criticized the *Goodwin* decision for giving "insufficient weight to the couple's reproductive interest and too much weight to the prison authorities' claims of administrative inconvenience." ROBERTSON, *supra* note 12, at 37–38, 240 nn. 50–51 (ch.2).

inseminate his wife while he was in prison.¹³³ Mr. Gerber, who was serving a prison sentence of 100 years to life, wanted to have a baby with his wife, so he requested that he be able to ejaculate into a collection container and send the sample to a laboratory via overnight mail or have his attorney return the sample, with all costs to be borne by him and his wife.¹³⁴ Mr. Gerber supported his claim by arguing that *Skinner* was a guarantee of a constitutional right to procreate while in prison, a claim that the Ninth Circuit firmly rejected.¹³⁵

The Ninth Circuit assumed that there is a constitutional right to procreate and, taking the step that the Eighth Circuit was hesitant to take in *Goodwin*, held that "the right to procreate is fundamentally inconsistent with incarceration."¹³⁶ Citing case law from the Second Circuit, the court noted that "the right[s] to marry and procreate, are . . . abridged in a prison setting."¹³⁷ The most persuasive language from *Gerber* supporting the claim that access to ARTs in the United States is a negative right is the court's acknowledgement that "inmates possess the right to maintain their procreative abilities for later use' . . . not current use."¹³⁸ This suggests that while the government has a duty not to interfere with or prevent an individual's freedom to procreate, it does not have an obligation to facilitate the exercise of that freedom when extenuating circumstances of socioeconomic or penological barriers are present.

The combination of the Supreme Court's procreative liberty jurisprudence and the status of the U.S. Constitution as a "charter of negative liberties" demonstrate that there is a robust negative constitutional right to procreate, which includes the right to use ARTs. Furthermore, the limitations imposed on the right to procure an abortion and on prisoners' rights to artificially inseminate their spouses imply that the right to use ARTs is not fully protected through affirmative constitutional obligations

¹³³ *Gerber v. Hickman*, 291 F.3d 617, 619 (9th Cir. 2002), *cert. denied*, 537 U.S. 1039 (2002). The *Gerber* decision resulted after a rehearing en banc, with six judges joining the majority and five judges dissenting. *Id.* at 617.

¹³⁴ *Gerber*, 291 F.3d at 619. Mr. Gerber did not have a parole date, which meant that he was not entitled to family visits, so he and his wife could not conceive a child naturally. As a result, he wanted to be able to artificially inseminate his wife. *Id.*

¹³⁵ See *id.* at 622 ("Skinner stands only for the proposition that forced surgical sterilization of prisoners violates the Equal Protection Clause."). But see *id.* at 628 (Tashima, J., dissenting) (claiming that the majority read *Skinner* too narrowly because not granting Gerber's request meant that he "[was] forever deprived of a basic liberty" (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942))).

¹³⁶ *Id.* at 619 (majority opinion); see also *id.* at 624 (Tashima, J., dissenting) ("The majority assumes that there is a fundamental right to procreation and I agree. There can be no dispute that such a right exists."). But see *id.* at 631 (Kozminski, J., dissenting) ("By making arrangements for conjugal visits [for certain inmates], the Department of Corrections must have concluded that imprisonment does not cut off a prisoner's right to procreate.")

¹³⁷ *Id.* at 621 (majority opinion) (quoting *Hernandez v. Coughlin*, 18 F.3d 133, 137 (2d Cir. 1994) (rejecting plaintiff's claim that denial of conjugal visitation privileges violated his constitution right to marital privacy)).

¹³⁸ *Id.* at 622 (emphasis added) (quoting *Hernandez*, 18 F.3d at 136).

on the state to ensure that individuals have the means necessary to exercise their freedom to procreate through assisted reproduction.

2. Regulatory Framework of IVF Reflects the Negative Reproductive Rights Jurisprudence

The system of regulating ARTs in the United States flows naturally from the Supreme Court's and lower federal courts' reproductive rights jurisprudence and the notion of a negative constitution. As a result, there is almost no governmental regulation of ARTs at either the federal or state levels. Regarding access to ARTs, "individual states have been slow to provide legislation,"¹³⁹ and among those that have done so, the access is not particularly meaningful. The fact that regulation of ARTs in the United States is both rare at the federal level and inconsistent at the state level reflects the understanding that the right to use ARTs is a negative right.

The most conclusive proof of the federal government's recognition that the right to use ARTs is a negative right is federal inaction. The federal Patient Protection and Affordable Care Act ("PPACA") does not contain any provisions specifically directed at treating infertility, and Medicare does not provide funding for ARTs.¹⁴⁰ In addition, the federal legislation currently in place takes the form of providing oversight for public welfare rather than serving as a means of enabling individual access to ARTs. The only federal legislation specifically directed at ARTs is the Fertility Clinic Success Rate and Certification Act of 1992 ("the Act").¹⁴¹ The Act requires each clinic that performs ARTs to provide annual reports to the Centers for Disease Control and Prevention ("CDC") on the following: (1) "pregnancy success rates" achieved through each type of ART procedure, (2) identities of the embryo laboratories used by each clinic, and (3) whether the embryo laboratories are certified under the Act.¹⁴² The

¹³⁹ Susan B. Apel, *Access to Assisted Reproductive Technologies*, 12 MICH. ST. U. J. MED. & L. 33, 37 (2006).

¹⁴⁰ Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 940 (1996); Susan Donaldson James, *Health Care Bill Offers Little Comfort to Infertile Couples*, ABC NEWS (Apr. 23, 2010), <http://abcnews.go.com/Health/ReproductiveHealth/infertility-health-care-bill-longer-pre-existing-condition/story?id=10451369>. In a positive change for infertile patients, the PPACA eliminates pre-existing conditions exclusions, which had been used in the past to deny health insurance coverage to women on the basis of past infertility diagnoses. Nizan Geislevich Packin, *The Other Side of Health Care Reform: An Analysis of the Missed Opportunity Regarding Infertility Treatments*, 14 SCHOLAR 1, 30-31 (2011).

¹⁴¹ Pub. L. No. 102-493, 106 STAT. 3146 (1992). In January 2009, then-Rep. Anthony Weiner introduced the Family Building Act of 2009 in the House of Representatives, which called for reforms to the Public Health Service Act and the Employee Retirement Income Security Act of 1974 to require coverage of infertility treatment. H.R. 697, 111th CONG. (2009). The proposed legislation never reached the floor of the House of Representatives. See H.R. 697 (111th): *Family Building Act of 2009*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/111/hr697> (last visited Jan. 11, 2014) (listing the status of the bill as "Died (Referred to Committee)").

¹⁴² 42 U.S.C. § 263a-1(a) (2006).

purposes of the Act are to provide consumers, meaning individuals who desire to use ARTs, with accurate information about clinics and to provide states with a model program for certifying embryo laboratories.¹⁴³ The Act clearly is not intended to regulate the mechanics of using ARTs or to aid individuals in accessing the procedures.¹⁴⁴ This supports the position that the right to use ARTs is a right against government interference, not a guarantee of government assistance.

In addition to the CDC, two other federal agencies have regulatory authority over the use of ARTs, but their involvement is even more indirect. First, clinics that perform ARTs can only use medications approved by the Food and Drug Administration ("FDA"), a requirement that applies across the entire medical field.¹⁴⁵ Second, under the Clinical Laboratories Improvement Act, the Centers for Medicare and Medicaid Services ("CMS") is responsible for regulating all laboratory testing in the United States, including tests associated with ARTs.¹⁴⁶ The consumer protection and public safety oriented roles of the FDA and CMS with respect to regulation of ARTs further demonstrate that the purpose behind federal regulation of ARTs is to protect the public, not to provide the public with access.

At the state level, inconsistent regulation reflects the basic premise that the right to procreate through the use of ARTs is a negative right. This is most evident in the context of state legislation mandating insurance coverage for ARTs, as very few states provide any meaningful access through their insurance legislation. Roughly two-thirds of employers report that the insurance plans they offer provide at least some coverage for infertility services, but only a small portion of the plans cover advanced infertility treatments like IVF.¹⁴⁷ For example, less than one-fifth of large employers (those with over 500 employees), offer plans that cover IVF, and among small employers (those with fewer than 500 employees), only one-fourth offer any infertility coverage.¹⁴⁸

¹⁴³ PRESIDENT'S COUNCIL ON BIOETHICS, *REPRODUCTION & RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES* 47 (2004), available at http://bioethics.georgetown.edu/pcbe/reports/reproductionandresponsibility/pcbe_final_reproduction_and_responsibility.pdf [hereinafter *REPRODUCTION & RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES*].

¹⁴⁴ *Id.*

¹⁴⁵ AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE, *OVERSIGHT OF ASSISTED REPRODUCTIVE TECHNOLOGY* 6 (2010), available at [http://www.reproductivefacts.org/uploadedFiles/Content/About_Us/Media_and_Public_Affairs/OversightOfART%20\(2\).pdf](http://www.reproductivefacts.org/uploadedFiles/Content/About_Us/Media_and_Public_Affairs/OversightOfART%20(2).pdf) [hereinafter *OVERSIGHT OF ASSISTED REPRODUCTIVE TECHNOLOGY*].

¹⁴⁶ Pub. L. No. 90-174, 81 Stat. 536 (1967) (current version at 42 U.S.C. § 263a (2006)); *OVERSIGHT OF ASSISTED REPRODUCTIVE TECHNOLOGY*, *supra* note 145, at 6-7.

¹⁴⁷ *Isacs*, *supra* note 23, at 1049.

¹⁴⁸ *Id.*

To remedy this situation, some states have passed regulatory legislation, but "the regulation is all over the map."¹⁴⁹ Only fifteen states have enacted laws that provide insurance coverage for infertility services.¹⁵⁰ States that require partial coverage of infertility impose conditions that range from one-time only IVF benefits for married couples who have at least five years of infertility (Hawaii), to limiting coverage to four egg retrieval cycles unless a live birth occurs (Illinois), to allowing insurers to cap IVF benefits at \$15,000 (Arkansas).¹⁵¹ Furthermore, California, Louisiana, and New York specifically exclude IVF coverage.¹⁵² Even states that provide "complete coverage" place certain limitations on access; Rhode Island limits IVF benefits to a lifetime \$100,000 maximum for married couples, and New Jersey provides religious exemptions for small employers.¹⁵³ This diverse state legislation indicates that access to ARTs is best characterized as a negative right not only because thirty-five states do not require any form of infertility coverage, but also because those states that do provide some form of coverage impose restrictive conditions on individuals' ability to access ARTs.

Another result of the limited federal and state regulation of ARTs is that a wide range of procedures is legally permissible. For example, there is no direct regulation of preimplantation diagnosis ("PGD") or sperm sorting, techniques used to perform genetic testing on early-stage embryos before they are implanted into a woman's uterus.¹⁵⁴ The capabilities of PGD have increased since the technology's inception in 1990, and today it is possible to test for genetic abnormalities, susceptibility to cancer and late onset disorders, human leukocyte antigen matches for existing children, and,

¹⁴⁹ *Bioethics at the Institute: Regulating ART. An Interview with James W. Fossett and Michelle N. Meyer*, NELSON A. ROCKEFELLER INST. OF GOV'T (July 2010) (hereinafter *Bioethics at the Institute: Regulating ART*), http://www.rockinst.org/A/fossett_meyer/Bioethics4.aspx.

¹⁵⁰ The states are Arkansas, California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Jersey, New York, Ohio, Rhode Island, Texas, and West Virginia. *State Laws Related to Insurance Coverage for Infertility Treatment*, NAT'L CONFERENCE OF STATE LEGISLATURES (hereinafter *Insurance Coverage for Infertility Treatment*), <http://www.ncsl.org/issues-research/health/insurance-coverage-for-infertility-laws.aspx> (last updated Mar. 2012). These fifteen states offer coverage in the following four ways: (1) complete coverage mandates that require insurers to cover infertility treatment including IVF, (2) partial coverage mandates that require insurers to cover IVF, but with certain limitations on access, (3) coverage offer mandates that require insurers to offer a policy that covers IVF but does not require employers to adopt the policy, and (4) "non-IVF mandates" that require insurers to cover infertility treatment but explicitly exclude IVF. Cohen & Chen, *supra* note 2, at 537-38; see also *Insurance Coverage for Infertility Treatment, supra* ("Thirteen states . . . require insurance companies to cover infertility treatment. . . . California and Texas [only] require insurance companies to offer coverage. . . .").

¹⁵¹ Packin, *supra* note 140, at 21-22; *Insurance Coverage for Infertility Treatment, supra* note 150.

¹⁵² *Insurance Coverage for Infertility Treatment, supra* note 150.

¹⁵³ Packin, *supra* note 140, at 22; *Insurance Coverage for Infertility Treatment, supra* note 150.

¹⁵⁴ REPRODUCTION & RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES, *supra* note 143, at 89-90, 99.

somewhat controversially, a desired sex in an embryo, known as sex selection.¹⁵⁵

In the absence of significant government regulation of ARTs, the medical profession is left to self-regulate the procedures. Fertility clinics and health care professionals make decisions regarding ARTs with guidance from professional societies like the American Society for Reproductive Medicine ("ASRM"), a "specialty society for physicians [who] focus on infertility," and its affiliate, the Society for Assisted Reproductive Technology ("SART"), an organization whose membership includes over 90% of the fertility clinics in the United States.¹⁵⁶ The guidelines and reports from the ASRM serve as important sources of guidance for physicians who perform PGD.¹⁵⁷

The ASRM Ethics Committee notes that PGD for sex selection warrants "serious ethical caution,"¹⁵⁸ but it does not call for a legal prohibition on the procedure. Instead, the guidelines suggest that PGD for non-medical sex selection "not be encouraged" when a patient is already undergoing an IVF procedure and that it "be discouraged" when a patient wants to undergo IVF solely for sex selection.¹⁵⁹ The extent to which physicians are expected to "not encourage" or to "discourage" PGD for non-medical sex selection is unclear, as some SART member clinics advertise the procedure, even though SART requires adherence to the ASRM Ethics Committee guidelines as a condition of membership.¹⁶⁰ However controversial it may be, the status of PGD for sex selection thus serves as an example of the broad range of legally permissible procedures that has resulted from the limited regulation of ARTs in the United States.

In practice, the use of ARTs reflects the judicial and legislative determination that access to the procedures is a negative right in the United

¹⁵⁵ J. A. Robertson, *Extending Preimplantation Genetic Diagnosis: Medical and Non-Medical Uses*, 29 J. MED. ETHICS 213, 213-14 (2003). As technology continues to advance it may one day be possible "to actively genetically modify a sperm, egg or embryo by replacing a defective (or undesirable) gene with another one [through] *germline* genetic modification." *Biethics of the Incubator: Regulating ART*, *supra* note 149.

¹⁵⁶ *Apel*, *supra* note 139, at 40, 41; OVERSIGHT OF ASSISTED REPRODUCTIVE TECHNOLOGY, *supra* note 145, at 9; REPRODUCTION & RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES, *supra* note 143, at 101. For example, the ASRM has issued and revised "guidelines for the number of embryos to be transferred in in vitro fertilization (IVF) cycles . . . in an effort to reduce the number of higher-order multiple pregnancies." Samantha Pfeifer et al., *Criteria for Number of Embryos to Transfer: A Committee Opinion*, 99 FERTILITY AND STERILITY 44, 44 (#013).

¹⁵⁷ See REPRODUCTION & RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES, *supra* note 143, at 101 (noting that the ASRM Practice Committee has published extensive guidelines for PGD, characterizing it as a clinical procedure, and that the Ethics Committee has published its own report "Sex Selection and PGD").

¹⁵⁸ Ethics Council of the Am. Soc'y of Reprod. Med., *Sex Selection and Preimplantation Genetic Diagnosis*, 72 FERTILITY AND STERILITY 595, 598 (1999).

¹⁵⁹ *Id.* at 598.

¹⁶⁰ REPRODUCTION & RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES, *supra* note 143, at 101.

States. Studies have found that "the United States has one of the lowest utilization rates of [ARTs] per capita among industrialized countries;" in particular, the utilization rate is one-fifth of the rate in Australia.¹⁶¹ The CDC estimates that approximately 2.1 million married couples, roughly 7.4% of that population, experience infertility.¹⁶² Fewer than 20% of those couples, however, use advanced ARTs like IVF.¹⁶³ This is likely because the expenses associated with advanced ARTs put the procedures out of reach for many infertile couples. For example, the average cost of one IVF cycle is about \$12,400, and the cost for a cycle of PGD for sex selection can rise above \$18,000.¹⁶⁴

Compounding the financial expense of individual cycles is the fact that many women undergo more than one cycle of IVF to have a live birth.¹⁶⁵ According to the CDC, slightly more than 1% of the total number of births in the United States result from ART cycles.¹⁶⁶ That year, clinics performed 147,260 ART cycles, including IVF, GIFT (gamete intrafallopian transfer), and ZIFT (zygote intrafallopian transfer).¹⁶⁷ Just under 32%, or 47,090, of the cycles resulted in live births, for a total of 61,564 infants.¹⁶⁸ Overall, the cost of a live birth through IVF is estimated to be between \$66,667 and \$114,286, which in the absence of government assistance, individuals must cover out of pocket.¹⁶⁹

In the United States, the use of ARTs and the ability to access the procedures are virtually unregulated.¹⁷⁰ There is little federal oversight, and state-mandated access legislation is neither consistent, nor comprehensive. The limited extent of regulation, combined with the Supreme Court's procreative liberty jurisprudence and the status of the Constitution as a

¹⁶¹ Byers, *supra* note 1, at 282 & n.114 (quoting Frank S. Trad et al., *In Vitro Fertilization: A Cost-Effective Alternative for Infertile Couples?*, 12 J. ASSISTED REPROD. & GENETICS 418, 418 (1995)).

¹⁶² Cobes & Chen, *supra* note 2, at 489 (citing NAT'L CTR FOR HEALTH STATISTICS, *supra* note 23, at 108).

¹⁶³ Roberts, *supra* note 140, at 937.

¹⁶⁴ AM. SOC'Y FOR REPROD. MED., *Frequently Asked Questions About Infertility*, <http://asrm.org/awards/index.aspx?id=3012> (last visited Jan. 12, 2014); Rebecca Leung, *Choose the Sex of Your Baby*, CBS NEWS (Apr. 13, 2004), http://www.cbsnews.com/2100-900164_162-611618.html (reporting that an American couple paid \$18,480 to undergo sex selection for implantation of female embryos at a fertility clinic in California).

¹⁶⁵ See DIV. OF REPROD. HEALTH, NAT'L CTR. FOR CHRONIC DISEASE PREVENTION AND HEALTH PROMOTION, U.S. DEPT. OF HEALTH AND HUMAN SERVS., 2010 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 28 (2012), available at http://www.cdc.gov/art/ART2010/PDFs/ART_2010_National_Summary_Report.pdf (reporting that close to 45% of women undergoing ART cycles in 2010 underwent at least one previous cycle).

¹⁶⁶ *Id.* at 5.

¹⁶⁷ *Id.* at 3-4, 6. The CDC compiled the statistics using data submitted by 443 of the 474 ART clinics in the United States because 31 of the clinics did not submit data in 2010. *Id.* at 5.

¹⁶⁸ *Id.* The number of infants is higher than the number of live births "[b]ecause in some cases more than one infant is born during a live birth delivery." *Id.*

¹⁶⁹ Cobes & Chen, *supra* note 2, at 492.

¹⁷⁰ METER, *supra* note 98, at 2.

"chance of negative liberties," provides strong support for the conclusion that there is a robust negative right to procreate through the use ARTs in the United States that imposes no affirmative obligations on the government to ensure individuals are able to access treatment procedures.

B. Victoria, Australia

1. Australian Health Care System Has Created a Positive Right to Access ARTs

If the United States is the clearest example of a negative right to procreate through the use of ARTs, then Australia is at the complete opposite end of the spectrum as perhaps the clearest example of a positive right to government assistance in accessing ARTs. The Parliament of Australia has fostered a positive right to access ARTs by including partial reimbursement for ARTs in the country's national health care system. The Australian system helps all individuals, whether they are covered solely by state health care or have additional private insurance coverage, access the means necessary to procreate through assisted reproduction.

From the ethical dilemma surrounding the cryopreservation of the Rios' orphan embryos, to the world's first baby born through IVF after embryo cryopreservation, Australia is somewhat of a pioneer in the field of ARTs.¹⁷¹ In addition, the Parliament of Victoria enacted the world's first ART legislation in 1984.¹⁷² Despite this auspicious history of pioneering technology and legislation, Australia today faces infertility concerns similar to those in the United States and other developed countries around the world. Studies indicate that "the population replacement value [is] 2.1 births per woman[, but i]n Australia, the total fertility rate in 2002 was 1.76, which is comparable to that in the UK, USA and Canada."¹⁷³ Unlike in the United States, "there is no national data collection on infertility in Australia," but the Australian Institute of Health and Welfare estimates that roughly 9% of couples experience infertility.¹⁷⁴ To address these concerns,

¹⁷¹ See *supra* notes 2-11 and accompanying text.

¹⁷² Skene, *supra* note 6, at 33.

¹⁷³ AUSTR. ASSISTED REPROD. TECHS. REVIEW COMM., INDEPENDENT REVIEW OF ASSISTED REPRODUCTIVE TECHNOLOGIES 23 (2006) (hereinafter AUSTR. ART INDEP. REV.), available at [http://www.health.gov.au/internet/main/publishing.nsf/Content/79D96DD080F81073ECA257BF00D1C1ABB/\\$File/artc_report.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/79D96DD080F81073ECA257BF00D1C1ABB/$File/artc_report.pdf).

¹⁷⁴ YUEPING A. WANG ET AL., AUSTR. INST. HEALTH AND WELFARE, Assisted Reproductive Technology in Australia and New Zealand 2009, at 1 (Nov. 2011), available at <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737420484>. Similar to the definition in the United States, the Australian report defines "infertility" as the "failure to achieve a clinical pregnancy after 12 or more months of regular unprotected sexual intercourse." *Id.* A 2006 Australian report noted that "[i]t is estimated that 12-25% of couples are affected by infertility." AUSTR. ART INDEP. REV., *supra* note 173, at 23. However, that report defined "infertility" as "a circumstance where there has been either an inability to conceive or carry a pregnancy to a live birth after one year of

the Australian government partially reimburses the costs associated with ARTs.¹⁷⁵

Australia has universal health care coverage, which means the entire population is covered by Medicare, the state-funded health care system.¹⁷⁶ A fairly significant portion of the population, roughly 30.5%, also has private insurance coverage, although private health insurance enrollment has declined since the introduction of Medicare.¹⁷⁷ Medicare has provided coverage for ARTs since 1990, and the Pharmaceutical Benefits Scheme finds drug therapies associated with treatment procedures.¹⁷⁸ Importantly, there is "no restriction on the number of [ART] cycles or services" that an individual can access.¹⁷⁹

Medicare coverage of ARTs is not absolute, but rather takes the form of partial reimbursements. After introduction of the Extended Medicare Safety Net in 2004, Medicare now reimburses either (1) 80% of the out-of-pocket and out-of-hospital expenses of those individuals whose expenses exceed the current safety net threshold or (2) the current amount of the Extended Medicare Safety Net Cap, whichever is lower.¹⁸⁰ The out-of-pocket costs for one cycle of IVF typically vary from \$1,079.11 to \$2,517.93.¹⁸¹ Private health insurance "can help further reduce the costs associated with [ART] treatment[s] like IVF – by covering day hospital expenses and some medications, which are not covered by Medicare."¹⁸² Thus, even though Australians who use ARTs pay some out-of-pocket costs, the Australian health care system essentially creates a positive right of access by providing reimbursements for procedures without limiting the number of times individuals can seek treatment.¹⁸³

unprotected sexual intercourse, or there is a medical condition that will reduce the likelihood of either conception or carrying a pregnancy to a live birth." *Id.*

¹⁷⁵ See *infra* notes 178–183.

¹⁷⁶ *What is Covered by Medicare?*, PUBVA/HEALTH.GOV.AU, <http://www.privatesector.gov.au/healthinsurance/whatiscovered/medicare.htm> (last visited Nov. 25, 2013).

¹⁷⁷ Timothy Stoltzfus *Smith*, *Private or Public Approaches to Insuring the Uninsured: Lessons from International Experience with Private Insurance*, 76 N.Y.U. L. REV. 454–55, 459 (2001).

¹⁷⁸ AUSTL. ART INDEP. REV., *supra* note 173, at 13.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*; VICT. ASSISTED REPROD. TREATMENT AUTH., COSTS OF IVF 4, available at <http://www.varta.org.au/costs-of-ivf/w/11004781/> (last visited Jan. 12, 2014) (The Extended Medicare Safety Net Cap figure is calculated "from a Medicare table which lists rebates for IVF services").

¹⁸¹ M. M. Peterson, *Assisted Reproductive Technologies and Equity of Access Issues*, 31 J. MED. ETHICS 280, 281 (2005). The cost figures cited in the article were \$1,200 to \$2,800 AUD, which amount to \$1,079.11 to \$2,517.93 USD. CURRENCY CONVERTER, OANDA, <http://www.oanda.com/currency/converted/> (last visited Jan. 12, 2014).

¹⁸² Health Fund Cover, IVF AUSTRALIA, <http://ivf.cover.au/ivf-fees/ivf-health-fund-cover> (last visited Jan. 12, 2014).

¹⁸³ *But see* Tory Shepherd, *Pen Sorry, But Society Doesn't Owe You a Child*, THE PUNCH (Austl.) (Nov. 1, 2011, 5:50 AM), <http://www.thepunch.com.au/society-doesnt-owe-you-a-child/> ("Last year the Federal Government made changes to the Medicare Safety Net, effectively

The consequence of Medicare funding for an unlimited number of ART procedures is that "[t]he burden of the cost of ART . . . falls more heavily on the Australian Government than in most other countries."¹⁸⁴ In 2009, ART clinics performed 70,541 treatment cycles throughout Australia and New Zealand, which was a 14% increase from 2008 and a 48% increase from 2005.¹⁸⁵ Live deliveries resulted from 12,127, or 17.2%, of the 70,541 cycles, for a total of 13,114 babies.¹⁸⁶ These deliveries accounted for approximately 3.2% of the live births in Australia in 2009.¹⁸⁷ The extensive use of ART cycles has come at a significant cost to the Australian government. The costs associated with a live birth through IVF range from \$24,615.40 for a woman between thirty and thirty-three years old who is undergoing her first IVF treatment, to \$168,625.00 for a woman between forty-two and forty-five years old undergoing her second treatment program.¹⁸⁸ Australian Medicare expenditures on ARTs in 2005 totaled \$97.5 million, representing a 117% increase from the \$45 million spent in 2003.¹⁸⁹ Between January 2000 and December 2005, the total government expenditure for ARTs, which includes Medicare and the Pharmaceutical Benefits Scheme, was \$525.7 million.¹⁹⁰ In response to these rising costs, the government placed a cap on the Medicare benefits available for ARTs, which purportedly saved \$48.6 million in 2010.¹⁹¹

Regulation of ARTs in Australia is allocated among the federal government and the individual states and territories. There is no federal legislation that regulates ARTs, but there is a certain amount of national uniformity as a result of accreditation requirements and codes of practice.¹⁹² Under the the Research Involving Human Embryos Act 2002, a clinic that handles human embryos must be accredited, either through the Reproductive Technology Accreditation Committee ("RTAC") of the

capping the amount it would pay out for assisted reproductive treatments (ARTs), which means that after a woman pays almost \$8k in the dollar for expensive treatments.")

¹⁸⁴ AUSTRALIAN ART INDUSTRY REV., *supra* note 173, at 13.

¹⁸⁵ WANG ET AL., *supra* note 174, at vi. *See also* Julia Medew, *IVF Costs Result in 1500 Fewer Babies*, THE SYDNEY MORNING HERALD (Austl.), Oct. 26, 2011, <http://www.smh.com.au/national/ivf-costs-result-in-1500-fewer-babies-20111025-1m90.html> ("An analysis of Medicare data by the University of New South Wales found that use of assisted reproductive technology increased about 10 per cent each year between 2004 and 2009, but dropped 13 per cent last year when Canberra capped Medicare reimbursements to patients undergoing procedures.")

¹⁸⁶ WANG ET AL., *supra* note 174, at vi.

¹⁸⁷ *Id.* at 1.

¹⁸⁸ Alison Griffiths et al., *A Cost-Effectiveness Analysis of In-Vitro Fertilization by Maternal Age and Number of Treatment Attempts*, 25 HUM. REPROD. 924, 928 (2010). In AUD, the figures equal \$27,373 and \$187,515, respectively. *Currency Converter*, OANDA, *supra* note 181.

¹⁸⁹ AUSTRALIAN ART INDUSTRY REV., *supra* note 173, at 13. In AUD, the figures equal \$108.4 million and \$50 million, respectively. *Currency Converter*, OANDA, *supra* note 181.

¹⁹⁰ AUSTRALIAN ART INDUSTRY REV., *supra* note 173, at 46. In AUD, the total expenditure equals \$584.6 million. *Currency Converter*, OANDA, *supra* note 181.

¹⁹¹ Medew, *supra* note 185. In AUD, the savings total \$54 million. *Currency Converter*, OANDA, *supra* note 181.

¹⁹² AUSTRALIAN ART INDUSTRY REV., *supra* note 173, at 13; *See also*, *supra* note 6, at 33.

Fertility Society of Australia ("FSA"), an organization of scientists and medical professionals involved in reproductive medicine, or through another accreditation program.¹⁹³ In addition, the National Health and Medical Research Council ("NHMRC") has propagated a set of "Ethical guidelines on the use of assisted reproductive technology in clinical practice and research" that it urges all ART clinics throughout the country to follow.¹⁹⁴ The RTAC accreditation procedures require clinics to "[p]rovide evidence of... compliance with the NHMRC Ethical Guidelines on the use of ART in clinical practice and research."¹⁹⁵ It is important to note that "[a]lthough RTAC accreditation and compliance with RTAC and NHMRC guidelines are not mandatory, there are strong incentives for compliance."¹⁹⁶ For example, RTAC accreditation is a precondition for accessing the state-funded drug program, and compliance with NHMRC guidelines is a prerequisite for receiving public research funds.¹⁹⁷ The practical effect, then, is that virtually all ART clinics must follow the RTAC accreditation and compliance procedures.¹⁹⁸

Decisions about health care law in Australia "generally fall[] within the constitutional power of the states and territories rather than the federal government," so health care law often varies considerably between jurisdictions.¹⁹⁹ All of the states and territories have enacted legislation on the status of children born from donated gametes and embryos.²⁰⁰ Only four states, however,—Victoria, New South Wales, South Australia, and Western Australia—have passed legislation specifically regulating ARTs.²⁰¹ If the legislation differs from the guidelines endorsed by the NHMRC, the state legislation takes precedence.²⁰²

¹⁹³ *Research Involving Human Embryos Act 2002* (Austl.); AUSTL ART UNDER REV., *supra* note 173, at 13.

¹⁹⁴ AUSTL GOV'T NAT'L HEALTH AND MED. RES. COUNCIL, *ETHICAL GUIDELINES ON THE USE OF ASSISTED REPRODUCTIVE TECHNOLOGY IN CLINICAL PRACTICE AND RESEARCH* 15 (June 2007), available at <http://www.nhmrc.gov.au/files/nhmrc/publications/attachments/e78.pdf>. But see Lyria Bowen Moore, *Understanding Legal Responses to Technological Change: The Example of in Vitro Fertilisation*, 6 *MORN. J.L. SCI. & TECH.* 505, 552 (2005) ("The NHMRC guidelines, like the RTAC guidelines, are not mandatory.")

¹⁹⁵ FERTILITY SOC'Y AUSTL. REPROD. TECH. ACCREDITATION COMM. *CODE OF PRACTICE FOR ASSISTED REPRODUCTIVE TECHNOLOGY UNITS 8* (Oct. 2010) (*hereinafter* FSA CODE OF PRACTICE), available at <http://www.fertilitysociety.com.au/wp-content/uploads/2010/11/201-f-mal-rtac-cop.pdf>.

¹⁹⁶ Moore, *supra* note 194, at 553.

¹⁹⁷ *Id.* at 553–54.

¹⁹⁸ FSA CODE OF PRACTICE, *supra* note 195, at 4.

¹⁹⁹ Skene, *supra* note 6, at 33.

²⁰⁰ Loane Skene, *Genetics and Artificial Procreation in Australia*, in *BIOMEDICINE, THE FAMILY AND HUMAN RIGHTS* 111 (Marie-Thérèse Meuaders-Klein et al., eds. 2002).

²⁰¹ *Assisted Reproductive Technology (ART)*, AUSTL. GOV'T NAT'L HEALTH AND MED. RESEARCH COUNCIL (*Assisted Reproductive Technology*, AUSTL. NHMRC), <http://www.nhmrc.gov.au/health-ethics/australian-health-ethics-committee/assisted-reproductive-technology-or/assisted-> (last updated Nov. 13, 2013). In the remaining jurisdictions, regulation is left to the common law. Skene, *supra* note 200, at 111.

²⁰² *Assisted Reproductive Technology*, AUSTL. NHMRC, *supra* note 201.

The fact that the Australian government partially reimburses assisted reproduction without restricting the number of cycles or services that an individual can receive suggests that the government has in effect created a positive right of access to ARTs through Medicare. Provision of the means necessary access ARTs has come at a significant financial cost to the government and has also prompted the Parliament of Victoria to enact broad legislation regulating the procedures.

2. Parliament of Victoria Enacted Sweeping Regulatory Legislation

Since passing the world's first ART legislation, the Parliament of Victoria has enacted one of the world's broadest frameworks for regulating ARTs.²⁰³ The current legislation, the Assisted Reproductive Treatment Act 2008 ("ART Act" or "the Act"), took effect on January 1, 2010.²⁰⁴ The ART Act is divided into 16 parts with 159 sections and regulates all aspects of ARTs, ranging from criminal offenses related to prohibited procedures, to establishing the Victorian Assisted Reproductive Treatment Authority, which monitors compliance with the Act. The most relevant provisions for demonstrating the extent to which Victoria regulates access to ARTs are the purposes and principles that guide the Act and the provisions governing access to treatment, presumptions against treatment, and appeals of treatment determination decisions.

The primary purpose of the ART Act is "to regulate the use of assisted reproductive treatment and artificial insemination procedures."²⁰⁵ Other purposes include regulating access to information about ARTs, promoting research into infertility, and regulating surrogacy arrangements.²⁰⁶ The Parliament of Victoria intended for the following principles to be given effect in fulfilling the purposes of the ART Act:

- (a) the welfare and interests of persons born or to be born as a result of treatment procedures are paramount;
- (b) at no time should the use of treatment procedures be for the purpose of exploiting, in trade or otherwise—(i) the reproductive capabilities of men and women; or (ii) children born as a result of treatment procedures;
- (c) children born as the result of the use of donated gametes have a right to information about their genetic parents;
- (d) the health and wellbeing of persons undergoing treatment procedures must be protected at all times;

²⁰³ In 1984, the Parliament passed the Infertility (Medical Procedures) Act, which it replaced with the Infertility Treatment Act 1995. See, *supra* note 6, at 33. Victoria's current ART legislation, the Assisted Reproductive Treatment Act 2008 superseded the 1995 legislation. *Assisted Reproductive Treatment Act 2008* (Vic.) s 1(g) (Austl.) (hereinafter *ART Act*).

²⁰⁴ *ABY v Patient Review Panel* (2011) VCAT 1382 ¶ 12 (Austl.).

²⁰⁵ *Id.* s 1(a).

²⁰⁶ *Id.* s 1(b)-(d).

(c) persons seeking to undergo treatment procedures must not be discriminated against on the basis of their sexual orientation, marital status, race or religion.²⁰⁷

These guiding principles provide valuable insight into the intent behind the ART Act. On the one hand, the Act is broad in its application and prohibits discrimination based on an individual's "sexual orientation, marital status, race or religion." On the other hand, however, the interests of "persons to be born," not of persons using ARTs, are considered "paramount." The principles thus seem to imply that the liberties of individuals who wish to use ARTs yield to the liberties of "persons to be born."

The ART Act carefully regulates who can perform ART procedures. A clinic must provide documentation of RTAC accreditation to become a "registered ART provider."²⁰⁸ Failure to comply with the ART provider requirement can result in criminal penalties, ranging from 480 penalty units (\$60,792.90), to a four-year prison sentence, or both.²⁰⁹ The ART Act is even more specific with respect to who is able to undergo treatment procedures in Victoria. In order for a woman to qualify for treatment, a doctor must reasonably determine that she is: (i) "unlikely to become pregnant other than by a treatment procedure," or (ii) "unlikely to be able to carry a pregnancy or give birth to a child without a treatment procedure," or (iii) "at risk of transmitting a genetic abnormality or genetic disease to a child born as a result of a pregnancy conceived other than by a treatment procedure."²¹⁰ To undergo treatment, a woman and her partner, either her spouse or "a person who lives with [her] as a couple on a genuine domestic basis," must consent to the particular procedure, undergo counseling, and submit to a child protection order check and criminal record check.²¹¹

Importantly, an ART provider is prohibited from performing a treatment procedure on a woman if there is a "presumption against treatment."²¹² A presumption applies against a woman who wishes to undergo ART treatment if a criminal record check reveals that the woman or her partner has been convicted of a sexual or violent offense or if a child protection order check reveals that a child was removed from the custody of the woman or her partner.²¹³ In addition, the ART Act specifically

²⁰⁷ *Id.* s 5 (emphasis added).

²⁰⁸ *Id.* ss 7, 74(1)-(2).

²⁰⁹ *Id.* s 7. For the fiscal year, 2012-13, ending June 30, 2013, one penalty unit equaled \$148.84 AUD, or \$126.65 USD, so 480 penalty units equaled \$67,603.20 AUD, or \$60,792.90 USD. See *Currency Converter*, OANDA, *supra* note 181 (providing currency conversions on Jan. 12, 2014); *Penalty and Fine Units*, VICTORIA LEGAL AID, <http://www.legalaid.vic.gov.au/find-legal-answers/fines-and-infringements/penalty-units> (last visited Jan. 12, 2014) (providing penalty unit information).

²¹⁰ ART Act s 10(2)(b).

²¹¹ *Id.* ss 10-14, 150(1).

²¹² *Id.* ss 10(2)(b), 14(3).

²¹³ *Id.* s 34(1).

outlaws treatment procedures intended to produce a child of a particular sex, unless sex selection is necessary "to avoid the risk of transmission of a genetic abnormality or a genetic disease" or the Patient Review Panel, a body tasked with reviewing refusals to provide treatment, approves the procedure.²¹⁴ An ART provider who violates the ban on non-medical sex selection is subject to a penalty of 240 units (\$35,476) and/or a two years imprisonment.²¹⁵

If there is a presumption against treatment, or if an ART provider otherwise refuses to provide treatment, an individual may file an application for review with the five-member Patient Review Panel ("PRP"). This includes circumstances in which an ART provider "reasonably believes that a child that may be born as a result of a treatment procedure carried out on the woman would be at risk of abuse or neglect."²¹⁶ The PRP decides if there is a barrier to treatment, basing its decision on the ART Act's guiding principles and determining "whether carrying out a treatment procedure . . . is consistent with the best interests of a child who would be born."²¹⁷ The regulations governing when ART providers and the PRP can deny treatment further demonstrate the primacy that the ART Act gives to the interests of "persons to be born."

A person "whose interests are effected" by a PRP decision concluding that there is a barrier to treatment may appeal the decision to the Victorian Civil and Administrative Tribunal ("VCAT").²¹⁸ The Parliament of Victoria created VCAT through the Victorian Civil and Administrative Tribunal Act 1998 to provide individuals with "an innovative, flexible and accountable organisation which is accessible and delivers a fair and efficient dispute resolution service."²¹⁹ Among the issues that VCAT handles are disputes about discrimination, health and privacy, disability services, and guardianship.²²⁰ A VCAT case is presided over by one to five VCAT members, at least one of whom must be a lawyer.²²¹ VCAT exercises both original and review jurisdiction, depending on the authority granted to it under enabling enactments.²²² The review jurisdiction is best

²¹⁴ *Id.* ss 15, 28.

²¹⁵ *Id.* s 28.

²¹⁶ *Id.* s 15(1). Section 15 does not provide any specifications for the qualifications of PRP members, other than to note that at least one member must be an expert in child protection matters. The chairperson and deputy chairperson are government appointed positions, and the other three members are appointed from an approved list of names. *Id.* s 83.

²¹⁷ *Id.* s 15(3).

²¹⁸ *Id.* ss 96-97.

²¹⁹ *Victorian Civil and Administrative Tribunal Act 1998 (Austl.)* [hereinafter *VCAT Act*]; *About VCAT, VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL*, <http://www.vcat.vic.gov.au/about-vcat/who-we-are-0> (last visited Jan. 12, 2014).

²²⁰ *Id.*

²²¹ *VCAT Act* s 64(1)-(2). VCAT members must be legal practitioners or have "special knowledge or experience" with respect to a class of matters handled by VCAT. *Id.* s 14(2)(a).

²²² *Id.* ss 40, 43-44, 48, 51.

characterized as *de novo* because on review, VCAT "has all the functions of the decision-maker."²²³ VCAT decisions are generally appealed to the Trial Division of the Supreme Court of Victoria, but only those appeals based on questions of law.²²⁴

By providing coverage for ARTs under Medicare, Australia's state-funded health care system, the Australian government has effectively provided individuals with a positive right to the means necessary to access assisted reproduction with no limit on the number of cycles one may undergo. Regulation of the procedures is left to the individual states, so there is considerable variation in the regulatory frameworks. The broad scope of the ART Act implemented by the Parliament of Victoria makes it a powerful piece of legislation for controlling access to ARTs. Despite the expansive nature of these regulations, the ART Act allows for a positive right to access ARTs, in contrast to the negative right that exists in the United States, as demonstrated by two recent cases from the Supreme Court of Victoria and VCAT. This highly regulated system does, however, come at a cost to procreative liberty, as it can result in placing arbitrary limits on reproductive choice when tribunals face controversial ethical issues.²²⁵

3. Victorian IVF Cases Reflect a Positive Right to Use ARTs Subject to Limitations

The extent to which Victoria's highly-regulated system provides individuals with a positive right to procreate through the use of ARTs is most clearly demonstrated by a discussion of two recent access-to-ART cases, *Castles v Secretary of the Department of Justice*²²⁶ and *ABY v Patient Review Panel ("ABY & ABZ")*,²²⁷ which came before the Supreme Court of Victoria and VCAT, respectively. *Castles* involved a low security prisoner's request to access IVF while serving her sentence, and *ABY & ABZ* addressed a claim that a husband's guilty plea to criminal sexual acts with a minor was not a barrier against treatment. In both cases, the Supreme Court of Victoria and VCAT determined that the women should be able to undergo the requested procedures. An analysis of *Castles* and *ABY & ABZ* indicates that, unlike the United States, Victoria has taken an approach to procreative liberty that recognizes a positive right to access

²²³ *Id.* s 51(1)(a).

²²⁴ *Id.* s 148(1).

²²⁵ The following discussion of three access-to-ART cases is not intended to represent the full spectrum of potential problems that could or will arise out of application of the ART Act in Victoria. The cases are, however, the most high profile cases currently available. As such, they are a strong indication of the possible "wave of the future" in Victorian ART jurisprudence.

²²⁶ [2010] VSC 310 (Austl.).

²²⁷ [2011] VCAT 1382 (Austl.).

treatment), provided that individuals satisfy the broad requirements of the ART Act.

In *Castles*, the Trial Division of the Supreme Court of Victoria held that Kimberley Castles, a forty-five-year-old low security prisoner at HM Prison Tarngower had a right under s 47(1)(f) of the Corrections Act 1986 to undergo IVF treatment.²²⁸ Although *Castles* did not directly involve an application of the ART Act, the court's discussion of infertility provides further proof that as long as an individual meets the standards set by the ART Act, there is a positive right to access ARTs in Victoria. On November 20, 2009, Ms. Castles was convicted of social security fraud for claiming almost \$140,000 in payment benefits that she was not entitled to receive, and subsequently sentenced to three years imprisonment.²²⁹ Ms. Castles was incarcerated at a maximum security prison before being transferred to the Tarngower prison, a minimum security facility that "emphasises release preparation and community integration," at which point her two-year-old daughter was allowed to live with her in one of the "self-contained units (or 'cottages')." ²³⁰ Ms. Castles had left Tarngower with an accompanying officer on thirty-six occasions, including for visits to a medical doctor, optometrist, and dentist.²³¹

Ms. Castles had been receiving IVF treatment at the Melbourne IVF Clinic for over one year prior to her incarceration. From the beginning of her incarceration in November 2009, she filed requests to allow her to continue the treatment at her own expense while she was in prison because when she turned forty-six in December 2010, she would no longer be eligible for treatment at the Melbourne IVF Clinic.²³² The Secretary of the Department of Justice denied Ms. Castles's request on May 3, 2010. On April 23, 2010, Ms. Castles initiated proceedings seeking an injunction against enforcement of the Secretary's decision.²³³ The Practice Court of the Supreme Court of Victoria denied Ms. Castles's request on the grounds that she was "not presently legally entitled to IVF treatment" because she had not undergone the criminal record and child protection order checks required by sections 10 and 14 of the ART Act.²³⁴

After a brief trial in early June 2010, the Trial Division of the Supreme Court of Victoria handed down a judgment granting Ms. Castles's request

²²⁸ *Corrections Act 1986* (Vict.) (Austl.); *Castles*, [2010] VSC 310 ¶¶ 1, 3, 10.

²²⁹ *Id.* ¶ 3; Katie Bice, *Kimberley Castles Wins Speedy Trial for IVF Treatment Bid*, HERALD SUN (Austl.), (May 4, 2010, 11:41 AM), <http://www.heraldsun.com.au/news/victoria/kimberley-castles-wins-speedy-trial-for-ivf-treatment-bid/story-e6fr7lcr-1225861985298>.

²³⁰ *Castles*, [2010] VSC 310 ¶¶ 8-9; see *id.* ¶ 9 ("The conditions at Tarngower are such that Ms[.] Castles believes [her daughter] is not aware that she is living in a prison.")

²³¹ *Id.* ¶ 11.

²³² *Id.* ¶¶ 2, 7, 15, 25(a). That Ms. Castles will pay for the IVF treatment at her own expense does not, however, mean that she would not be eligible for Medicare reimbursements, but only that the prison would not cover the costs.

²³³ *Id.* ¶¶ 18, 22.

²³⁴ *Castles v Sec'y of the Dep't of Justice* [2010] VSC 181 ¶¶ 14(a), 58(2), 62 (Austl.).

to access the IVF treatment. The court found that Ms. Castles had a right to the treatment under s 47(1)(f) of the Corrections Act, which grants prisoners "the right to have access to reasonable medical care and treatment necessary for the preservation of health."²³⁵ Significantly, the court's only discussion of the ART Act was to note that the "checks [required by the ART Act] have now been satisfactorily completed."²³⁶

The court reasoned that IVF is a "treatment for a legitimate medical condition[and there is] no proper basis to treat IVF treatment differently from other forms of medical intervention that are considered to be necessary to enable people to live dignified and productive lives."²³⁷ The court was persuaded that the "respect for the inherent dignity of the human person," protected by section 22(1) of the Australian Charter of Human Rights and Responsibilities Act 2006, applied to its decision about Ms. Castles's reproductive health.²³⁸ Ultimately, the court found that "IVF treatment is both necessary for the preservation of Ms[.] Castles[s] reproductive health and reasonable, consistent[] with her right as a person deprived of liberty to be treated with humanity."²³⁹ Although the Supreme Court of Victoria did not decide *Castles* based on an interpretation of the ART Act, the deference given to the determination of eligibility reached under the ART Act, the connection between reproductive health and the "preservation of health" guaranteed by the Corrections Act, and the prison's duty to accommodate medical needs by facilitating transportation and escorts, albeit at Ms. Castles's expense, provide strong support for the claim that the right to use ARTs is a positive right in Victoria.

In addition to the Supreme Court of Victoria protecting the right to use assisted reproduction, VCAT's interpretation of the ART Act in a similarly controversial case reveals the broad right to access ARTs that exists in Victoria. In *ABY & ABZ*, VCAT had to determine whether there was a barrier to allowing ABZ to undergo IVF treatment because her husband ABY had a conviction for sexual offenses that qualified as a presumption against treatment under the ART Act.²⁴⁰ VCAT determined that there was no barrier to treatment and that ABZ could receive IVF treatment because ABY's "sexual offending" did not pose risks to a child who would be born.²⁴¹

In February 2008, ABY was charged with committing "criminal acts of a sexual nature" against a sixteen-year old girl who attended a school for students with learning and behavioral difficulties where ABY was a martial

²³⁵ *Corrections Act 1986* (Vict.) s 47(1)(f) (Austl.).

²³⁶ *Castles*, [2010] VSC 310 ¶ 24.

²³⁷ *Id.* ¶ 5.

²³⁸ *Charter of Human Rights and Responsibilities Act 2006* (Vict.) s 22(1) (Austl.); *Castles*, [2010] VSC 310 ¶¶ 93–94, 106.

²³⁹ *Castles*, [2010] VSC 310 ¶ 194.

²⁴⁰ [2011] VCAT 1382 ¶¶ 1.3, 6 (Austl.).

²⁴¹ *Id.* ¶¶ 50, 114, 182.

arts teacher.²⁴² Six months after ABY's arrest, in August 2008, ABY and ABZ completed an application to undergo IVF at the Monash IVF Clinic.²⁴³ ABZ was permitted to undergo treatment, but the cycle was unsuccessful. The couple delayed a second cycle because of ABY's impending trial.²⁴⁴ In January 2009, ABY pled guilty to three counts of sexual penetration of a minor and was sentenced to three years imprisonment. He served one year before being released in January 2010.²⁴⁵

In between the couple's first application for IVF and their second application, filed in July 2010, the ART Act went into effect and implemented section 14, which states that a presumption against treatment exists if a woman or her partner has been convicted of a sexual offense.²⁴⁶ As a result of ABY's offense, there was a presumption against ABZ receiving IVF treatment. The couple filed an appeal with the PRP, which ruled that ABZ could not undergo treatment. The PRP reasoned that ABY took advantage of "a vulnerable young person with whom he was in a relationship of trust."²⁴⁷ The PRP was "not satisfied in light of these serious and recent events that the welfare of child born to ABY will be protected."²⁴⁸

VCAT set aside the PRP decision and determined that there was no barrier to ABZ undergoing IVF treatment, provided that ABZ completed twelve sex offender counseling sessions.²⁴⁹ The tribunal determined that, of the guiding principles set out in section 5 of the ART Act, the only one that was directly relevant to the present case was that "the welfare and interests of persons born or to be born as a result of treatment procedures are paramount."²⁵⁰ Noting that under Australian case law, "paramount means overriding," VCAT thus focused its decision exclusively on the interest of "persons to be born."²⁵¹ In language reminiscent of Robertson's "better to be born" argument, the tribunal reasoned that denying IVF treatment to ABZ "would deny any child to be born through such treatment their very existence."²⁵² The *ABY & ABZ* tribunal's reasoning differed from Robertson's approach in that VCAT did not find it necessary "to decide if the interests of the proposed parents are relevant to the determination of whether there is a barrier to treatment."²⁵³

²⁴² *Id.* ¶¶ 11, 84.

²⁴³ *Id.* ¶ 9.

²⁴⁴ *Id.* ¶¶ 10, 14.

²⁴⁵ *Id.* ¶¶ 83, 86-87.

²⁴⁶ ART Act (Vic.) s 14 (Austl.); *ABY & ABZ*, [2011] VCAT 1382 ¶¶ 1-2, 9.

²⁴⁷ *ABY & ABZ*, [2011] VCAT 1382 ¶¶ 4, 29.

²⁴⁸ *Id.*

²⁴⁹ *Id.* ¶¶ 195, 209.

²⁵⁰ ART Act s 5(a); *ABY & ABZ*, [2011] VCAT 1382 ¶ 45.

²⁵¹ *ABY & ABZ*, [2011] VCAT 1382 ¶ 46.

²⁵² Compare *id.* ¶ 55, with *supra* note 35 and accompanying text.

²⁵³ *ABY & ABZ*, [2011] VCAT 1382 ¶ 58.

In reaching its decision, VCAT relied on a report from two "pre-eminent experts in the assessment and treatment of sex offenders" to find that ABY was not a pedophile and had a low risk of reoffending.²⁵⁴ The tribunal also found it "extremely unlikely that ABY would have difficulty discerning the boundaries between parent and child" or that he poses a risk of sexual offense against a biological child.²⁵⁵ VCAT concluded that ABZ could receive IVF treatment because ABY's offending did not create a risk of harm to a child to be born or indicate a tendency to put his interests before a child's.²⁵⁶ In fact, the only limitation imposed on ABZ's access to the IVF was that ABY complete the required counseling sessions before ABZ could undergo the treatment.²⁵⁷ Although the *ABY & ABZ* decision was not based on the couple's interest in procreating, VCAT's interpretation of the ART Act to permit the wife of a convicted sex offender to undergo IVF suggests that the Act allows broad access to ARTs in Victoria.

The focus on the interests of "persons to be born" in *ABY & ABZ* did not prevent the couple from accessing IVF, but another case before VCAT demonstrates that the highly-regulated system in Victoria can have the opposite effect of limiting procreative liberty. That case, *JS v Patient Review Panel ("JS & LS")*,²⁵⁸ addressed the prohibition against sex selection of embryos for non-medical purposes. VCAT dismissed an application for review of the PRP decision denying permission to use IVF for non-medical sex selection on the grounds that "it is ethically undesirable, and contrary to the welfare of the child, to make acceptance of a child conditional on its sex."²⁵⁹

JS gave birth to a daughter in 2006 who died tragically as a result of "brain injuries and complications" shortly after birth.²⁶⁰ At the time of the case, JS and her husband LS had three sons, all of whom were conceived naturally, but no daughter.²⁶¹ The couple wanted to use IVF for sex selection so that JS could give birth to a daughter, "to improve their emotional wellbeing, to help them move on from their tragedy and to complete their family."²⁶² JS and LS were diagnosed with post-traumatic stress disorder after their daughter's death, and they felt that using sex selection of embryos would help them overcome the trauma of having lost

²⁵⁴ *Id.* ¶¶ 95, 114(i)-(iii).

²⁵⁵ *Id.* ¶ 114(iv)-(v).

²⁵⁶ *Id.* ¶¶ 115-19.

²⁵⁷ *Id.* ¶ 213.

²⁵⁸ [2011] VCAT 856 (Aus 1.).

²⁵⁹ *Id.* ¶¶ 82, 89 (emphasis added).

²⁶⁰ *Id.* ¶ 46; Shelley Hadfield, *Couple Aborts Twin Boys for Girl*, HERALD SUN (Austl.), Jan. 8, 2011, at 1. Interestingly, VCAT discussed the relevant facts in its decision, but removed all sex-identifying information. This case discussion will proceed by citing VCAT's decision, but the sex identification comes from the Hadfield article.

²⁶¹ *Id.*

²⁶² *JS & LS*, [2011] VCAT ¶ 64.

their infant daughter.²⁶³ JS admitted that she was "desperate to have another [daughter] for [her] psychological wellbeing."²⁶⁴ JS and LS also believed that having a daughter would improve the psychological wellbeing of their family, because their sons would "see[] their parents in a better frame of mind."²⁶⁵

In April 2010, JS and LS consulted a fertility doctor at the Monash IVF Clinic about their desire to use PGD for sex selection in the hopes of JS giving birth to a daughter.²⁶⁶ The doctor supported the couple's decision, but because section 28 of the ART Act prohibits sex selection of embryos unless necessary to prevent the "transmission of a genetic abnormality" or otherwise approved by the PRP, JS and LS had to file an application for approval with the PRP. The PRP denied the application for two reasons.²⁶⁷ First, the PRP commented that if the couple's reason for using sex selection was "family balancing to assist emotional wellbeing, then [that] is not a sufficiently grave reason to approve a procedure which would otherwise be a criminal offence."²⁶⁸ Second, the PRP reiterated that the interests of "persons born or to be born" are paramount and noted that nothing in the couple's request related "to the welfare and interests of the proposed child."²⁶⁹

JS and LS subsequently filed an application for review of the PRP decision with VCAT.²⁷⁰ During this time, JS went to the Monash IVF Clinic for an ART procedure and became pregnant with twins.²⁷¹ After learning that the twins were both male, JS terminated the pregnancy.²⁷² JS and LS indicated that JS "would continue to terminate" pregnancies achieved through IVF if the fetuses were males. They said that their desire for a daughter was so strong that they were prepared to travel to Thailand or the United States, where PGD for sex selection is legal.²⁷³

Over the course of a two-day hearing in March 2011, VCAT heard testimony from JS and LS, their fertility doctor, JS's psychiatrist, and their psychologist, all of whom supported the sex selection procedure.²⁷⁴ VCAT refused the couple's request, relying instead on the testimony of two ethicists and a post-traumatic stress disorder expert.²⁷⁵ VCAT pointed out

²⁶³ *Id.* ¶¶ 42, 61-64.

²⁶⁴ *Id.* ¶ 61.

²⁶⁵ *Id.* ¶¶ 63-64.

²⁶⁶ *Id.* ¶ 8.

²⁶⁷ *Id.* ¶¶ 5-9, 54.

²⁶⁸ *Id.* ¶ 54.

²⁶⁹ *Id.* ¶¶ 2, 54.

²⁷⁰ *Id.* ¶ 9.

²⁷¹ *Id.* ¶ 57.

²⁷² *Id.* ¶¶ 57, 62, 67-68.

²⁷³ *Id.* ¶ 62. For a discussion of sex selection in the United States, see *supra* notes 155, 15E-160, 164 and accompanying text.

²⁷⁴ *JS & LS*, [2011] VCAT ¶¶ 67-74.

²⁷⁵ *Id.* ¶¶ 51, 59, 83, 86, 88.

that "[t]here was no express reference to the welfare and interests of the child to be born" in any of the evidence presented in favor of the couple's request.²⁷⁶ Furthermore, the tribunal reasoned that even if giving birth to a daughter could improve JS's mental health, an assertion for which it found insufficient support, when "there is a conflict between the welfare and interests of a child to be born, and the health and wellbeing of the person undergoing an ART procedure, . . . the conflict must be resolved in favour of the child's welfare and interests."²⁷⁷ Ultimately, the tribunal dismissed the couple's application because it was "not satisfied" that it was in the best interests of a child to be born through non-medical sex selection.²⁷⁸

VCAT explicitly rejected the claim that concern for the welfare and interests of JS and LS, the individuals seeking to use ARTs, was an adequate reason to allow non-medical sex selection.²⁷⁹ *JS & LS* thus represents a clear limitation on procreative liberty based on an interpretation of the ART Act. The juxtaposition of *ABY & ABZ* with *JS & LS* makes it difficult to understand VCAT's reasons for permitting the requested IVF treatment in the former case while prohibiting it in the latter. Certainly, both cases involved controversial ethical issues, those of a convicted sex offender and his wife using IVF and of a couple seeking non-medical sex selection. That VCAT did not find a barrier to treating *ABZ* because her husband's sexual offense was not related to pedophilia, yet refused to allow *JS* and *LS* to select the sex of an embryo, suggests that VCAT could place further limits on procreative liberty with no justification other than that an action is "ethically undesirable."

By partially reimbursing the costs associated with ARTs through Medicare, the Australian government effectively created a positive right to access ARTs, which led the Parliament of Victoria to enact broad legislation regulating assisted reproduction. On the one hand, the jurisprudence of Victorian courts and tribunals in two controversial IVF cases, involving requests to access treatment while in prison and when one's partner has a conviction for a sexual offense, implies that there is a positive right to access ARTs as long as one satisfies the standards of the ART Act. On the other hand, the extensive regulation has the potential to place arbitrary limits on procreative liberty based on the "ethically undesirable" nature of a procedure, as demonstrated by the decision not to allow *JS* and *LS* to use IVF for sex selection.

²⁷⁶ *Id.* ¶ 55.

²⁷⁷ *Id.* ¶¶ 87, 85.

²⁷⁸ *Id.* ¶ 89.

²⁷⁹ *Id.* ¶¶ 81-82.

CONCLUSION

The different regulatory frameworks for ARTs in the United States and Victoria, Australia reveal the cyclical nature of "procreative tourism"²⁸⁰— from the 1980s when Americans travelled to Victoria to access IVF, to 2013 when Australians are presumably traveling to the United States to access treatment with fewer regulations and restrictions.²⁸¹ The divergent regulatory approaches for ARTs pursued in the United States and Victoria informs an understanding of this interesting phenomenon. While the U.S. system mirrors Robertson's conception of procreative liberty as a negative right against government interference,²⁸² Victoria has adopted a highly regulated system that provides individuals with the means necessary to access ARTs.²⁸³ A discussion of recent IVF case law in Victoria, however, suggests that the extensive regulations that accompany a positive right to assisted reproduction can have the opposite effect of limiting procreative liberty.²⁸⁴ The better system for regulating ARTs is the one implemented in the United States, which reflects Robertson's notion of a robust negative right to procreate. This scheme is preferable to one that provides the means necessary to access ARTs because protecting the freedom to procreate prevents the negative consequences that result from excessive governmental regulation, while permitting certain limitations to prevent substantial harm.

An important critique of Robertson's approach to procreative liberty is that it "appears to possess no logical stopping point, expanding to the outer limits of technological possibility and human ingenuity."²⁸⁵ Robertson does, however, acknowledge that certain harms justify placing constraints on procreative liberty.²⁸⁶ He contemplates these harms in conjunction with the view that individual autonomy and privacy in reproductive decision-making deserve presumptive primacy.²⁸⁷ Unlike the approach taken in Australia, in which the focus on the interests of "persons to be born" can limit procreative liberty,²⁸⁸ Robertson's conception gives primary

²⁸⁰ Bartha M. Knoppers and Sonia LeBris coined the phrase "procreative tourism" in 1991. See Bartha M. Knoppers & Sonia LeBris, *Recent Advances in Medically Assisted Conception: Legal, Ethical and Social Issues*, 17 AM. J.L. & MED. 329, 333 (1991) (arguing that "citizens [may] practice 'procreative tourism' in order to exercise their personal reproductive choices in other less restrictive states."). More specifically, procreative tourism is "is the travelling... from one institution, jurisdiction or country where treatment is not available to another institution, jurisdiction or country where [one] can obtain the kind of medically assisted reproduction [she] desire[s]." G. Pennings, *Reproductive Tourism as Moral Pluralism in Motion*, 28 J. MED. ETHICS 337, 337 (2002).

²⁸¹ See *supra* notes 1-4, 273 and accompanying text.

²⁸² See *supra* Part I-II.A.

²⁸³ See *supra* Part II.B.1-2.

²⁸⁴ See *supra* Part II.B.3.

²⁸⁵ Rao, *supra* note 15, at 1479.

²⁸⁶ See *supra* text accompanying notes 91-92.

²⁸⁷ See *supra* text accompanying notes 39, 75, 92.

²⁸⁸ See *supra* Part II.B.3.

consideration to the interests of the individuals making reproductive choices.

As a result, Robertson focuses less on societal harms²⁸⁹ than on so-called "tangible" harms to individuals who seek to exercise the freedom to procreate. In the context of ARTs, Robertson acknowledges that the need "to protect consumers from fraud, misrepresentation, and incompetent practitioners" not only justifies, but may also require, regulation as technology proliferates.²⁹⁰ For example, he would likely support state regulations that give effect to the ASRM guidelines on embryo implantation as a way to address the medical and ethical concerns that result from higher-order multiple pregnancies and births.²⁹¹ Permissible regulations would also likely extend to IVF refund programs, under which "patients pay a premium up front, but they are guaranteed multiple cycles of IVF and a refund if they fail to conceive" as a means of preventing exploitation.²⁹²

Contrary to critiques,²⁹³ Robertson's approach can accommodate the rapidly changing technological landscape of ARTs. According to Robertson, "[s]peculations about potential future uses of [ARTs like] PGD should not prevent otherwise acceptable current uses of PGD."²⁹⁴ For example, in *Children of Choice*, Robertson noted that sex selection of embryos may be permissible at the pre-implantation stage because the expense and burden of the procedure would likely prevent it from becoming widespread.²⁹⁵ Just over twenty years later, however, in light of increasing technological capabilities, Robertson refined his view on PGD for sex selection.²⁹⁶ He noted that the concern for "sexist social mores" and gender discrimination may justify limitations on using sex selection for a first child, but argued that there is a stronger case for allowing the technique for purposes of family balancing and gender variety.²⁹⁷

²⁸⁹ See *supra* notes 34, 36, 91-92 and accompanying text.

²⁹⁰ ROBERTSON, *supra* note 12, at 15.

²⁹¹ See John A. Robertson, *The Octopus Case—Why More Regulation is Not Likely*, 29 HASTINGS CTR. REP. 26, 28 (2009) (concluding that "[t]he best solution here would be single embryo transfer in patients under thirty-five, backed by repeated transfer of single frozen embryos if a fresh cycle fails to produce a pregnancy.").

²⁹² Jim Hawkins, *Financing Fertility*, 47 HARV. J. LEGIS. 115, 116 (2010); see *id.* at 117 (concluding that "additional regulations are needed to protect consumers (because [t]hese programs are presented . . . in ways that often exploit common consumer decision-making biases, as well as biases specific to patients in the fertility industry").

²⁹³ See Rao, *supra* note 15, at 1496 (writing that "Robertson's quest . . . would freeze the law in an area of rapidly developing technology with as yet unknown and potentially far-reaching implications for society").

²⁹⁴ ROBERTSON, *supra* note 15, at 213.

²⁹⁵ ROBERTSON, *supra* note 12, at 156.

²⁹⁶ ROBERTSON, *supra* note 15, at 214-15.

²⁹⁷ *Id.*

Many scholars have written on issues of reproductive justice in Australia,²⁹⁸ yet no scholarship to date has addressed the negative implications on procreative liberty of a highly regulated system that provides the means necessary to access to ARTs.²⁹⁹ This Article has sought to provide insight on that aspect of assisted reproduction by evaluating the regulatory structures in the United States and Victoria and concluding that the optimal approach to regulating ARTs derives from Robertson's notion of procreative liberty—a negative right to procreate subject to limitations only when substantial harms are likely to result. This juxtaposition of the experiences of the United States and Victoria demonstrates that the United States "got it right" in creating a system that protects a robust negative right to procreate because, although "[t]he freedom to act does not mean that we will act wisely. . . . denying that freedom may be even more unwise, for it denies individuals' respect in the most fundamental choices of their lives."³⁰⁰

²⁹⁸ See, e.g., Deborah Conway, *Donor, Father or Parent? Conceiving Paternity in the Australian Family Court*, 18 INT'L J. L. POLY & FAM. 76 (2004) (discussing a paternity case before the Family Court of Australia that involved a child born to a lesbian couple with sperm donated from a homosexual man); Bryn E. Floyd, Comment, *Regulation of Stem Cell Research: A Recommendation That the United States Adopt the Australian Approach*, 13 PAC. RIM L. & POLY J. 31 (2004) (suggesting that the U.S. adopt legislation like that implemented in Australia that permits embryonic stem cell research of excess embryos left over from fertility treatments); Terry & Storey, *supra* note 14, at 210-11 (discussing ART legislation in Australia and concluding that regulation is better left to ethics committees with government input).

²⁹⁹ Two professors at the University of Sydney have argued that the legislative arena is an "[i]nappropriate forum for debating emotive issues" of ARTs, but their opinion was published ten years before the ART Act took effect. Terry & Storey, *supra* note 14, at 232.

³⁰⁰ ROBERTSON, *supra* note 12, at 24.