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Illicit Reasons and Means for Reproduction: On Excessive Choice and Categorical and Technological Imperatives

by
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Table of Contents

I. Introduction	1084
A. Opportunities and Reasons for Exercising Them ...	1084
B. Some Criticisms of NRTC's	1085
C. Sources of Error: Remarks on Perceptions/ Judgments Resting on Comparisons	1087
II. The Assault on Choice: The Dangers of Too Many Options	1091
A. The General Problem	1091
B. Too Many Reproductive Options?	1099
C. Does the Focus on Choice Impair Other Values? ...	1102
D. Does the Focus on Choice Even Make Sense? "Connectedness" as a Nonstarter and Nonfinisher ..	1103
E. Transitional Note on Reproductive Imperatives and Arguments Against Using NRTC's Because of Harms to Resulting Children	1107
III. What Reasons for Reproduction Are Selfish, Illicit, Irresponsible, or Otherwise Tainted?	1110
A. The Nature of Selfishness, the Occasions for Inquiring into It, and Why It Is Morally Relevant ..	1110
B. The Status of Selfishness and Irresponsibility as Moral Negatives or Taints	1118
C. Other Taints: Defects in Preference Formation.....	1119

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D.	Some Familiar Cases	1119
(1)	AID	1119
(2)	Surrogacy	1120
(3)	Germ Line Augmentation	1123
(4)	Postmenopausal Women	1126
(5)	Posthumous Reproduction Through Use of Gametes	1127
(6)	Posthumous Reproduction by Maintaining the Bodies of Dead Pregnant Women; and Reproduction by Women in Irreversible Comas or Permanent Vegetative States.....	1132
(7)	Reproduction of Persons with Conditions Generally Thought Impairing by Unaffected Persons, in Substitution for Persons Who Would Not Have the Condition	1134
(8)	Reproduction of Persons with Impairing Conditions—The Nonsubstitution Cases	1140
IV.	NRTC's Often Entail or Result in the Improper Use of Persons (Especially Women and Children) as Mere Means and Not as Ends, in Violation of the Second Formulation of Kant's Categorical Imperative	1141
A.	Introduction	1141
B.	Exploring the Formula	1143
(1)	Individuals and Networks; Discrete Acts and Acts In Context	1144
(2)	Treating Persons as Means and as Ends-in- Themselves, and the Nature of the Connection Between These Two Forms of Treatment	1149
(a)	Means and Ends	1149
(b)	The Role of Limits on Consensual Capacities.....	1151
(c)	A Note on Treating People Well	1156
(d)	The Residual Indeterminacy of "Treat as a Mere Means" and "Treat as an End"	1157
(3)	Applying the Formula to NRTC's—In General .	1158
(a)	The Conceptual Apparatus	1158
(i)	Personal and Impersonal Relationships Generally and within the Context of NRTC's	1159
(ii)	Consent in Personal and Impersonal Relationships	1160

- (iii) Creating Persons under the Formula: Procreational Purposes, and Subsequent Treatment of Offspring 1163
- (b) More Examples of Applying the Formula to NRTCs—In Brief 1175
- (4) Individuals and Networks Revisited 1179
- V. Objectification and Commodification 1180
 - A. The Nature of the Arguments from Objectification and Commodification 1180
 - (1) The Work Done by the Argument from Objectification 1180
 - (2) The Systematic Errors In the Objectification Literature: The “Fragmentation of Perception” (Multiple Perspectives Ignored); Reductivism Exaggerated; Terminology Misinterpreted; and “Fragmentation and Reassembly” Misconstrued 1183
 - (a) Objectification Is Rarely Defined 1183
 - (b) “Objectification” Is Used as a Bottom-Line Word of Critique 1185
 - (c) Comparisons to Commercial Transactions Are Made Clumsily 1185
 - (d) Claims of Objectification are Often Driven by Particular Moral Frameworks and Ideologies 1188
 - (e) Reductivism Is Perceived to Be Driven Largely by Patriarchy and Male Domination Generally 1189
 - (f) NRTCs Straddle Categories, Which Partly Accounts for Problems in Characterizing and Evaluating Such Transactions 1190
 - (g) What is Being Objectified? 1190
 - (h) The Impact of Fragmentation of Life Processes Is Overestimated 1190
 - (i) “Dehumanization” Is Too Loosely Assumed 1194
 - (3) Objectification and What We See: A Review .. 1196
 - B. Repairing the Debate 1197
- VI. The Claim That There is No Constitutional Problem If the State Refuses to Enforce Agreements Concerning

NRCts Because No One Is Obligated to Assist Others in Trying to Reproduce	1199
A. The Varieties of "Affirmative Assistance"	1199
B. Going Too Far	1207
VII. The Claim That Some NRTCts Are Not Enforceable Because Constitutional Rights to Companionship and Procreative Choice Are Not Linked	1208
VIII. Is the Moral and Legal Burden of Proof in Evaluating NRTCts on Those Proposing Their Use?	1212
IX. The Argument from Symbolism Against NRTCts Must Be Taken Seriously	1214
A. The Nature of Arguments from Symbolism	1214
B. Evaluating Arguments from Symbolism; Mechanisms of Public Debate	1216
C. Concluding Examples	1219
Conclusion	1220

Selfishness is one of those innocent conceptions the meaning of which appears clear until a few simple questions are asked about it.—Joseph Katz¹

I. Introduction

A. Opportunities and Reasons for Exercising Them

"Assisted reproduction" and related phrases are too terse to convey a wide range of issues. They simply suggest relief of infertility and thus the expansion of reproductive *opportunities* through new technologies and new forms of human affiliation. This is important, but there is much more to say. Such mechanisms reflect and further both a larger set of *reasons* for reproduction—or for using the reproductive system—and may more precisely realize some "standard" reasons for reproduction.

The emphasis on expanded opportunities for reproduction should thus be accompanied by attention to reproductive objectives: it is the intersection of reasons and opportunities that drives the use of reproductive technologies and generates criticism of their use. And it is these criticisms I want to address, for they stimulate lines of inquiry that have not been adequately pursued. In particular, I focus on the view that there are illicit reasons for reproduction or use of reproductive capacities, and that these reasons—whether viewed apart from or integrated with technology—use persons inappropriately.

1. Joseph Katz, *On the Nature of Selfishness*, 45 J. PHIL. 96, 96 (1948).

The assault on new reproductive technologies and collaborations (NRTCs) is linked to arguments and themes that partly reflect an anti-technology, anti-autonomy stance. Although I think the critiques are flawed, their popularity suggests that probing the arguments on both sides will be illuminating.

The linked critiques of NRTCs (viewed as a whole) can be summarized this way:

B. Some Criticisms of NRTCs

1) *Individual choice—including especially reproductive choice—is generally overrated and leads to the rejection of competing values of superior moral stature.* There can, in short, be too many options. In addition to being overrated,² choice is often “illusory,” partly because

2. “The concept of person as free choice maker could not, I believe, have arisen outside the vast proliferation of technologies that has given the self the options from which it may choose. It is no accident that the Kantian Enlightenment Man came into being at the same time as the Industrial Revolution. Until the technologies were available that made alternative ways of living possible, until people had practical means for realizing private notions of the good life, a concept of the person that laid great emphasis on the faculty of choice would have been deeply puzzling, to say the least. A liberal society, in which it is left to the individual to determine his or her own conception of the good, cannot exist without the technologies that permit one to put one’s conceptions into practice.” Hilde Lindemann Nelson, *Dethroning Choice: Analogy, Personhood, and the New Reproductive Technologies*, 23 J.L., MED. & ETHICS 129, 133 (1995).

Taken literally, the claim is questionable. The idea of persons as free choosers long antedates the rise of industrial technology. It may be that many of such reference to human freedom bore a different meaning from that assigned to parallel terms today—they may not refer to what we now understand by the concept; the status of being politically and otherwise free was more sharply confined; and the ideal may have been less elevated in the hierarchy of human good. Moreover, some paeans to freedom sound in nationalism, or apply in a religious context. Still, the examples are instructive for they emphasize the pre-eminence of choice at some important levels: “It will be found unjust and unwise jealousy to deprive a man of his natural liberty upon a supposition that he may abuse it.” Oliver Cromwell (1599-1658) in *THE CONCISE COLUMBIA DICTIONARY OF QUOTATIONS* 152 (Robert Andrews ed., 1987); “Only in states in which the power of the people is supreme has liberty any abode.” Cicero, *De Republica I* (c. 50 B.C.) in *A NEW DICTIONARY OF QUOTATIONS* 680 (H.L. Mencken ed., 1942); “I tell you true, liberty is the best of all things; never live beneath the noose of a servile halter.” William Wallace [on whom the movie *Braveheart* was based], Address to the Scots (c. 1300) in *A NEW DICTIONARY OF QUOTATIONS* 680 (H.L. Mencken ed., 1942). See also Barbara Herman, *Could It Be Worth Thinking About Kant on Sex and Marriage?*, in *A MIND OF ONE’S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY* 49, 51 (Louise M. Antony & Charlotte Witt eds., 1993) (referring to “Kant’s insistence on human freedom as the regulative ideal for personal life”). Technology may have made the idea of choice more vivid and enabled it to spread across classes of persons and issues, but that is a somewhat different matter.

of the coercive impact of a technological imperative driven by patriarchy.³

2) *The choice to use reproductive mechanisms in nonstandard ways is often the product of selfish, irresponsible motivations. These motivations do not deserve the same respect, moral or legal, that we accord reasons for procreation in more standard circumstances.*⁴

3) *Such reckless reproductive ventures often constitute or lead to the improper treatment of persons (especially women and children) as mere means and not as ends, in violation of the second formulation of Kant's Categorical Imperative ("the Formula").*⁵

4) *This improper use is both definitionally and instrumentally linked to objectification of persons (again largely women and children).*⁶

5) *No constitutional law doctrines require us to protect such inappropriate exercises of choice. In particular, the Constitution does not require government to "affirmatively assist"⁷ persons in their techno-*

3. The term "patriarchy" has different definitions in different contexts. Professor Robertson, for example, refers to the argument that certain forms of collaborative reproduction could "further patriarchal domination of women by reinforcing the traditional identification of women with childbearing and child rearing." JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 228 (1994). This is a fairly broad use of the term, but probably reflects common usage. Barbara Katz Rothman, however, stresses that her use of "patriarchy" refers to patrilineal descent—a narrower definition that focuses on an institution affecting how we structure reproduction and property rights. (Comments at this Symposium, Feb. 10, 1996) See also Barbara Katz Rothman, *Reproductive Technologies and Surrogacy: A Feminist Perspective*, 25 CREIGHTON L. REV. 1599, 1600 (1992) (defining "patriarchy" as "a system in which men rule as fathers"). "The relationship between a father and his son is the defining social relationship. It is the basis for the organization of the society." *Id.* Rothman characterizes American society as a "modified patriarchy." *Id.*

Technology generally—not just reproductive capability—is sometimes linked to patriarchy (in either the broad or narrower sense). I do not pursue this point. See generally Christina Hoff Sommer, *The Flight From Science and Reason*, WALL ST. J., July 10, 1995, at A14. This article refers to the view that "male scientists exploit nature the way a violent man exploits a helpless woman."

4. I will not give an account of "standard" circumstances, though completeness requires at least mention of the fact that the standard keeps changing. It seems to include both coital and noncoital production within the marital unit. For purposes of assessing charges of selfishness and irresponsibility, the baseline may also include various forms of coital and noncoital reproduction within a nonmarital heterosexual unit: we do not automatically hurl these charges just because the parents are not married to each other.

5. This may indeed be part of the very meanings of "selfishness" and "irresponsibility," so this criticism is linked to that in #2.

6. So, critiques ##2, 3, and 4 seem conceptually linked. The exact nature of the linkage is hard to specify, and I do not try to deal with it here.

7. This term is ambiguous and, I argue later, has led to questionable assertions describing current constitutional doctrine. See *infra* text accompanying notes 274-291.

logical and collaborative reproductive ventures. Even assuming there is a strongly protected liberty interest that might be impaired by interfering with NRTCs, there is no governmental duty to assist in fulfilling it, whether by providing funds, tools, or judicial enforcement of collaborative agreements.

6) *The right to procreate (at least for men) has no special link to the right to the companionship of one's children.*

7) *The moral and legal burden of proof is on those defining the new mechanisms and arrangements: it is they who must show that any NRTC is acceptable, not those who are opposed to or seriously question its use.*

8) *On the other hand—NRTC defenders claim that there is no significant threat to our normative system arising from the learning effects of using and observing NRTCs. The “argument from symbolism” against NRTCs thus can be ignored—at least until such threats have been demonstrated. Otherwise, they should not be acted upon and are of no serious constitutional significance.*

C. Sources of Error: Remarks on Perceptions/Judgments Resting on Comparisons

I think nearly all of these lines of criticism of NRTCs are defective insofar as they are thought *broadly* to condemn NRTCs. (In a few restricted areas, some charges against NRTCs are at least colorable.) The critique embodies unacceptably loose standards of argument, including simple errors such as “lumping” while failing to consider “splitting,” and “splitting” while failing to consider “lumping”: put otherwise, classifications are made or rejected upon inadequate grounds; similarities are found and dissimilarities ignored, and vice versa.⁸

8. See Nelson, *supra* note 2, at 129-131, where the author begins persuasively by complaining that “[t]here is something about the debate over reproductive technologies of all kinds . . . that seems to invite dubious analogies.” She then offers some dubious ones of her own, as explained *infra* in text accompanying notes 231, 265-67.

Not all entries in the literature are loose about lumping and splitting. See, e.g., Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987), discussing “incomplete commodification” and referring to a “continuum reflecting degrees of commodification.” *Id.* at 1917-21. See also Maura Ann Ryan, *The New Reproductive Technologies: Defying God's Dominion?*, 20 J. MED. & PHIL. 419, 426 (1995): “[T]he institution of ‘hatcheries’ or the adoption of consumer attitudes toward children are not obvious consequences of separating the punitive and procreative dimensions of reproduction. They are more likely to result from two other factors: the abstraction of reproduction from the context of procreative responsibility, and the shift from a medical to a social rationale for reproductive therapy. That is, hatcheries will result not from our coming to think that

This is no small matter: finding similarities and differences (whether one talks of resemblances, analogies, parallels, symmetries, similes, representativeness, metaphors, or whatever) is central both to abstract thought and to many matters of perception. It is a constitutive part of *thinking* of virtually every sort.

Recognition, learning, and judgment presuppose an ability to categorize stimuli and classify situations by similarity. As Quine . . . puts it: 'There is nothing more basic to thought and language than our sense of similarity; our sorting of things into kinds . . .' Indeed, the notion of similarity . . . is fundamental to theories of perception, learning, and judgment.⁹

(This is global; it's not just about the thinking of lawyers and judges.)

And of course, the process of finding similarities is bound up with finding differences. To state the obvious—which sometimes is not patent: "[S]imilarity increases with the measure of the common features and decreases with the measure of the distinctive features."¹⁰ Equally obvious—this is just a starting point: what is a "common" or "distinctive" feature itself may be contested. Why this simple postulate often seems ignored is itself an important target of investigation.

Important rhetorical effects may arise from open calls to split what is often lumped, and vice versa. The calls may direct our attention to questions about the relative importance of shared or non-shared elements. At this Symposium, for example, Ruth Colker announced that she would not speak of "gametes" because this would improperly place sperm and ova in a single category, masking their differences. As long as "gamete" doesn't wind up on some across-the-board Index of Forbidden Words, fine. Sperm and ova are certainly different: they cannot be retrieved or handled in the same ways; there are many more of the former than of the latter; mitochondria can be transmitted through ova but not generally through sperm; and so on. These differences indeed bear some emphasis. But there are obvious similarities—and in some circumstances, their similarities outweigh

procreative acts need not be sexual, but our coming to think that procreation need not occur in the context of a committed and responsible partnership." One can question, however, the connection between "abstraction of reproduction from the context of procreative responsibility" and the absence of "a committed and responsible partnership." The risk posed by a "shift from a medical to a social rationale," moreover, seems exaggerated. Still, the passage is an example of trying to sort plausible from implausible claims of objectification, rather than relying on what might be called "definitional lumping."

9. Amos Tversky & Itamar Gati, *Studies of Similarity*, in *COGNITION AND CATEGORIZATION* 79 (Eleanor Rosch & Barbara B. Lloyd eds., 1978).

10. Tversky & Gati, *supra* note 9, at 80. I do not discuss the connection between similarity and difference. The authors raise the issue of whether the ideas are "conceptually independent" or "perfectly correlated," and suggest the data support the latter.

their differences. Think of a dispute between genetic parents about whether a fetus being artificially gestated ought to be terminated, or about whether a cryopreserved embryo is to be discarded. The weights of conflicting parental claims—resting in part on their “gametic” contributions—are far closer in this context than in others (e.g., abortion). They are not identical, partly because it is more troublesome to retrieve ova or embryos from women than it is to supply male gametes.

In any event, it is unfortunate, if not surprising, that observers often fail to recognize the richness and complexity of this cognitive-affective-perceptive-and,-yes,-partly normative process of making comparisons. Some simply say, for example, “Surrogacy is similar to selling toasters, and since selling is what one does with commodities, surrogacy treats children as commodities and women as baby factories.” Not only is it not that simple, it is highly questionable. Without more, it is not a justified ascription on any intelligible theory of making comparisons and resolving doubts in light of specified standards, both empirical and normative.

There may also be an accompanying attributional difficulty: the view that use of reproductive innovations are, in the main, driven by improper purposes reflecting male-dominated technological systems. If so, use of NRTC is likely to be oppressive.

A full account of human disagreement is impossible, but many clashes are obviously grounded in preexisting perceptual/normative frameworks, themselves affected by understandable fears of domination and by political or value ideologies. Some of these differences have little or nothing to do with facts but reflect differences in attitude—perhaps resting in turn on disputes involving basic values—that may be largely intractable.¹¹ Some may reflect differences in attitude

11. Cf. Tversky & Gati, *supra* note 9, at 81-82 (discussing “similarity versus difference”): “The relative weight assigned to the common and distinctive features may differ in the two judgments [of similarity and difference] because of a change in focus. In the assessment of similarity between stimuli, the subject may attend more to their common features, whereas in the assessment of difference between stimuli, the subject may attend more to their distinctive features. Stated differently, the instruction to consider similarity may lead the subject to focus primarily on the features that contribute to the similarity of the stimuli, whereas the instruction to consider difference may lead the subject to focus primarily on the features that contribute to the difference between the stimuli. Consequently, the relative weight of the common features is expected to be greater in the assessment of similarity than in the assessment of difference.” Of course, the matter of comparing reproductive ventures to other kinds of transactions is not quite as simple as dealing with the perception of similarity and difference between geometrical figures, which occupies a fair portion of this branch of the cognitive science literature. Although geomet-

or predisposition coupled with the effects of framing issues in particular ways.¹²

One of the functions of scholarship is to illuminate the nature of disagreement. Part of this task requires us to unearth the risk of cognitive error and to avoid it or explain it—and to see if indeed the error is less erroneous than might appear. (Of course, it is not always clear what an error is.) Some observers may be prone to errors in rejecting criticisms of NRTC's because, to them (myself included), the attacks appear clumsy and calculated to drive wedges between groups of persons. What lies behind systematic cognitive errors, however, are not simply "mistakes" in human wiring design or loose connections from decaying neuronal solder, but forms of human thought that may be adaptive in some ways, and maladaptive in others. Of course, the indeterminacies and errors in making comparisons do not make comparisons useless (one might as well claim that thinking is useless).

ric models are common, Tversky & Gati, *supra* note 9, at 79, they are not fully applicable here.

12. Tversky & Gati conclude, "[E]xperimental manipulations that call attention to the common features . . . are likely to increase the weight assigned to these features." Tversky & Gati, *supra* note 9, at 97. The authors are referring to the common features of things being compared—e.g., in our context, the sale of widgets and a surrogacy transaction: in both cases, money goes in one direction and something else (widget/child) in the other. See generally Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341 (1995) ("[J]urors' estimates of damages differ when they are asked what would 'make whole' an injured party—the ex post perspective—rather than what a person's 'selling price' would be if put to the choice of accepting injury for a price ex ante); Jon Elster, *Belief, Bias and Ideology*, in RATIONALITY AND RELATIVISM 123, 127 ("*Preference change by framing* means that the relative attractiveness of options change when the choice situation is reframed in a way that rationally should have no impact on the preferences.").

See also Tversky & Gati, *supra* note 9, at 84, noting the asymmetry between "*a* [the subject] is like *b* [the referent]" and "*b* is like *a*," and commenting: "[T]he choice of a subject and a referent depends, in part at least, on the relative salience of the objects. We tend to select the more salient stimulus, or the prototype, as a referent and the less salient stimulus, or the variant, as a subject. Thus we say 'the portrait resembles the person' rather than 'the person resembles the portrait'. . . . [T]his asymmetry in the choice of similarity statements is associated with asymmetry in judgments of similarity." But this point is of uncertain significance here. Apply this schema to, say, "surrogacy is like [or just is]" an exchange of commodities." A typical exchange of commodities is not particularly "salient": the vividness of the surrogacy transaction lies in the fact that under a preexisting norm, we do not expect or want certain similarities to hold in certain contexts. Here, the "subject" (surrogacy) is more salient because we have already noted a suspect similarity between it and the referent. Cf. Radin, *supra* note 8, at 1927 ("We do not fear relinquishment of children unless it is accompanied by market rhetoric.").

And particular judgments of similarity and difference may be revisable over time.¹³

II. The Assault on Choice: The Dangers of Too Many Options¹⁴

A. The General Problem

The possibility that having “too much choice”—or *any* choice—might make one “worse off” is troubling: it assaults our intuitive notions about the nature and worth of that autonomy—to the extent that autonomy is a function of the scope of our opportunities.

But anti-technology talk can be construed as an attack on the moral status of autonomy in the sense of sheer range of choice, and as a defense of other aspects of autonomy against the supposed coercive and transformative effects of technology. There are internal tensions in the idea of autonomy: autonomy as pure opportunity may contend against autonomy as rational self-direction or as a function of “net” choice in which certain counterproductive preferences are discounted.¹⁵ The value of expanded choice in some domains is, on this

13. See Tversky & Gati, *supra* note 9, at 98 (“The present studies . . . show that similarity is indeed relative and variable, but it varies in a lawful manner. A comprehensive theory, therefore, should describe not only how similarity is assessed in a given situation but also how it varies with a change of context. . . . [S]imilarity is as much a summary of past experience as a guide for future behavior. We expect similar things to behave in the same way, but we also view things as similar because they behave in the same way. Hence, similarities are constantly updated by experience to reflect our ever-changing picture of the world.”).

14. On the idea of having “too much choice,” see generally Gerald Dworkin, *Is More Choice Better Than Less?*, 7 *MIDWEST STUD. IN PHIL.* 47 (1982); Michael H. Shapiro, *Fragmenting and Reassembling the World: of Flying Squirrels, Augmented Persons, and Other Monsters*, 51 *OHIO ST. L.J.* 331, 349-50 (1990) (asserting that “[n]ew choice may . . . be too much choice.”); Michael H. Shapiro, *Regulation as Language: Communicating Values by Altering the Contingencies of Choice*, 55 *U. PITT. L. REV.* 681, 772-74 (1994) (addressing problems of too much choice arising from markets for organs). In the reproductive context, Nelson offers the same suggestion, arguing that “[a]n accumulation of choices can be a burden as well as a blessing” (citing BARBARA KATZ ROTHMAN, *THE TENTATIVE PREGNANCY: PRENATAL DIAGNOSIS AND THE FUTURE OF MOTHERHOOD* (1986)). Nelson, *supra* note 2, at 132. Nelson also refers to “the ideology of choice.” *Id.* at 133.

15. See *infra* text accompanying note 17 on aspects of autonomy.

Cf. ARTHUR KORNBERG, *THE GOLDEN HELIX: INSIDE BIOTECH VENTURES* 8 (1995) (“It was generally agreed [at a meeting] that the age-old saying ‘necessity is the mother of invention’ is usually wrong. Generally, the reverse has proved to be true: *invention is the mother of necessity*. Inventions only later become necessities.”) (emphasis in original). See generally Leo Marx & Merritt Roe Smith, *Introduction*, in *DOES TECHNOLOGY DRIVE HISTORY? THE DILEMMA OF TECHNOLOGICAL DETERMINISM* xi (Merritt Roe Smith & Leo Marx eds., 1994) (describing “technological determinism,” and “the idea of ‘technology’ as

view, eclipsed by its risks—risks that comprehend both impaired choice *overall* and declines in social status and power that are not fully captured by reference to choice. of technology.

A broad anti-technology stance may, in particular reflect fears that humanity—or particularly vulnerable groups—will become excessively dependent on technology, and thus subject to an elite, supposedly expert establishment, such as the health care professions.¹⁶ The

an independent entity, a virtually autonomous agent of change"). The authors describe criticisms of "hard" technological determinism, which imputes agency to technology, and observe that "soft" determinists advise us "that the history of technology is a history of human actions." *Id.* at xii-xiii. The authors describe a redefinition of technological determinism: "[Technological determinism] now refers to the human tendency to create the kind of society that invests technologies with enough power to drive history." *Id.* at xiv. See generally David A. Grimes, *Technology Follies: The Uncritical Acceptance of Medical Innovation*, 269 J. AM. MED. ASS'N 3030 (1993) (describing the use of untested procedures, and stating that "[a] second impediment [to critical assessment of medical technologies] is the 'false idol of technology.' Many American physicians not only accept new technology without a critical appraisal, but they also seem to worship it. Some of this penchant for new gadgets and procedures relates to the fundamental problem of physicians being paid for doing things to patients, rather than for keeping them well. Procedures pay."). *Id.* at 3031. See also Robert Goldberg, *Television: To Drop the Bomb*, WALL ST. J., July 31, 1995, 1995 WL-WSJ 8735990 (reviewing "Hiroshima," which ascribes to Secretary of State James Byrnes the comment, "not using [the bomb] is not an option. When the government of this democracy spends \$2 billion on something, sooner or later, the people are going to ask what it is they got to show for their money. . . .").

Nelson discusses the impact of technology on reproductive decisions, arguing that "[t]echnologies create their own culture of practices, institutions, and discourses, and these become a powerful force that inscribes individual bodies to its own specifications. In a kind of mirror image of the person as free chooser, the person created by technology is shaped by outside forces to particular cultural norms. . . . The disciplinary power of technological culture, as Foucault conceives of it, is a grid of everyday practices, people, tools, techniques, market forces, social arrangements, sciences, and patterns of thought that imposes itself on individuals and molds them according to its dictates. . . . [Foucault's] claim is that, far from being the rational, free agents of the Kantian paradigm (or the autonomous preference-satisfiers that abound in the bioethics literature), the individual is *constructed* by these disciplinary technologies." Nelson, *supra* note 2, at 132-33.

16. See Timothy F. Murphy, *Sperm Harvesting and Post-Mortem Fatherhood*, 9 BIOETHICS 380, 390 (1995) (appraising the argument "that novel and untiring efforts to effect conception in women may not only thrive on but also contribute to objectionable notions that women are valuable only insofar as they bear children. . . . Sperm harvesting and postmortem fatherhood may prove an ambiguous benefit for women if it does in fact increase the dependence for happiness on medicine; but it almost goes without saying that medicine has this effect for all people regardless of gender insofar as it develops previously unavailable aids to physical and mental well-being. Unless it were shown that SH [sperm harvesting] and AI [artificial insemination] were an especially objectionable form of medicalized dependence compared to all other such forms, I think it would be difficult to conclude that the practice should be barred when elsewhere women and men increasingly look to medicine not only to relieve suffering from disease and early death but also to alleviate other forms of suffering . . ."). Cf. DAVID HEYD, *GENETHICS: MORAL ISSUES IN THE CREATION OF PEOPLE* 169 (1992) ("[M]uch of the repulsion regarding genetic engineering

dependence may impair autonomy, despite the fact that it may also enhance our overall opportunities to delegate tasks to experts who can deal with them efficiently. And hostility to reproductive technology can reflect fears that embedded in a technological imperative is a reductivist vector that degrades and objectifies humanity—especially women and children. Reproductive technology exacerbates the male habit of seeing and treating women as procreative engines: they are converted from natural persons to artifacts for propagating, repairing, and reassembling the species.¹⁷ Again, the argument goes, autonomy is defeated by developments that merely create the illusion of greater autonomy through greater choice. We lose choice—and autonomy—overall, and so descend from being persons to being objects for use by a technocratic establishment.

Still, *one* of the components of autonomy rests on the “size” of one’s field of choice.¹⁸ All things equal, we often presume that the more choice you have, the more autonomous you are, and so the better off you are. At least in the case of autonomy, having more of a good thing is generally better than having less of it.

A full response to this requires attention to the internal structure of autonomy. It has several “aspects” that are hard to define: it is related to rationality and self-direction, as well as scope of opportunity, and to connected values.¹⁹ One who makes irrational choices over a large domain of important options may at best be only weakly autonomous. Persons who freely choose to delegate important life choices, viewed as personal decisions within a given culture, seem similarly nonautonomous. And we often withhold assigning the honorific appellation “autonomous” to exercises of choice that seem inconsistent with basic values. (Should we call the Nazi concentration camp overseers autonomous because of their large range of choice?)

There are examples of troubles that may arise with expansion of choice in particular areas. To leave reproduction aside for the mo-

arises out of concern about the abuse of power by a particular group of people in society, who might come to hold the key to the creation of the future generation, thus monopolizing all genetical *power* in the present generation. This concern is more of a redistributive nature.”) (emphasis in original).

17. Cf. OLIVER O'DONOVAN, *BEGOTTEN OR MADE* 2-3 (1984) (“[W]hat marks this culture out most importantly, is not anything that it does, but what it thinks. It is not ‘technological’ because its instruments of making are extraordinarily sophisticated . . . , but because it thinks of everything it does as a form of instrumental making.”).

18. The idea of the “size” of a set of choices is not clear, but I cannot pursue this here; I rely on rough intuitive notions.

19. On distinguishing several senses of autonomy, see generally Michael H. Shapiro, *Is Autonomy Broke?*, 12 L. & HUM. BEHAV. 353, 383-86 (1988).

ment, suppose the legal terrain were transformed to allow sale of organs and other tissue. A standard question is: "Isn't it better to enlarge choice than not to have it at all? You can always decline to embrace the new opportunity." One could argue that within a liberal moral framework such a general claim must be presumptively true. But there are problems that, for some, overcome the presumption. (They are not in order of importance.)

First, deciding among many options may require a greater expenditure of energy. There may also be costs in anticipated and actual regret from missing readily available opportunities. But so what? We can "satisfice": we don't go to every store to test every toaster—we sample. This is the standard answer to complaints of "information overload."²⁰ If we regret the movies not seen on the days many good ones were playing, this seems an acceptable price for choice. Still, we all know persons who become addled when faced with certain kinds of choices. Perhaps for them it's less stressful or time-consuming to buy breakfast cereal in a 7-11 where the selection is smaller than in a Safeway.

I will not review the psychiatric/psychology literature dealing with the bewilderment and disquiet caused by the sheer size of one's field of choice. There does seem to be some chance that an abundance of choice may impair one's autonomy by diminishing the quality of deliberation—in turn, lessening quality of life. After all, an abundance of choice once killed a donkey. Buridan's Ass, poised equidistant between two identical bales of hay, perished of starvation.²¹ But this choice/overload problem, if it is one, is peripheral to the issues here, which do not concern an "excess" of the kinds of choices we should have anyway (e.g., colleges to choose from). What "too much reproductive choice" means is that we have options to do things we couldn't do before—such as have children when we are infertile, have them in artificial wombs, or have them past menopause. In some cases, one might argue, we shouldn't have the choices at all. One can play with the level of generality of description here, but it is clear enough that the choices represented by NRTC's are not like the choices presented by having many schools to choose from. In the or-

20. See David M. Grether et al., *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277, 301 (1986) (arguing that "the information overload idea—that too much information causes disfunction—is a myth. Instead, when choice sets become large or choice tasks complex relative to consumers' time or skill, consumers satisfice rather than optimize.").

21. See Nicholas Rescher, *Choice Without Preference: A Study of the History and Logic of the Problem of "Buridan's Ass,"* 51 KANT-STUDIEN 142 (1959-60).

gan sales example, the “donor” faces a single, complex choice. There may be reasons, apart from issues of energy and regret, for attacking choice itself on certain matters, not just the range of similar alternatives. This is the next point.

Second, there are contexts in which the very existence of choice can impair values. Suppose, as in a novel by Robert Heinlein, persons on oxygen-starved worlds had to pay potential rescuers for oxygen.²² If you forgot your money or credit cards at home, or simply had no wealth—too bad, you’d die, unless you could arrange financing on the spot. Or suppose emergency medical facilities could refuse lifesaving or life-prolonging treatment on the basis of ability to pay.²³ Such regimes of choice arguably assault the value of life by making its continuation *contingent* on money or other morally inappropriate conditions for sustaining life. In some provinces of human conduct, choice does not cohere with reigning values.²⁴

In the case of markets for organs, the matter is less clear. One could say that the integrity of one’s body—and so one’s status as an autonomous person—is made improperly contingent by the very possibility of organ sales. If one is sufficiently well off, there is little temptation to sell a kidney. But if one’s family is already malnourished and getting worse, what then? Whether one remains whole is a function of one’s wealth. To some, at least, this is another form of assaulting personhood.

Suppose, as a final example, we had the option to give our children away within one week of birth, depending on how we liked the newborn.²⁵ (The analogy and *disanalogy* to surrogacy and adoption are pretty clear.) What then of the value of life, and the ideal of non-contingent bonds to our children, independent of their traits?

22. See ROBERT A. HEINLEIN, *THE CAT WHO WALKS THROUGH WALLS* 195 (1985).

23. Statutes may be called for in order to make the provision of emergency care less contingent on inappropriate factors. See, e.g., CAL. HEALTH & SAFETY CODE §§ 1317-1317.5 (West 1995), requiring licensed health care facilities with emergency departments to provide medical treatment without regard to “insurance status, economic status, or ability to pay.”

24. See generally Shapiro, *Regulation as Language: Communicating Values by Altering the Contingencies of Choice*, supra note 14, at 690-92 (describing the communicative impact of the community’s allowing certain choices may impair values).

25. There are few reported cases of putative parents refusing to accept the transfer of a child from a surrogate. See, e.g., *Stiver v. Parker*, 975 F.2d 261 (6th Cir. 1992), where the supposed father refused to accept a child with serious impairments. It was later determined that the husband of the surrogate was the genetic father. The court ruled that a cause of action was stated by the surrogate mother against a lawyer and others for negligently arranging and implementing the surrogacy transaction. *Id.* at 273.

Third, the existence of an option may entail *responsibility* for failing to choose in a certain way—a risk of culpability that did not exist when the option was closed off. Are you morally liable because you didn't sell your organ so you could feed your children? Because you didn't make use of in vitro fertilization techniques to satisfy your husband's desire for a child, or your own wish for one—or your parents' wish for grandchildren? In this sense, one is normatively worse off because one is newly at risk for moral liability. Of course, one may also garner moral praise for exercising the option in a particular way.

Fourth, having too much choice of certain sorts may annul choice. The technological imperative coerces action—it is a command that is hard or impossible to resist. Indeed, the technology is what ultimately “makes” our choices. The power and the investment embedded in the technology bind us.²⁶

Fifth, choice—and autonomy itself—are simply less important than liberals believe it to be. Community, order, mutual respect, connection . . . all of these are compromised by choice, or at least by some domains of choice. Such competing goals ought to trump autonomy more often than John Stuart Mills would countenance. Indeed, we never thought much of choice until technology expanded it, as some say.²⁷

Sixth, some choices, although not technologically coerced, are entitled to only modest deference because they are the products of a false consciousness attributable to patriarchy or other forms of oppression. For example: “According to the myth, if I do not have a child I will never experience that caring, that uncritical peace, that completely understanding sensibility. Only the role of mother will al-

26. See *supra* note 15 and accompanying text; *infra* note 35 and accompanying text. See Nelson, *supra* note 2, at 129: “I want to argue further that the idea of the self as private chooser is an inherently contradictory concept, as privileging private choice over all other sources of value ultimately permits our *technologies*—not our personal selves—to determine what persons shall be.” She also argues: “The illusion of an autonomous, unencumbered agent, who independently enters into agreements or seeks the goods he prefers, conceals the coercive power of the reproductive technologies as they produce persons according to their own specifications of what is normal or desirable.” *Id.* at 133. See also *id.* at 133-34 (referring to the “technologically constructed self” that is denied “the possibility of personal freedom,” with “no real possibility of rational reflection or ethical suasion, only the assertion of one’s desires”). I suggest such claims are themselves confused, and that no adequate defense can be made of this reification of technology, even as metaphor. Ideals of liberty, freedom and autonomy do not rest on the exclusion of causes or influences on behavior. Indeed, the concepts would be meaningless without these ideas.

27. Nelson, *supra* note 2.

low me that. This is clearly a wrong reason for having a child—one which can be ultimately disastrous.”²⁸

There is clearly something wrong with the flat claim that “this is clearly a wrong reason for having a child.” There are things one cannot experience well without children, and many people want children in order to gain that experience.²⁹ (Does this violate the Kantian injunction against using people as mere means, not ends? I discuss this later.) Can they want it “too strongly”? Perhaps so, but that’s not what the quoted author is talking about: she is not describing someone whose desire to have children is *crazy* or pathological—someone addicted to a dream. Perhaps the idea is that (some) women identify their self worth too strongly with motherhood, and so are mistaken in thinking that life itself will be meaningless without children. They have made a kind of reductivist error. This seems on the mark, but once again, there is no indication that the author is speaking only of cases of disordered or distorted self-image.

One might well think that, absent patriarchy, normal women wouldn’t be inclined to associate self-worth exclusively with motherhood, and that to further such tainted preferences would ratify oppression. It is hard to deny that patriarchy may heighten the risk of women having low estimates of self-worth, but it hasn’t been shown that the *general* interest women have in being parents is simply the product of patriarchy. I do not see why a person who believes that having children will be a source of strong fulfillment and “uncritical peace” (not in the sense of auditory calm) is wrongly motivated.

More, the general idea of false consciousness in this context seems feeble. As Gerald Dworkin has observed, “there are no uninfluenced influencers.”³⁰ We are all affected by our circumstances and it seems quite overdone to condemn the motivations—and implicitly the autonomous status—of large groups of persons because some of

28. Irena Kleptisz, *Irena Kleptisz*, in *WHY CHILDREN?* 15, 22 (Stephanie Dowrick & Sybil Grundberg eds., 1980).

29. I doubt that as a general matter, having children to gain certain experiences violates the Kantian injunction against merely using persons as means and not treating them as ends, but I pass this for now. Such issues are discussed in Part IV, *infra*.

30. Gerald Dworkin, *The Nature and Value of Autonomy* (unpublished), quoted in Robert Morison, *The Biological Limits on Autonomy*, 14 *HASTINGS CENTER REP.* 43 (Oct. 1984). Cf. Carol Sanger, *Separating From Children*, 96 *COLUM. L. REV.* 375, 457-64 (1996) (“[C]hoosing to reproduce, especially through the conditional version of motherhood that surrogacy presents, is not necessarily complicitous with patriarchal domination. If we mean to take seriously the charge of feminism to listen to what women say and respect their choices, we cannot disregard out of hand decisions women make in the direction of motherhood.”).

its members have been specially influenced by unjust social conditions. To infer from the existence of patriarchy that strong desires by some women to have children are presumptively wrongheaded is a non sequitur.

Seventh, in some cases, the very existence of choice—whether enough or too much—is an illusion because of lack of means to implement one's preferences. "'Choice' is meaningless in a society which refuses to accept that responsibility for the care of children should be shared by all who benefit from their existence. So we 'choose' between economic independence within the family structure or the double load of work in the home as well as outside—or punitive welfare payments if we cannot or will not choose either. Our 'choice' takes place against a background of increasing unemployment"³¹

This is a very confused account of choice. It is true that choices may be constrained by any number of circumstances, but this hardly makes choice illusory—"meaningless"—as a general matter. The protest reflects a particular normative view of the duties of society and government affirmatively to provide various forms of support. Perhaps there are such duties, but to assert that there is "no choice" if they are unfulfilled overstates the case substantially.

Taken together, these lines of commentary question the value of choice—and more choice—and they deserve attention. Still, the way in which this value is casually downgraded in reproductive contexts is remarkable. Recall the peremptory dismissal of choice in *Matter of Baby M*: "The point is made that Mrs. Whitehead *agreed* to the surrogacy arrangement, supposedly fully understanding the consequences. Putting aside the issue of how compelling her need for money may have been, and how significant her understanding of the consequences, we suggest that her consent is irrelevant. There are, in a civilized society, some things that money cannot buy."³² And, from Nelson, discussing assisted procreation: "[P]erhaps the woman mistakenly believes she cannot be fulfilled as a woman unless she gives birth."³³

The remarks in *Matter of Baby M* beg too many questions and needn't detain us. Nelson's remark about "mistake" at least suggests a reason for questioning choice: some impairment or defect in the process of preference formation and exercise—perhaps the result of

31. Sybil Grundberg & Stephanie Dowrick, *Introduction*, in *WHY CHILDREN?*, supra note 28, at 7, 10.

32. *In re Baby M*, 537 A.2d 1227, 1249 (N.J. 1988).

33. Nelson, *supra* note 2, at 131.

male domination. Think of women conditioned by a rigorously sheltered upbringing to think that they are competent only to be parents and to engage in a restricted list of household activities.

Yet, to recall the earlier discussion, in what sense is such a woman “mistaken” in thinking “she cannot be fulfilled” or, more simply, cannot be happy? There are many persons whose upbringing has resulted in a restricted perception of their own options. Are we simply to dismiss *their presently occurrent needs or preferences, however formed*, as irrelevant *across the board*? And suppose the woman’s upbringing was *not* so restricted, yet she develops an intense preference to have a child. It is difficult indeed to see how the analysis of reproductive technologies is aided by a casual ascription of error to such preferences. It is not that “mistake” and “error” have no content in reproductive matters. It is that no content in the relevant context has been clearly identified. We simply cannot uncritically accept the notion that strong preferences, however formed, are necessarily inconsistent with autonomy—though they may not fully cohere with an emerging ideology in the community.

B. Too Many Reproductive Options?

Think of the following possibilities: 1) Artificial insemination with one’s husband as donor (AIH). 2) Artificial insemination with a different (known or unknown) donor (AID). 3) In vitro fertilization (IVF) within a marital unit. 3) Standard surrogacy (the birth mother is also the genetic mother). 4) Gestational surrogacy (the birth mother is not the genetic mother). 5) Donation and distribution of ova, sperm, and embryos in various ways. 6) Posthumous reproduction by men or women generally. 7) Maintenance of the bodies of dead pregnant women (one kind of posthumous reproduction)—or irreversibly comatose women—in order to bring their fetuses to term. 8) Genetic screening of parents and fetuses in order to prevent the birth of persons with serious disorders or injuries. 9) Genetic screening of fetuses to select the sex of one’s offspring. 10) Genetic screening of fetuses as part of a plan to assure the birth of a child with a particular condition usually thought harmful, such as hereditary deafness or dwarfism. 11) Postmenopausal reproduction. 12) Producing a child whose tissue is to be used for medical purposes. 13) Producing a fetus whose tissue is to be used for medical purposes. 14) Germ line genetic engineering to avoid disorders. 15) Germ line genetic engineering to augment favorable traits. 16) Reproduction by single women. 17) Reproduction by single men. 18) Reproduction involving

gay couples. 19) Reproductive ventures resulting in more than two custodial parents.³⁴

Does this set represent “too many options”? That characterization just won’t do, even for persons who downgrade autonomy. If autonomy isn’t everything, it isn’t nothing either. Each arrangement requires separate attention. But one can raise the following issues, in light of the general critique of expansion of options outlined above:

1) Many people do not want to have children. For them, infertility is a blessing. Both men and women who would otherwise have felt pressure to have children—from families, friends, and the demands of cultural norms favoring reproduction—had a ready explanation for being childless. It was not a failure of will but of body. But now more reproductive options are available, thus defeating the happy excuse. Pressure on wives to use AID may be reasonably resistible, because it asks the woman to reproduce “outside” the genetic unit. But where the unit remains genetically “intact,” what “excuse”—other than monetary—exists for not using NRTCs? The stress and physical intrusion entailed are likely to be viewed as the sort of thing one should suffer for the blessings of parenthood.³⁵

The idea of a “technological imperative”—*suitably reconstructed*—thus makes sense in this context: the availability of the technological option coupled with various pressures may raise the likelihood that the option will be used.³⁶ This is a more complex claim

34. Not all of these options—which do not exhaust the field—can be dealt with at length here.

35. A similar point is made in Ryan, *supra* note 8, at 434 (“[I]nfertility is to some extent a socially constructed impairment. The availability of technology increases the burden many patients feel to pursue all methods of conceiving a genetically related child; now, not even menopause releases the infertile woman from the ‘obligation’ to continue trying!”).

36. Few think that technologies are living things directing us to use them. A better premise is that persons who have invested in acquiring knowledge and capabilities are under strong incentives to use them to avoid monetary and psychic losses. Still, it may overstate the case to say that “there is no turning back from the technical control that we now have over human reproduction.” ROBERTSON, *CHILDREN OF CHOICE*, *supra* note 3, at 5. Later, however, he states that “[e]fforts to assure responsible use of reproductive technologies could take several forms. One is for both providers and consumers to resist the seductive urge to use a technology because it is there and might work.” *Id.* at 223. See also Paul Lauritzen, *Pursuing Parenthood: Ethical Issues in ASSISTED REPRODUCTION* xiv-xv (1993) (describing his own difficulty in resisting “the goal-oriented ‘production’ mentality of infertility treatment. The very availability of the technology appears to exert a sort of tyrannical pressure to use it.”). Cf. Thomas H. Stix, *Fusion Prospects*, 271 *SCIENCE* 891 (1996) (“At present, it is not known how to construct a fusion reactor economically. To enter directly into the actual construction of the Interim Design [of a thermonuclear reactor]—a single machine of grandiose scale and cost in time, human effort, and money—

than is reflected in the idea that we do certain things simply because we can.

Is it morally objectionable that there are these strong pressures to use a technological option? It is one thing to clarify what a technological imperative might be. It is another to explain what is wrong with it—across the board or in specific domains. We have already encountered the views that technological imperatives are suspect because they render us overly dependent on powerful establishments and perhaps less autonomous as a result; and because they risk objectifying humanity, in part because of their reductivist effects. Reductivism, in particular, challenges the normative ideal of embracing noncontingent bonds to our children—that is, noncontingent on the children's specific traits, actual or expected.³⁷

But there are many infertile persons who want children. If we banned IVF and other NRTC's in order to avoid "coerced" use of these technologies by persons who want to remain childless, we would be favoring them over those who want to exercise their new reproductive options. And what would the basis be for such a preference? Even if the infertile-and-want-to-stay-that-way group were larger than the infertile-but-want-children group, we would still need to compare burdens: the burden of resisting outside blandishments and the burden of being involuntarily childless.

2) Does the very existence of NRTC options intrinsically or instrumentally demean any persons, reducing them to objects or artifacts? Are NRTC's widely perceived as tools used by men to control women as reproductive devices? Even—especially?—within the standard marital unit, the techniques may be viewed as male subjugation of women as property. On the other hand, does reproduction by a single woman through anonymous sperm donation objectify anyone

suggests otherwise and would establish a commitment to a highly specific direction of development from which it would prove increasingly difficult and embarrassing to depart."). This seems to be one version of a slippery slope argument. See generally Wibren van der Burg, *The Slippery Slope Argument*, 102 ETHICS 42 (1991); Jeanne Salmon Freeman, *Arguing Along the Slippery Slope of Human Embryo Research*, 21 J. MED. & PHILOS 61 (1996). For other remarks on the technological imperative, an idea often misused, see *supra* text accompanying notes 15 and 26.

37. For a brief explication of "noncontingent bonds," see Shapiro, *Fragmenting and Reassembling the World: of Flying Squirrels, Augmented Persons, and Other Monsters*, *supra* note 14, at 348-49, and Shapiro, *Regulation as Language: Communicating Values by Altering the Contingencies of Choice*, *supra* note 14, at 683-87. Cf. Martha C. Nussbaum, *Objectification*, 24 PHIL. & PUB. AFF. 249, 262 (1995) ("[T]he norm of unconditional love of children may lead love to disregard the particularizing qualities of the individual, and this may be seen as a good feature of parental love.").

or anything? Is her choice perverse, nonautonomous, driven by a vision of woman-as-incomplete-without-child—a vision pushed by men?

3) Does reproduction by a couple through IVF entail overinvestment, reflecting “excessive” desires that impair autonomy? Does the surrogate’s transfer of her child resemble a choice to reject a child because of its traits, thus demeaning children and humanity generally? If so, perhaps the harm risked to future children by a given reproductive mode justifies withholding the characterization “autonomous choice” from the parents’ decision.

4) Think also of germ line intervention to enhance traits: does the very existence of options to augment particular traits alter the nature of our relationship to our children, “reducing” them to the selected traits?

5) And think of the abortion of fetuses *not* affected by conditions usually thought to be impairing, as part of a reproductive plan to produce children *with* those conditions. Does this choice simply vindicate the selfishness of persons who wish to avoid the discomfort and pain of having a child not like them? If so, is the choice impermissible? Does the choice objectify those born as well as those aborted?

Such possibilities suggest that it is realistic to fear that the ideal of noncontingent bonds to children might be impaired by certain technological options—by “too much choice.” But it also seems clear from this brief review that abstract complaints about an excess of choice will get us so far and no further. To discover if any new options either shouldn’t exist at all, or should be exercised sparingly, we have to inspect the nature and consequences of the choices more extensively.

C. Does the Focus on Choice Impair Other Values?

Nelson argues that “When choice sounds the dominant note in a culture, it is likely to silence other notes.”³⁸ Although the proposition is not obviously correct, it deserves attention.

What does “dominant” mean? It can’t mean “logically trumps everything else without question,” for then the proposition would be trivially true, and of no interest. If it means “very important” (if not “give me liberty or give me death,” at least “give me liberty, *please*”),

38. Nelson, *supra* note 2, at 133. She continues: “[T]he intense emphasis on choice drives society in certain directions and leaves other avenues invisible.” *Id.* at 133. And she concludes: “[T]he analogy to adoption and the ethical orientation that underlies it is ultimately unsuccessful: its dominant call of personal choice has, as it were, drowned out the baby’s cry.” *Id.* at 134.

then the quoted proposition suggests that autonomy has been over-valued and improperly devours everything else.³⁹

We are thus faced with a complex empirical question: does valuing autonomy above certain levels cause harm by preventing us from adequately realizing competing values?

But this is a question without much meaning. It *looks* like an empirical question, and there are indeed empirical issues to be considered, but how could we reach an answer in any context without agreement on the ordering of values? What is it to "adequately realize" a communitarian ethic? When communitarianism "sounds the dominant note in a culture," why isn't it "likely to silence other notes," as Nelson argues choice does? Indeed, this seems the far likelier proposition: the roar of the community is more deafening than the sound of one hand clapping. Claims about autonomy consuming everything else may say less about facts and more about a particular value stance that requires clearer articulation and defense.

D. Does the Focus on Choice Even Make Sense? "Connectedness" as a Nonstarter and Nonfinisher

I do not mean to review the family of concepts that includes autonomy, liberty, freedom, choice, opportunity, individualism, liberalism, license, and so on. The comments here are a specific response to the claim that the imperatives of human "connectedness" and "intimacy" are in tension with our emphasis on rights, choice, and autonomy in the reproductive domain.⁴⁰

We were admonished at the symposium by Barbara Katz Rothman for ignoring the fairly obvious fact that we come into existence "connected." This omission, it is said, has led to a lot of dithering about autonomy and rights. Of course, as she noted, humans do separate but, she observes, we don't go too far. As she states elsewhere, "Parenthood itself is an intimate social relationship wherever it develops and between whomever it develops. We need to find a per-

39. I assume for the sake of argument that we can indeed separate and pit one "value" against another, at least in certain circumstances. In fact, although there are obvious tensions between urging both autonomy and deference to "communitarian" claims, there is no across the board "contradiction" in espousing both, as many have noted. Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 698, 735 (1992). Individualistic values are a major part of our public culture, possessed in common by the whole community; shared or communal values are not necessarily communal in substance or necessarily anti-individualistic. *Id.* at 698, 735.

40. Cf. Alexander Capron & Vicki Michel, *Law and Bioethics*, 27 LOY. L.A. L. REV. 25, 36 (1993) (noting the critique of "rights talk" in bioethics but indicating that many legal commentators "resist over-legalizing the field").

spective as a society that does not discard the intimacy, nurturing, and growth that grows between generations, but a perspective that supports, develops, and encourages that intimacy. We need to reject the very concept of surrogacy. We need to reject the notion that any woman is the mother of a child that is not her own, regardless of the source of the egg and[/]or of the sperm. Maybe a woman will place that child for adoption, but it is *her* child to place. Her nurturing of that child with the blood and nutrients of her body establishes her parenthood of that child. Trying to find a moral stance that recognizes the viewpoint of women in these various patriarchal traditions is not an easy task.”⁴¹

If this is supposed to establish that surrogacy or any other NRTC is morally improper, it doesn't work. The ideas of connectedness and intimacy, however important they are for many purposes, are non-starters and nonfinishers for purposes of attacking any NRTC. What exactly is supposed to follow from the fact that we are gestated by someone, or linked or coupled in some way to each other? Consider some questions suggested by the quoted remarks:

(a) Does gestation trump genetics? If so, the argument goes, the woman's birth child is “her” child (to the genetic father's exclusion?) and therefore she (and she alone?) may decide about adoption. Gestation may indeed properly trump genetics in the abortion context, leaving the pregnant woman free to end the connectedness. But why should it do so here? Because of the “investment” represented by the gestating mother's effort? Or is this a bit too commercial? Are we to revise the current constitutional understanding that, under appropriate circumstances, a genetic father can contest or block a proposed adoption by the birth mother?⁴²

(b) How does surrogacy, or any other NRTC, “discard the intimacy, nurturing, and growth that grows between generations”? Why doesn't integration into the father's family “support, develop, and encourage that intimacy”—to the same degree as integration into the surrogate's family? Why is the image of the child within the father's family persistently omitted from the surrogacy picture? Perhaps it is the unduly limited perspective in this partial picture that “discard[s] the intimacy, nurturing, and growth that grows between generations.”

We are never really told what “connectedness” or “intimacy” mean, nor how they support the inferential leaps made in denunciation of NRTCs—which generally result in the birth of children who

41. Rothman, *Reproductive Technologies*, *supra* note 3, at 1607.

42. See *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding that under the Fourteenth Amendment's due process and equal protection clauses, an unwed father entitled to a fitness hearing in a state dependency proceeding before his children can be taken from him).

would otherwise not be born and thus not be connected to anyone. NRTC's, as we have seen, create opportunities for intimacy and connectedness that wouldn't otherwise exist while *not* obliging anyone to reproduce. Apparently we are being told that because the standard image of standard connectedness and standard intimacy is fractured, true connectedness is denied or destroyed. The mechanism for this destruction is not apparent. If it is the act of disconnection or fragmentation that causes the problem, that has so far not been established, though another look is suggested when surrogacy is assessed later.

Is connectedness captured by Rothman's statement, "I feel like Alice in Wonderland at the Mad Hatter's tea party, seeing an attorney represent the fetus and a separate attorney represent the mother, when they are one person on the bed"?⁴³ This won't do, for it seems to deny the separateness—the new identity—of the fetus. "One person on the bed," taken literally, is about merging identities and thus denying actual and potential separateness. (If the child is scheduled to be born, the idea of "potential" is as morally material as it can get.) And what follows from this merger? That the woman can ingest whatever legal toxic substances she wishes, such as alcohol? (Rothman complains about warning labels on liquor bottles.)⁴⁴ With merger, there is no "connectedness," for there are not two things to be connected.

We are indeed born "connected," linked to others. But standing by itself, this obscure remark yields nothing specific enough for our purposes. We are born dependent and are hard wired to seek attention and to develop strong affective links to caregivers. Therefore what? Individualism is wrong? But we also seem to be hard wired to strike out on our own. This unfocused reliance on our connectedness

43. Barbara Katz Rothman, Remarks of Barbara Katz Rothman, in Isabel Marcus et al., *Looking toward the Future: Feminism and Reproductive Technologies*, 37 *BUFF. L. REV.* 203, 214 (1988/89). This isn't connection, it's merger.

44. "We have the beginning of the language of fetal abuse developing out of the concept of child abuse. We are looking at such things as warnings in bars regarding drinking during pregnancy." Rothman, *supra* note 43, at 214. If mother and fetus are connected, why wouldn't the mother appreciate being warned that something she ordinarily does might harm the baby? The risks to fetuses posed by alcohol ingestion aren't a matter of a priori knowledge that every woman (except every woman with a certain degree of education?) is supposed to know. Later, Rothman expresses disdain for an ethicist who was surprised that pregnant women were willing to take risks to save their babies—"that the mothers actually turned out to be advocates for the fetus. And I thought, give this man ten more minutes and he will discover apple pie." *Id.* at 216. Having just insisted that there is "one person on the bed," wouldn't an auditor hearing this question whether the speaker is an advocate for a fetus?

(a form of argument from Nature?) is of limited analytical value. We are *disconnected as well as connected*. The umbilical cord is severed shortly after birth and if it's not, it will slough off on its own. We crawl off by ourselves, resist, rebel, and leave home. We remain connected *in some respects* and disconnected *in others*. And, without other premises, nothing useful for us *follows* normatively from these observations. There is a *spectrum* of arrangements reflecting collisions—and concurrences—between claims of individual preference and claims of family, community, or state. The exclusive focus on connectedness is an exemplar of the restricted forms of perception and evaluation that plague discussion of NRTCs. As Ruddick observes,

[T]here are no criteria for individuating child from parent, or for defining the beginning or end of parenting and childhood. In various respects at various times, parent and child are not distinct individuals . . . [T]he gardening analogy reflects the fact that a child is a parent's *product*, the result of intentional effort, but a product with a unique capacity to become the equal of its producers. Hence, child-producers may not treat children as if they were and would remain artifacts or property.⁴⁵

I have not overlooked the last sentence just quoted, and argue later that one cannot condemn NRTCs across the board for objectifying children in this way.⁴⁶ For now, it is instructive to test the potency of "connectedness" and "intimacy" by applying them briefly to specific NRTCs. Should posthumous reproduction be banned because it severs genetics from nurture? This is implausible. The children of posthumous transactions are not meant to be abandoned in the fields. They will be connected to someone. Should postmenopausal reproduction be banned because connectedness will be terminated too early by the mother's death? Are IVF, AIH and AID to be rejected simply because sex is severed from procreation?⁴⁷ If there are marginal impairments of connectedness, why is this sufficient to defeat any given NRTC?

45. William Ruddick, *Parents and Life Prospects*, in *HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLECTIONS ON PARENTHOOD* 124 (Onora O'Neill & William Ruddick eds., 1979). He refers also to the child's simultaneous "product-origin" and its "autonomous future." *Id.* at 125.

46. See *infra* Parts IV and V (discussing Kant's Formula and the problem of objectification).

47. AIH seems to be questionable in Catholic theology. See *CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION ON RESPECT FOR HUMAN LIFE IN ITS ORIGIN AND ON THE DIGNITY OF PROCREATION: REPLIES TO CERTAIN QUESTIONS OF THE DAY 26-28* (1987) (discussing homologous artificial fertilization). See also *infra* text accompanying notes 258-260 (presenting Ramsey's views on the effect of severing sex from procreation).

The sole merit of the emphasis on connectedness is that it may remind us of one of our normative rocks: the ideal of noncontingent bonds between ourselves, our children, and at least certain others. That, I argue, ought to be our primary focus. Assuming we do not reinvent our entire social structure, we should try to assess what impact a given practice or institution will have on our acceptance and vindication of this normative ideal. Part of this analysis, as we saw, can focus on the impact of the act of disconnection or severance that makes possible a "substitute" connective network. But connectedness itself remains largely a constant, regardless of its origins.

It would be a vast oversimplification, however, to view reproductive autonomy as fatal to the maintenance of noncontingent bonds. Few claim autonomy as some sort of absolute, and bonding with our children is a way of promoting, implementing and recognizing *their autonomy* as well as ours. Ryan expresses a reasonably balanced view on this with the exception of the too-sharp contrast between autonomy and other values: "[A] feminist perspective includes commitments to human relationality as well as autonomy, and attention to the social context of personal choices. Thus questions of individual freedom, even in matters of reproduction, must be raised in conjunction with other equally compelling considerations about what is needed for human flourishing and what is required for a just society."⁴⁸

So far, then, there is no apparent basis for relying on ideas of excessive choice or choice *vel non* in attacking NRTC's.

E. Transitional Note on Reproductive Imperatives and Arguments Against Using NRTC's Because of Harms to Resulting Children

There may be some confusion between two arguments: (1) The prospect that persons will be harmed because of circumstances attending their creation is a reason to prevent their existence for their sakes. (2) It is in the interest of unconceived entities (who somehow maintain an anxious pre-existence existence) to be born and they therefore (presumptively) ought to be born. Cynthia Cohen writes: "The basic response to the Harm to Children Argument [mentioning the views of John Robertson as an example] is that even if children born of the new reproductive technologies were to suffer serious impairments as a result of their origin, this would not necessarily render it wrong to use

48. Maura A. Ryan, *The Argument for Unlimited Procreative Liberty: A Feminist Critique*, 20 HASTINGS CENTER REP. 6, 6 (1990).

these techniques. We might call this response the Interest in Existing Argument: since it is, in almost all cases, better to be alive than not, and these children would not be alive but for the employment of these techniques, using them to bring these children into the world is justified."⁴⁹

But this is not an "interest in existing" argument. For one thing, to say that propelling a person into existence is "justified" is not to say that it is obligatory, at least in ordinary parlance. (We are not speaking of the justification defense in criminal law, where there is arguably a duty to choose certain alternatives over others.) For another, the argument made in defense of NRTCs simply states that if one contemplates having children, whether or not with NRTCs, one's fear that the child will be harmed is not *in general* a sufficient reason for avoiding or condemning the proposed reproduction. This holds whether the anticipated harm arises from having "too many" parents, having uncommon origins, being the product of a contractual/commercial transaction, being born into a repressive society, and so on. This NRTC defense that the risk of adversities does not decisively show that reproduction would be wrong in a given case does not in turn rest on an interest-in-being born position. The "no harm" defense does suggest that in most cases it is "better" (or at least not more harmful) for the person born to exist than not to exist, but this does not mean that the unconceived have a legal or moral claim to existence. In short, the claim that "anticipated harm is not conclusive against birth" does not entail the claim that "unconceived entities have an interest in existence that should be vindicated." The author is thus refuting an argument that few writers make, was not made by Robertson, and is certainly not being made here, expressly or by implication. No argument is offered which "assumes that children with an interest in existing are waiting in a spectral world of nonexistence where their situation is less desirable than it would be were they released into this world."⁵⁰ There is no claim of two worlds, one of existence, the other of nonexistence,⁵¹ in which the latter anxiously await their call to the Big Leagues.

Of course, parents may well forego reproduction in certain cases for various reasons—e.g., because it will harm them. And one may

49. See Cynthia B. Cohen, "Give Me Children or I Shall Die!": *New Reproductive Technologies and Harm to Children*, 26 HASTINGS CENTER REP. 19, 20-21 (Mar.-Apr. 1996) (discussing "the interest in existing argument").

50. Cohen, *supra* note 49, at 21.

51. *Id.* at 22.

wonder whether a practice of reproduction in certain forms would tend to brutalize society. A complete review of reasons for nonreproduction would be out of place here, but the views expressed in this article are fully consistent with the claim that prospective users of NRTC's "must be informed about the risks these techniques would present to the children born as a result of their use."⁵²

Cohen's own formulation of the core material issue suggests the same basic inquiry: it is "whether these children ought to have been conceived and born."⁵³ The response by NRTC defenders is that the risk of after-the-fact harm to the children who are born is not in general enough to warrant an across-the-board No. It may indeed be ethically objectionable to bring some impaired children into the world, but the reasons lie elsewhere.

Cohen also refers to Joel Feinberg's description of a possible argument against wrongful life actions, as part of her argument that NRTC defenders prove too much in criticizing the harm-to-children argument: "Since it is necessary to *be* if one is to *be better off*, it is a logical contradiction to say that someone could be better off though not in existence."⁵⁴ But Feinberg does not appear to endorse this position. He responds to it by saying: "When one party says that another would have been better off had he never been born, he is claiming that the preference for the one state of affairs over the other is a rational preference. Whether true or not, this is an intelligible claim without contradiction or paradox In the most extreme cases . . . , I think it is rational to prefer not to have come into existence at all" ⁵⁵ He also states that "[w]hen a miserable adult claims that he would be 'better off dead,' . . . surely he is not making some subtle metaphysical claim implying that there is a realm of being in which even the nonexistent have a place."⁵⁶ Feinberg was thus not arguing that the claim that existence can be a harm under given circumstances entails some odd existential proposition. He reformulated the point in a way that made no existential claims, and this reformulation hides

52. *Id.* at 26. Cohen does point out, however, that "possible children can have interests, if these are taken in the sense of what contributes to their good, rather than as psychological states." *Id.* at 23.

53. *Id.* at 22.

54. Joel Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, 4 Soc. PHIL. & POL'Y 145, 158 (1984).

55. *Id.* at 159.

56. Feinberg, *supra* note 54, at 158.

nothing.⁵⁷ There is, in short, no existential claim necessarily implied by the NRTC defense. One can, on this view, claim both that a wrongful life suit (one brought by a child on her own behalf) may be sound where there are seriously impairing personal or external conditions, and deny that rejecting such a claim where there are lesser conditions rests on an interest-in-existing argument.

III. What Reasons for Reproduction Are Selfish, Illicit, Irresponsible, or Otherwise Tainted?⁵⁸

A. The Nature of Selfishness, the Occasions for Inquiring into It, and Why It Is Morally Relevant

The charge that several NRTCs are generally (or necessarily) used selfishly or irresponsibly is often made, but doesn't always make sense. But these related claims nevertheless require close attention: they address the moral foundations of every deliberate and most accidental reproductive ventures. Moreover, they are not limited to NRTCs, though we rarely subject "standard" reproduction to the scrutiny we apply to the former.

To identify which reproductive choices are inappropriately selfish or irresponsible, it would help to know which choices are *not* thus contaminated. Without some examples of what is at the acceptability baseline, it is hard to know what exactly is being criticized, and what

57. There is a matter for further inquiry on the nature and significance of "reformulations" designed to show that there is or is not some problem at hand.

58. See also Michael H. Shapiro, *How (Not) to Think About Surrogacy and Other Reproductive Innovations*, 28 U.S.F. L. REV. 647, 664-67 (1994) (linking the idea of selfishness to violation of the Kantian Formula; the latter is discussed in Part IV, text accompanying notes 127-228, *infra*).

I do not generally distinguish here between reasons, motivations, purposes, goals and objectives. They may be contrasted in the appropriate contexts - e.g., accepting a general objective ("to have children") but criticizing a particular motive for it ("to replicate myself").

There are at least three recent articles on matters of irresponsibility in reproduction, but I cannot integrate them fully into the discussion here. See Melinda A. Roberts, *Present Duties and Future Persons: When are Existence-Inducing Acts Wrong?*, 14 LAW & PHIL. 297, 327 (1995) (concluding that in certain cases, "it is morally permissible to produce children whose existence is bound to be materially flawed"); Lois Shepherd, *Protecting Parents' Freedom to Have Children With Genetic Differences*, 1995 U. ILL. L. REV. 761, 798 (1995) (discussing parental selection for hereditary deafness or dwarfism, and describing a possible rights formulation that might implement this view: "If belonging to the child, the right could be called the right to be created in such a way as to share, as desired by her parents, in her family's genetic identity and according to her family's values"); Linda C. McLain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339, 347-59 (1996) (analyzing the rhetoric of "irresponsibility" as applied to mothers who are single, or on welfare, or are in their teens).

“selfishness” or “irresponsibility” might mean concerning NRTCs. Are there “normally” selfish or irresponsible reproductive choices that are morally acceptable?

In discussing the following examples, I do not intend to offer a philosophical theory of selfishness, nor do I propose a set of necessary and sufficient conditions defining “selfishness” or “irresponsibility.” I am simply investigating certain aspects of each in order to further the assessment of NRTCs.

Suppose we have an average couple in their twenties, earning a decent living, neither one having mental or physical conditions that might be considered disabling or dangerous to others. (The young Ozzie and Harriet will do.) They decide to have a child. If one asked them why, they might well find the question incomprehensible. “Why shouldn’t we have a child?” they may reply. “Well,” you say, “having a child is the most momentous, dangerous, life-defining act you could engage in. Shouldn’t it take at least as much careful thought and reflection as—say—skydiving or balancing the budget? You can’t just sail into these things.”

The conversation might well end there if academics are not involved. The reproducers are not likely to perceive that explanations for having children are in order. Indeed, it isn’t clear that, under normal circumstances, they *need* specific reasons. “Practically everyone wants a family. Why do we have to defend it? It’s what human beings do. Why would anyone think otherwise?”

The restricted nature of this simple example does not fully reflect our disinclination to demand defenses of reproduction: the procreators are assumed to be a “standard” couple bearing no serious contraindications for having a family. But, while we might have private reservations in certain cases, most think procreative entitlements are so strong that discussion is not required by law or by customary practice—even in cases where we believe that moral virtue requires the decisionmakers to examine critically the merits of their decision.⁵⁹ Think for example, of persons extremely impoverished, or seriously

59. See generally ROBERTSON, CHILDREN OF CHOICE, *supra* note 3, at 228. “Surprisingly, there is a widespread reluctance to speak of coital reproduction as irresponsible, much less to urge public action to prevent irresponsible coital reproduction from occurring. If such a conversation did occur, reasons for limiting coital reproduction would involve the heavy costs that it imposed on others—costs that outweighed whatever personal meaning or satisfaction the person(s) reproducing experienced. With coital reproduction, such costs might arise if there were severe overpopulation, if the persons reproducing were unfit parents, if reproduction would harm offspring, or if significant medical or social costs were imposed on others.”

mentally impaired. Even in those cases, there is no clear requirement of open consultation with others.

Reproduction is thus something that is done as a matter of course, at least at this time and place in our culture. The *general*, but not universal *non*requirement of good reasons marks a baseline of sorts.

Still, the absence of easily articulable "reasons" does not entail a lack of rational basis for reproducing. Nor does it entail that the choice cannot be criticized, say, by addressing its consequences. The inquiry into reasons is clearly not senseless. And when the choice goes beyond the ill-defined baseline of normality—when the bounds of nuclear familial "privacy" are exceeded, or outside professional assistance is needed to achieve conception or manage a difficult pregnancy—the open assessment of reasons seems more appropriate, perhaps necessary. Exactly why this is so is not entirely clear. Perhaps it rests partly on the greater visibility of the "externalities" of reproduction—costs and risks of various sorts—as well as the aura of "outside assistance" that thins out the walls of privacy. In any event, it seems that the usual drives and reasons for reproduction take on a different moral cast when we deal with NRTCs. So it is worth trying to reconstruct underlying motivations for reproduction generally.

One model, for example, offers "a set of nine basic values or satisfactions that children may provide," including the promotion of adult status and social identity; expansion of the self (both in the sense of someone carrying on after the parent's death, and adding meaning to life); moral improvement in the form of becoming less selfish and more willing to sacrifice; attaining intimacy with another person who requites one's feelings for him/her; having fun; allowing for achievement and creativity; attaining power and influence (presumably over the development of another person); benefitting from social comparisons through competition between one's children and those of others; and economic utility or need.⁶⁰

Is it indeed surprising, given the culturally assigned value to procreative preferences, that we rarely condemn coital reproduction as irresponsible? Is it surprising that this cultural value arose in the first place? Note that specification of reasons is also not required for abortion. *Id.* at 63. For additional discussion, see Robertson's analysis of "reproductive responsibility." *Id.* at 72-93 (discussing Norplant).

60. Gerald Y. Michaels, *Motivational Factors in the Decision and Timing of Pregnancy*, in *THE TRANSITION TO PARENTHOOD* 23, 29-30 (Gerald Y. Michaels & Wendy A. Goldberg eds., 1988) (relying on the work of L.W. Hoffman & M.L. Hoffman, *The Value of Children to Parents*, in *PSYCHOLOGICAL PERSPECTIVES ON POPULATION* (J.T. Fawcett ed., 1976)). See also HEYD, *supra* note 16, at 199 (referring to empirical research that describes the wide variety of reasons for reproduction, including economic need, security for the

This short list contains hints of trouble, as one can see from questioning possible hidden assumptions. Suppose a couple is homeless and destitute, suffering from malnutrition, perhaps addicted to drugs, without means for acquiring the implements to raise a child, and with no prospects. Few would claim that the state could constitutionally forbid them from having children, although there is some risk that the child would soon be snatched from them on a variety of grounds—child endangerment or neglect, for example. What this couple has done seems presumptively irresponsible and possibly selfish, in simple senses of the terms: they have given birth to a child under circumstances in which they are unable adequately to care for it as defined by cultural norms. The American Fertility Society's Ethics Committee would likely accept this as a moral constraint on reproduction, citing "inability to rear children" and possibly "unwillingness to provide proper prenatal care" and "psychological harm to children."⁶¹

True, the child has not *necessarily* been harmed or wronged: her alternative is nonexistence. She has a significant chance of being rescued. But the fact that the child is not harmed or wronged does not end the inquiry, as students of reproductive paradoxes and Derek Parfit are well aware.⁶² Before conception, potential persons are fungible in the sense that none of them has a greater claim to existence than any other. Indeed, none has any such claim. But *the world* is likely to be better off if, among fungible potential entities, the ones who become actual are the least problematic. So, from society's viewpoint, they are not entirely fungible: some will cost more in money and in the demoralization created by images of suffering children.⁶³

elderly, status, power, psychological stimulation, "primary group ties (love)," companionship, self-realization, preserving lineage, religious or moral duty, and fun). The entries do not seem to be to exclusive inter se. (Why is fun last?)

61. Ethics Committee of the American Fertility Society, *Ethical Considerations of the New Reproductive Technologies*, 53 FERTILITY 41, 23S-25S (Supp. 2 1990).

62. See generally DEREK PARFIT, REASONS AND PERSONS 351-79 (1984) (describing the non-identity problem). Parfit discusses the example of a woman who is told that if she reproduces within a certain window of time, the child will be born with a serious impairment, but if she waits until the window closes, her child (presumably a different one) will not be so impaired. The impaired child could not have been wronged because, the argument goes, it is implausible to say that nonexistence is preferable from her point of view. See text accompanying notes 49-57, *infra*, and note 78 *infra*, for a defense of relying on the idea that the child's only alternative to his or her possibly impaired existence is nonexistence, which is not obviously preferable.

63. Cf. Shapiro, *How (Not) to Think About Surrogacy and Other Reproductive Innovations*, *supra* note 58, at 671 (discussing points of view other than the child's when evaluating reproductive projects, and noting that the existence of some children may pose serious risks to the community). See also Lawrence Crocker, *Meddling With the Sexual Orientation of Children*, in HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLEC-

This is hardly a complete moral critique of the couple's decision to have children, but it helps to account for the rough consensus I think exists concerning its irresponsibility.

But were they *selfish*?⁶⁴ What they wanted from children may not have been any different from what other persons wanted: the pleasures of parenting, the power of molding, the validation of one's existence, the approval of their family and friends, their participation in the standard life of the community, the creation of persons to love and love back.

Selfishness, however, is something to be judged on the basis of purposes in context. Wanting what everyone else wants when the likely risks go beyond the baseline might be selfish.⁶⁵ Leave reproduction aside for a moment to find illustrations. Suppose someone wants to drive fine cars, just as all his friends do. His friends, however, are all successful movie directors and producers while he is a mere academic. Still, he purchases a luxury car, letting his family suffer for want of important goods and services. Perhaps what he "wants" is not the same as what his friends want. Their goals might contain built-in affordability constraints. But however we characterize his goal, the point is clear: when you want something that everyone else does but the costs it imposes are great enough, then you want it too much: you are selfish. Some may also think you are relatively nonautonomous, but that is a dangerous ascription: the only autonomous people might be those who don't care much about anything.

One can easily add examples. Most persons want to live. Those in need of a heart transplant await someone's death. Few count them selfish in doing so. But if they arranged a kidnapping to obtain the necessary organ, they would be so counted. People are ordinarily not viewed as selfish if they do not volunteer to give up a kidney to a

TIONS ON PARENTHOOD 145 (Onora O'Neill & William Ruddick eds., 1979) ("The interests and autonomy of the child are not the only things to be taken into account in deciding on the use of drugs [that prevent homosexuality] of the sort we have been considering. There are also the interests of other parties . . .").

64. "Irresponsibility" seems to suggest a more disproportionate risk than "selfishness"; and one can be irresponsible without being selfish. I do not try to specify the differences any further.

65. One could urge that what is consistent with the baseline cannot be selfish (considering how the term is used in ordinary language); or one could argue that baseline desires are indeed selfish, but that this is tolerable (perhaps even good, on some theories) unless the baseline is significantly exceeded. See generally HEYD, *supra* note 16, at 199-200 ("The decision to have children is one of the most selfish of human choices, and parentocentric motives guide not only the positive choices (to create another happy child), but also the negative (refraining from begetting a handicapped child).").

stranger. But if your own child, sibling or spouse needed an organ and you were an adequate match, you might well be considered selfish if you fail to make the donation. And so on.

Both selfishness and irresponsibility seem to share the element of creating externalities beyond the baseline—a kind of unjustified incremental risk. But this looks like the sort of cost benefit analysis embedded in a standard utilitarian account of negligence—the Hand formula,⁶⁶ perhaps.

How can the Hand formula fully explain selfishness? It can't. There are questions about purpose and attitude that also are implicated in analyses of the selfishness or irresponsibility of moral agents. Even though these questions are always there, they are not entirely like the fixed costs that economists adjure us to ignore, at least in general. The question is whether our evaluation of the purpose and attitude variables of procreators changes when we go beyond the reproductive normality baseline—where the prospective parent is too old, too infertile, too disabled, too desirous of or too obsessed by her goal, and so on. If the valuation of procreative purposes changes, it is in response to the incremental risks and benefits of nonstandard reproduction, and to the determination of whether these added risks are disproportionate or excessive.⁶⁷ The bare fact that the risks outweigh the benefits, however, is not sufficient to condemn reproduction within or outside of the baseline.

A further strand of selfishness and irresponsibility assessment rests on the idea that challenging natural or cultural categories and norms is itself so morally perilous that one is both selfish and irresponsible in doing so.⁶⁸ The fragmentation of genetics from gestation,

66. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). See also ROBERTSON, *CHILDREN OF CHOICE*, *supra* note 3, at 73 (discussing reproductive costs on others as compared with parental reproductive interests).

67. See ROBERTSON, *CHILDREN OF CHOICE*, *supra* note 3, at 77 (discussing reproduction when parents must rely for support on welfare or charity, and stating: "The question is . . . whether those costs are beyond what we reasonably expect children to cost, or which we are willing to pay to enable persons to have offspring.").

68. Such arguments were briefly discussed in Michael H. Shapiro, *The Technology of Perfection: Performance Enhancement and the Control of Attributes*, 65 S. CAL. L. REV. 11, 53-59 (1991) (discussing arguments from nature invoked against performance enhancement). I do not continue the analysis here.

See generally HEYD, *supra* note 16, at 168-69 (discussing genetic engineering and describing the view that "tampering with the natural biological process of the evolution of both the individual and the species is considered as a form of metaphysical trespass, an abuse of human power and knowledge, a self-destructive plan to change the course of natural selection, an arrogant attempt to transcend the religious role of humankind in the universe, the illegitimate desire to assume the function of a creator.").

sex from procreation, biology from rearing, and so on, appear to challenge the authority of higher forces, and thus creates a variety of risks, known and unknown.⁶⁹ Moreover, nature and God aside, wanting or striving for something outside the boundaries established by cultural norms may be at least equally risky. Think of cultural patterns under which women are expected to marry and reproduce in their early or mid-teens. Those who insist on passing this boundary and postponing reproduction until they are in their twenties offend authority and generate resentment, and so might be viewed as selfish or irresponsible. The point has some current application: the expansion of opportunities for women may lead to postponed reproduction. But, to anticipate later discussion, it seems fairly lame to characterize as selfish those women who wait to reproduce until they are in their thirties or beyond in order to establish and enjoy a career. It may well be that the delay is beneficial—say, because the older parent is likely to have more resources. In any event, a broad denunciation of such practices is unwarranted.⁷⁰

Still, to act in contravention of powerful social mores imposes costs on one's family and community, and this may count as a kind of harm. At any rate, it may be so perceived and felt by the community, whatever plausible philosophical arguments one might mount against calling such reactions "harms."⁷¹

Finally, recall that there is a strong conceptual link between claims of selfishness, irresponsibility, objectification, and violation of Kant's Formula, which bars use of persons as mere means and requires treating them as ends. Ryan argues, "children ought not be thought of as products or commodities, as something owed to their parents or amenable to design, as existing to fulfill their parents' desires or round out their possessions."⁷² This would be a more ac-

69. Cf. Shapiro, *Fragmenting and Reassembling the World: of Flying Squirrels, Augmented Persons, and Other Monsters*, *supra* note 14, at 334-37 (discussing "fragmentation" and mentioning the idea of the "moral force" of nature). Cf. also ROBERTSON, *CHILDREN OF CHOICE*, *supra* note 3, at 32 ("Charges that noncoital reproduction is unethical or irresponsible arise because of its expense, its highly technological character, its decomposition of parenthood into genetic, gestational, and social components, and its potential effects on women and offspring.").

70. Cf. Lois Wladis Hoffman et al., *The Value of Children to Young and Elderly Parents*, 25 INT'L. J. AGING & HUM. DEV. 309, 316-18 (1987) (finding older parents are likely to give financial help to children). See also William E. Schmidt, *Birth to a 59-Year-Old Generates an Ethical Controversy in Britain*, N.Y. TIMES, Dec. 29, 1993, at A1.

71. See generally JOEL FEINBERG, *OFFENSE TO OTHERS: 2 THE MORAL LIMITS OF THE CRIMINAL LAW* 50-96 (1985) (discussing, among other things, deviant moral practices and "profound offense" generally).

72. Ryan, *supra* note 8, at 431. Ryan refers here to O'DONOVAN, *supra* note 17.

ceptable statement—and more consistent with Kant—if the term “only” (or “solely”) were inserted after the word “existing”: within the current baseline for reproductive practices, we *do* have children to “fulfill our desires”—though it is also part of our practice to be circumspect in admitting it. Assuming one is not having children because of a felt duty or social pressure to do so, why else would we seek to have them? Even without adding “only” or “solely,” it is not clear that there is anything even presumptively wrong with fulfilling our desires here: it depends on just what those desires are. If one has children to obtain playthings, mementos, display items, goods for sale, or moldable pets, that’s one thing. If one wants the usual pleasures of child rearing, it’s another. One must concede that “the usual pleasures of childrearing” might contain links to the rejected set of goals, but they are far from identical sets.

A complete account of selfishness and irresponsibility would require much more than the foregoing. Enough has been said, however, to challenge the casual ascription of selfishness to persons involved in nonstandard reproductive ventures. One must at least identify purposes, compare them to customary baselines, and ask probing questions about actual risks and how to assess them. Assessing the risks here, as with other NRTC’s, requires both empirical and normative analysis of “riskiness.”

In any event, explicating selfishness and irresponsibility by comparing benefits and burdens is not quite the Hand formula, as we saw. To the extent that in reproduction we are morally entitled to take our own needs into account and favor them over speculative harms to others, the formula here entails measurement not of a simple excess of burdens to others over benefits to oneself, but a notion of serious disproportion.⁷³ There are clear risks imposed on children born of parents living even in the best of circumstances. While we may find some fault with persons reproducing at the wrong moment, we construct stories about the heroics of reproduction under adverse circumstances—in wartime, for example—and extol familial courage under hardship. The risks, such as they are, must attain a certain threshold before serious criticism is offered. As suggested, these risks must go beyond a culturally accepted baseline of hazard imposition. The obvi-

73. The idea of “disproportion” arises in a number of contexts. The interpretation of “reasonableness” in torts is one example. See generally Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311, 349-60 (1996) (discussing precaution and proportionality). Disproportion was also used to mark the boundaries of physicians’ duties in *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 1018-19 (1983).

ous fact that the baseline is only incompletely determined doesn't gainsay this basic point.

How does this notion of disproportionate risk apply to NRTCs? I suggest that for most NRTCs, the fear of such excessive risk imposition on women, children and the community seems unwarranted. The more serious candidates for denunciation as selfish or irresponsible include germ line engineering to augment traits, and the abortion of non-affected fetuses as part of an effort to have children with a given condition, such as deafness or dwarfism.

B. The Status of Selfishness and Irresponsibility as Moral Negatives or Taints

Now it is time for the So What? inquiry: what difference does it make if reproductive motives are selfish or irresponsible? Unless specific risks or harms are shown or we adhere to a pure ethics of virtue (unlikely), who cares? The children of the nonvirtuous are not tainted by the sins of their parents, assuming that this form of selfishness or irresponsibility is indeed a sin.⁷⁴ Selfish, irresponsible people can raise children rightly and properly. (Perhaps this is more true of the selfish than the irresponsible; the latter may mark greater risks.)

I deal with this only briefly. The moral materiality of selfishness and irresponsibility, whether approached from a consequentialist or nonconsequentialist perspective, primarily concerns the risk of harm to the child, and perhaps to the "moral fabric" of the community.⁷⁵

As for the charge that some reproductive purposes are illicit for reasons other than matters of selfishness and irresponsibility, the main possibilities seem linked to violation of Kant's Formula (Part IV) and to conditions lightening the risk of objectification (Part V). (It is not clear how "independent" these are.) "Illegality" is irrelevant, because in this context we are questioning what should or shouldn't be illegal. If a motivation is selfish, irresponsible, *or otherwise immoral*, as

74. The philosophical literature tries to distinguish between selfishness and the very idea of the self acting. Part of the issue is the familiar one of discerning the meaning of "altruism" against the claim that all actions by the self are selfish in some nontrivial sense. See generally Andrew Oldenquist, *The Possibility of Selfishness*, 17 AM. PHIL. Q. 25, 32-33 (1980) (discussing selfishness as aiming at the good of oneself; egoism).

75. There is another, perhaps lesser risk, and that is to the autonomy of the person making the selfish or irresponsible choice: despite the risk of annihilating the very concept of autonomy, there is a place for a doctrine of "excessive wanting." (Think of addiction.) Vindicating the choices of persons burdened by these wants may harm them, as well as others. But I do not press this point here.

judged in light of the social and technological mechanisms used and the risks posed by them, I will judge it illicit.

C. Other Taints: Defects in Preference Formation

The title of section III contained the catch-all “or otherwise tainted.” Aside from a decision being selfish, irresponsible, or illicit, how else can it be wrong?

Here we loop back into the assault on choice. Some choices are viewed as suspect because of infirmities in the process of forming preferences affecting choice. Oppression and adverse social conditions can produce warped preferences and distorted self-images that corrupt important life choices. A woman who believes that her worth is fully exhausted by her status as a parent is almost certainly mistaken. But not all men and women raised in a patriarchal society believe the worth of women is exclusively captured by their reproductive functions. It’s catchy to refer to women as “baby machines,” “wombs for rent,” “fetal containers,”⁷⁶ and so on, but few women look upon themselves in that way, patriarchy or no. Whether we deal with standard reproduction or NRTCs, viewing the desire to reproduce as tainted by deficiencies in preference formation seems overbroad and insulting to many women who view themselves as autonomous. But we can pursue this—and the discussion in the preceding subsections—by dealing with a few well-known reproductive situations.

D. Some Familiar Cases

We all know persons we think should not reproduce, at least during given periods in their lives: drug addicts, criminals, persons severely mentally disordered or of extremely low intelligence, and so on. We thus have some intuitive basis for thinking about when reproduction is inappropriate or even immoral. The problem is to fill out and explain this unschooled intuition, and apply it to NRTCs. Here we need to separate particular cases.

(1) AID

What about single mothers using AID? There is no shortage of commentary on the supposed selfishness of single women giving birth to children who will have no rearing father. I will not add to the discussion about the risks and benefits to children in single-parent fami-

76. See George Annas, *Pregnant Women as Fetal Containers*, 16 HASTINGS CENTER REP. 14 (Dec. 1986).

lies.⁷⁷ But this is quite unlike the case of the homeless couple—the risks are not so obvious or catastrophic. Here, it is telling to observe that the child's existence is not likely to be so bad that nonexistence is better for her.⁷⁸ If the woman has the means to be a competent mother, it is not apparent that she wants children “too much” or is properly said to be selfish or to be acting on illicit or tainted purposes. And even if she is, it is difficult to imagine an acceptable regime for interdicting her choice.

(2) *Surrogacy*

Turn next to *Matter of Baby M.*⁷⁹ I view the Court's opinion as very poorly reasoned. But it requires a response.

The court believed that all the parties acted out of “selfish” motives: Mr. Stern, who wanted his family line to continue after its near destruction in the Holocaust; Mrs. Stern, who, in the court's view, was simply a coward for fearing the marginal incremental risks of pregnancy that might be occasioned by multiple sclerosis; and Ms. Whitehead, who just wanted money.

If what you want is like what other people want but getting it imposes disproportionate risks, then insisting on doing it is arguably selfish and irresponsible, as we previously discussed. But despite the cascade of scholarship on surrogacy, there is no showing that any child or person has been significantly harmed by the surrogacy venture itself; invasions of privacy or emotional upset arising from publicity or the interference of outsiders are another matter.⁸⁰ The failure of a

77. See generally Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19 (1995).

78. A standard defense to charges that NRTCs pose unacceptable risks to children is that such reproductive modes are their only avenue to existence. Unless nonexistence is to be preferred, there is no “harm” that could count against the reproductive project. Some have argued that this proves too much—that all unconceived entities have a right to life and should be born—but this is incorrect. The argument does not articulate a reproductive imperative. It merely establishes that if one is contemplating use of some NRTC, harm to the resulting child is unlikely to be an important criterion weighing against the venture. Harm to children thus cannot generally be cited as a reason for condemning or limiting NRTCs. See Shapiro, *Regulation as Language: Communicating Values by Altering the Contingencies of Choice*, *supra* note 14, at 762-73. See *supra* text accompanying notes 49-57. (This NRTC defense thus cannot be said to imply that one must reproduce.)

79. *In re Baby M.*, 537 A.2d 1227 (N.J. 1988).

80. Shapiro, *How (Not) to Think About Surrogacy and Other Reproductive Innovations*, *supra* note 58, at 674 n.84. This was also noted by the California Supreme Court in *Johnson v. Calvert*, 5 Cal.4th 84, 97 (1993) (finding no evidence of commodification of children or exploitation or dehumanization of women; the court, however, seemed to think these were pure empirical questions about harm and did not discuss the difficult conceptual issues involved).

surrogacy transaction⁸¹ may, through publicity or odd custody/visitation arrangements, cause harm to the child. But most such transactions do not fail, and standard reproductive ventures often result in disaster. There is no *special* risk induced by surrogacy that anyone has ever demonstrated—never mind a disproportionate one. (Citing the harm from critical publicity is a sort of “Heckler’s Veto” justification: complaining about a practice thought to be harmful can itself cause harm that is cited as a justification for prohibition.)

Supposed risks to persons and to the normative system caused by objectification are supported by conclusory ascriptions, definitions, or non sequiturs—e.g., “surrogacy” necessarily commodifies the child because she is transferred for money.⁸² This is argument by stipulation. One also hears arguments based on learning effects arising from surrogacy as a practice that are, from the perspective of the parties at least, extremely remote. These arguments afford little support for charges of selfishness or irresponsibility.

It is hard to see, then, that what the Sterns did was selfish. As reasons go for having children, what is wrong with wanting “the line to go on,” especially when one is the last of the line who can send it on? Again, whatever critical questions one may have about the very idea of wanting one’s line to continue, there is no basis in cultural practice to conclude that it is necessarily selfish, irresponsible, or otherwise tainted.

And as for Ms. Whitehead, who produced a child for others for money: given her initial understanding that the child was to be transferred, her reasons for reproduction were clearly nonstandard. She did not expect the companionship of the new child. She expected financial gain. She did not reproduce for no reason, but for reasons that do not fit into the standard set of justifications and explanations for having children.

81. I realize that “transaction” carries an aura of commerce about it, but it avoids cumbersome circumlocutions. In any event, most surrogacy transactions concededly do involve a strong commercial element.

82. 2 ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES, PROCEED WITH CARE: FINAL REPORT OF THE ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES 683-84 (1993) [hereinafter ROYAL COMMISSION] (“The premise of commercial preconception contracts is that a child is a product that can be bought and sold on the market. . . . The commodification of children *entailed* by preconception arrangements ignores these essential values [that children are not commodities or instruments]. . . . Commercial preconception contracts *by their nature*—the exchange of money for a child—contradict one of the fundamental tenets of the Commission’s ethical framework.”) (emphasis added).

But it is hard to see how this is selfish or irresponsible simply because of its departure from custom. If her intention had been to have a child "to see what it was like" and then to abandon it to the winds, then she could be accounted both selfish and irresponsible. She would have left a child to die for an obviously noncompelling reason, a cost hugely disproportionate to the benefit. But we cannot cite the incremental risks of surrogacy as she pursued it as a basis for an ascription of selfishness because such risks—to the child or anyone else—have not been shown, and there is no evidence she credited such risks.

So, Ms. Whitehead's purposes may have been anomalous, but not selfish or irresponsible. And even if they are counted as such, what then? Why should this taint the entire transaction—a transaction in which the object is to fully integrate a child into a traditional, connected family structure? Surrogacy and the other NRTCs are indeed "conservative" in this way, as was noted during the Symposium.⁸³

It is worth considering the motivations of surrogates a bit further.⁸⁴ In the case of traditional surrogacy, the surrogate is fully participating in procreation in every sense: she is a willing genetic as well as a gestational parent. In gestational surrogacy, the surrogate is an element of a procreational process, but it is reasonable to ask if she is indeed procreating, given her lack of genetic connection to the child.⁸⁵ Despite this reservation about how to describe any surrogate's actions, however, one can again ask about selfishness, irresponsibility, illicitness, and other taints.

The argument for characterizing the surrogate's motivations and actions in these ways is weak and often rests on a tendentious characterization of what she is doing: she is said to be creating children for the purpose of transferring them, and this is viewed as intrinsically and instrumentally immoral. The motivations are therefore illicit because they are immoral. The surrogates are also selfish because their

83. What is "conservative" with respect to promoting the institution of the family depends on how we define and view that institution. Every NRTC involves a departure from some view of the "paradigm" of a human reproductive transaction. The paradigm itself is not firmly fixed, especially given the pressure of new developments. But in the cases at issue here, it seems more accurate to say that we are shifting from one form of family to another, rather than demolishing it. True, if one can play chess so badly it ceases to be chess, one can construct "families" so bizarre they shouldn't be referred to in that way. But none of the NRTCs under discussion here reach that threshold.

84. See generally Sanger, *supra* note 30, at 457-64 (discussing altruism, profit and enjoyment of pregnancy).

85. See ROBERTSON, CHILDREN OF CHOICE, *supra* note 3, at 22.

participation in a reproductive enterprise is designed to bring financial gain to them while violating moral principles.

This line of argument is yet another example of deficiencies in the debate over new reproductive techniques. It is misleading—because incomplete—to describe the transaction as “creation of a child for the purpose of transfer.”⁸⁶ The mischaracterization is of course made to allow a near-automatic conclusion that this is moral (though not literal) abandonment—or at least improper disconnection—and is inconsistent with ideals of fidelity to children.

All that is required to remedy the mischaracterization is to consider some that are more complete—e.g., “creation of a child for the purpose of forming a new nuclear family, implemented by transferring the child from one genetic parent to the other.” Doesn’t sound quite as bad, does it? And it’s at least equally accurate. Indeed, it is more accurate because it is more complete.

(3) *Germ Line Augmentation*

Perhaps this is a more plausible case for ascribing selfishness to parents. If one “purpose” of parenthood is to secure fulfillment from children, why not superfulfillment from superchildren? If they are bigger, smarter and stronger than other children, think of the rewards. Still, the risks are immense, particularly in the early stages of the technology. The technology may not work at all; it may work imperfectly; it may produce adverse effects; it may produce the desired mental or physical traits but the larger goals may be defeated: for example the child may prefer chess to basketball (or the reverse), or simply fail at the endeavor to which she has been directed; and the child may be confused about his or her “identity” as a result.

Any of these failures might cause serious demoralization and produce severe emotional distress for all parties concerned. More, the risks of compounding social inequality are obvious. There is also a risk of eroding noncontingent bonds to our children because of the very focus on particular traits “needing” enhancement, and the risk of failure of the parents’ investment.⁸⁷ The erosion of such bonds, one

86. For a further discussion of such mischaracterization, see *infra* text accompanying note 206.

87. See generally Ryan, *supra* note 48, at 8 (“How might parents look upon offspring when they enter the process with the belief that a certain kind of child is owed to them, and after they have paid a high price for that child?”). Her account is generally consistent with the use made here of the idea of noncontingent bonds. Cf. *id.* at 10 (“The common expression ‘This child has a face only a mother could love’ speaks, of course, to the fact that a parent’s bond to her child transcends all cultural standards of beauty, etc., but also alludes

might also argue, weakens the commitment to the value of life itself: commitment to life entails commitment to particular persons who stand in certain relations to us, whatever their traits.

This leaves out, of course, the obvious point that the child may be hugely benefited by the enhancement, and not harmed at all by the knowledge of his nonstandard antecedents. Indeed, as some have argued, parents might be under a duty to technologically enhance their offspring, at least where there is only modest risk.⁸⁸

Nevertheless, the risks are fairly serious. The technological difficulties alone suggest both selfishness and irresponsibility in pursuing such "reassembly." But I do not see germ line engineering as a clear example of these excesses under all circumstances. The appropriate line of inquiry here focuses on the exact nature of the risks on which such ascriptions depend.

What are those risks? Identifying them has become a thriving enterprise.⁸⁹ There are the risks of replacing or blurring disorder-based justifications for intervention with other justifications. "Disorder models," as abstract guides for decisionmaking, generally presuppose and are partly guided by the idea of an enduring personal identity to be protected or restored in all or most of its aspects. "Augmentation models," while not logically inconsistent with this presupposition, do not necessarily contain it as a rigorous goal or constraint,

to a deeply entrenched understanding of the 'givenness' and duration of parental responsibilities. . . . 'A face only a mother could love' says something as well about acceptance and fidelity to children, even to those whose looks or gender or genetic characteristics are not what the parent would have desired or what meets society's standards The commitment a parent undertakes is not dependent on that child's behavior or the return of like affection or the fulfillment of expectations in life, although those factors can certainly influence a parent's subjective experience and may at times modify obligations. . . . Life includes the acceptance of those kinds of indissoluble and predefined obligations as well as the ones we freely incur. . . . To image reproduction as primarily a contractual process, where all the elements are open for negotiation, threatens to lose sight of this sense of transcendent commitment.").

But who considers it "primarily" a contractual process, and how does this "contractual process" necessarily shred noncontingent bonds?

On the risks of "overinvestment," see also Nancy (Ann) Davis, *Manufactured Motherhood: Ethics of the New Reproductive Technologies*, 9 LOGOS 51, 70 (1988).

88. See generally E. Joshua Rosenkranz, *Custom Kids and the Moral Duty to Genetically Engineer Our Children*, 2 HIGH TECH. L. J. 1 (1987).

89. See, e.g., JEFF LYON & PETER GORNER, *ALTERED FATES: GENE THERAPY AND THE RETOOLING OF HUMAN LIFE* (1995); Nelson A. Wivel & LeRoy Walters, *Germ-line Gene Modification and Disease Prevention: Some Medical and Ethical Perspectives*, 262 SCIENCE 533 (1993).

although they may be concerned with preserving identity in some sense.⁹⁰

Does this suggest that those acting on augmentation models are selfish or irresponsible, or violate the Kantian Formula, or objectify one's offspring? It is not illegitimate to want to improve the performance of our offspring in a variety of categories. But why is it illegitimate to wish to augment the potential of one's children through altering the genome? I am not suggesting that everything is to be judged solely by reference to selfishness, irresponsibility, mere use, and objectification, but, as we have seen, these are among the classic critiques of NRTCs.

The question whether germ line augmentation violates the Kantian formula can be deferred, but it bears mention here that an across-the-board attack on that ground is unwarranted. There are too many possible purposes and goals and too many variant circumstances to allow such an easy ascription. If one is genetically engineering slaves, that is one thing; if one is genetically engineering somewhat taller or more intelligent or more attractive children, that is something else. One can argue that such enhancement is like polishing a bowling ball; one can also observe that it is far different. And precisely the same point applies to the charge of objectification: both similarities and differences must be recorded.

Finally, one observation about the objectification/mere use risks of germ line augmentation—which may apply even to germ line intervention directed against adverse genetic conditions or dispositions: some have argued that one effect of such genetic intervention is the emergence of an “other”—a child, or race of children who, being “artifacts” of sorts, are “alien.” This is suggested by O'Donovan, who argues that “[t]hat which we beget is *like* ourselves,” and “that which we make is *unlike* ourselves.” (Why is this necessarily true?) He con-

90. See generally Shapiro, *The Technology of Perfection: Performance Enhancement and the Control of Attributes*, *supra* note 68, at 72-78 (discussing identity and related considerations in performance enhancement). The phrase “to augment person X” may presuppose the continuing identity of person X.

One can apply an augmentation model in the context of infertility generally, not just germ line engineering. Thus, Ryan (speaking about reproductive technologies generally, as well as genetic engineering) states: “Since there is often no normative clinical distinction made between seeking medically-assisted reproduction to satisfy a desire and seeking it to overcome a disability, it then becomes difficult to draw boundaries around legitimate desires.” She then compares “‘involuntary childlessness’ resulting from natural menopause,” “‘involuntary childlessness’ resulting from the absence of a partner,” and “‘involuntary childlessness’ resulting from a blocked fallopian tube.” Ryan, *supra* note 8, at 433. Why would some of the described desires be illegitimate, as she suggests?

tinues, “[w]hat we ‘make’ then, is alien from our humanity. In that it has a human maker, it has come to existence as a human project, its being at the disposal of mankind.”⁹¹

Once again, the commentators cover the terrain with colorful terms of questionable use. To “make” something is characteristic of what we do with things. There is an obvious similarity between assembling artifacts and genetically augmenting or even repairing a genome destined for personhood. There are also obvious differences between a VCR or fighter plane and a person whose germ line has been altered. But the degree to which these very different entities are “made” by our hand differs substantially. Why are these differences rarely mentioned? Why should we accept this loose lumping of germ line change with, say, aircraft manufacture in the face of the obvious call for splitting? Perhaps we indeed will be overwhelmed by the similarities, but on what basis do we know this?

(4) *Postmenopausal Women*

Women in their late forties and beyond are now able, in some cases at least, to bear children, either with their own eggs or with donor eggs.⁹² Are they selfish or irresponsible in doing so? Why? For wanting something too much? Is there some reason to think it abnor-

91. See O'DONOVAN, *supra* note 17, at 1. O'Donovan goes on to say (characterizing the views of the fathers of the Council of Nicaea): “It [what we “make”] is not fit to take its place alongside mankind in fellowship, for it has no place beside him on which to stand: man’s will is the law of its being. That which we beget can be, and should be, our companion; but the product of our art—whatever immeasurable satisfaction and enjoyment there may be both in making and in cherishing it—can never have the independence to be that ‘other I’, equal to us and differentiated from us, which we acknowledge in those who are begotten of human seed.” *Id.* at 1-2. If this is to be taken literally, then this is not about objectification as a shift in our attitudes toward others resulting from the psychological effects of tinkering; this is simply a stipulative characterization. Later, O'Donovan refers to persons “formed by what we are and not by what we intend.” But this is not a sharp distinction. Is it part of an argument against prenatal screening? Against eliminating disorders by germ line engineering? And what justification would there be for dealing with persons on the basis of such distinctions? O'Donovan's work is discussed in Ryan, *supra* note 8, at 429-30. See Gilbert Meilaender, *New Reproductive Technologies: Protestant Modes of Thought*, 25 CREIGHTON L. REV. 1637, 1644-46 (referring to O'Donovan's idea of making life instead of begetting life). See also HEYD, *supra* note 16, at 174 (“[I]t is an interesting thought-experiment to take genetic inheritance (which so far has been a strong criterion of parenthood) and gradually to weaken it by imaginary genetic changes. At what state would we, the parents, stop seeing the ensuing child as *our* child? At what stage would we consider the radical artificial leap in the evolution of humankind as tantamount to the creation of a new species, that is, to the end of the human race?”).

92. See generally Sheryl Stolberg, *Science Helps Italian Woman Give Birth at 62*, L.A. TIMES, July 19, 1994, at A1.

mal or suspect to want children when you're over fifty? Normal AARP candidates wouldn't want to, right?

Failure to adhere to societal norms concerning age-related activities, however, isn't enough to justify tarring women who reproduce after menopause. In any event, wanting something "too much" depends, once again, on risks and costs imposed on others, as well as oneself. What are the risks here?

If the mother is the egg source, there are elevated risks of Down Syndrome; this anomaly, however, can be detected *in utero* and the fetus aborted by persons not opposed to abortion.

There are two risks worth mentioning here: the child may be at risk because his mother, and likely his father, are "too old to raise him." This is a much-debated point in the child development literature, but middle-age is hardly a universally debilitating condition. One could urge that persons over a certain age who would clearly be incompetent at child care are both selfish and irresponsible if they have children. However, postmenopausal women who have reproduced are not only not the "old old," they are not even the "young old." In any case, conditions that would seriously compromise the ability to raise children are not confined to any particular age group.

The other risk is that the children will be orphaned at an early age. How early? If the parent gives birth at age fifty or sixty, she is likely to live to be at least seventy or eighty. It isn't wonderful to lose one's parents at age twenty, but when is it wonderful? There is little basis for concluding that this risk is so great that postmenopausal reproduction is selfish or irresponsible.

(5) *Posthumous Reproduction Through Use of Gametes*

There are several mechanisms for posthumous production: obtaining and saving gametes or embryos while the genetic parents are alive; harvesting gametes after their sources are dead; and maintaining the bodies of dead pregnant women, a practice that will be discussed later in this article.⁹³ What one thinks of posthumous reproducing may depend not only on analysis of the reasons gamete sources or others have for doing so, and on the circumstances involved, but on the precise mechanism used.

93. See *infra* text accompanying notes 101-105. For a recent development in the technology of sperm production and storage, see Gina Kolata, *Study Finds Way to Produce an Animal's Sperm Cells in Another Species, Years Later*, N.Y. TIMES, May 30, 1996, at A24.

There are situations in which we would be hard pressed to establish that preservation of gametes for posthumous reproduction is selfish or irresponsible. A standard example would be a soldier going off to war. If there is something unpleasantly egotistical about this, it is not so awful that it should be discouraged. From the standpoint of the soldier's mate, there is little to be said for the idea that he or she is selfish for wanting a child formed in part by the departed soldier.

But, to get to the obvious point, what of the late Mr. Kane and Ms. Hecht, who wished to use his stored sperm? Mr. Kane's children accused him of selfishness. To wish for fatherhood after one's death is "egotistic and irresponsible," according to Mr. Kane's survivors.⁹⁴

Once again, a presumption of selfishness or irresponsibility makes little sense. For one thing, the deceased may have wished to make Ms. Hecht, his significant other, happy. If her desire to have a child by him rather than by anyone else was at the time irrational, so be it; wanting to reproduce, as we have seen, is not the place to look for exemplars of rational behavior. If he wanted to make her happy, why is this either selfish or irresponsible? If he thought posthumous reproduction was a way of extending his own existence, the same question applies. If the thought is foolish, it is not necessarily illegitimate.

Perhaps it is selfish because it imposes unacceptable risks on the child: a single-parent household, only one provider, and a world that thinks her origins are bizarre. It seems even worse if the dead parent disliked the idea of caring for children. One may concede that there are risks here, but that these risks are unacceptable is another matter. I am aware of neither facts nor theory that would clearly show such reproduction to be bad for anyone, including the resulting children. It is quite possible to seriously doubt one's parenting skills but think it beneficial to have offspring after death—to make the prospective mother happy, to transmit an excellent genome, or, again, to extend one's being. When we consider some of the questionable reasons for having children while we are alive (everybody else does it? carrying on the family name?), posthumous parenthood seems less odd, less

94. *Hecht v. Superior Court*, 16 Cal. App. 4th 836, 844 (1993). Mr. Kane, before his suicide, had deposited sperm in a storage facility. His agreement with the facility authorized release of the sperm to Kane's "girlfriend," Ms. Hecht. He had also indicated in his will that she be allowed to use the sperm to impregnate herself. Kane's children and former wife objected, and the trial court ordered the personal representative of Kane's estate to destroy all the stored sperm. The Court of Appeal did not rule on the validity of the storage agreement or the will, but issued a peremptory writ of mandate under which the trial court, among other things, was required to vacate its order to destroy the sperm.

like tampering with death. Moreover, any instabilities concerning property distributions could easily be ameliorated by legislation regulating posthumous claims. Section 4 of the Uniform Status of Children of Assisted Conception Act,⁹⁵ for example, deals with this problem by providing that a fertile decedent “is not a parent of the resulting child.”

This is not to say that there is a strong constitutional liberty interest in this form of procreation. Critics rightly analyze it by referring to the split between biological reproduction and the ordinarily expected benefits of companionship of one’s children.⁹⁶ Few people would value reproduction if their children were snatched and raised by the State in some version of Plato’s Republic.⁹⁷ This would be mere “abstract parenthood,” parenthood without responsibility—the ultimate delegation of parenthood to others. There is a large gap between the genetic forebear and his personal connection with the children. Being a dead forbear is not what “parenting” is about and fails to take parenthood seriously—or so one might say. So why defer to such a preference for procreation without connection?

But this is an incomplete account. There are different possible circumstances for posthumous parenting through saved gametes. If the decedent had a personally known, living parent-to-be in mind (as did Kane), his preference seems less abstract and bizarre than, say, pursuing “immortality” by saving gametes for *anyone* to use, even eons after one’s own death. Perhaps present happiness is elevated when one believes that a loved one will raise one’s child. And the intended surviving parent has her/his own liberty interest at stake, which is likely to be more highly rated under the Constitution than the decedent’s.

95. Uniform Status of Children of Assisted Conception Act §4 (1988).

96. See ROBERTSON, CHILDREN OF CHOICE, *supra* note 3, asking of noncoital technology generally: “Is a person’s procreative liberty substantially implicated in such partial reproductive roles?” *Id.* at 32. Robertson describes gestational mothers as “having a reproductive experience, even though she does not reproduce genetically.” *Id.* at 22.

97. *E.g.*, PLATO, THE REPUBLIC, BOOK VIII 543 (B. Jowett trans. 1960, at 291) (“[W]e have arrived at the conclusion that in the perfect State wives and children are to be in common . . .”). See also *id.*, Book V, at 460 (Jowett trans., at 183) (“The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.”); *id.*, Book V, at 457 (Jowett trans., at 179) (discussing “the very great utility of having wives and children in common”). Cf. Hecht v. Superior Court, 16 Cal. App. 4th 836 (1993) (referring to a case pointing out that “[w]e simply do not in our society take children away from their mothers—married or otherwise—because a ‘better’ adoptive parent can be found”).

It appears, then, that Mr. Kane's plans were far from irrational, however unusual they were. He had already experienced the companionship of his prior children and apparently wished to help promote the same enjoyment for Ms. Hecht. This case is not about losing your child to the state or to anyone else. It is not about child abandonment; nor is it about any classic form of irresponsibility. One can imagine cases in which we would be right to ascribe selfishness or irresponsibility to someone who wishes to reproduce posthumously, but round condemnations of such plans, once again, make no sense.

Ms. Hecht, of course, did not plan to be a posthumous parent. Is there any basis for ascribing selfishness, irresponsibility, or any other category of illicitness to her? She may be a single parent, at least at first—but so what? Her child will likely be advised of his or her origins—but so what? As the court pointed out, there was no relevant policy against reproduction by single women, and whatever the incremental risks involved, no compelling case for interdiction is apparent.

Compare *Hecht v. Kane*-like situations with harvesting the gametes of the recently dead. Imagine, for example, a young man killed before he is able to reproduce. If there were indications that he was likely to attempt reproduction with a specific woman (the clearest case would be if he were married or engaged to her), would she have a reasonable claim for requesting a sperm harvest? What about his parents, who may wish for grandchildren?

There may be many important reasons why sperm might be sought for postmortem fatherhood. It may be that partners had long promised one another to have children; that goal may have been a sustaining feature of the relationship. In other instances, having a child may not honor any specific promise to the brain dead partner, but it might serve as a meaningful way for a surviving partner to honor the nature of the previous relationship, whether this relation was formalized in marriage or not.⁹⁸

I suppose one could argue that wanting a memento of a dead loved one is perfectly rational—depending on the memento and its

98. Murphy, *supra* note 16, at 383-84. Murphy describes a case in which a mother demanded that a hospital harvest her dead son's sperm as a condition for permitting use of his organs for transplantation. The sperm was not harvested and the organs not transplanted. See also John A. Robertson, *Posthumous Reproduction*, 69 IND. L. J. 1027, 1042 (1994) (discussing the "important impact on the sense of self and personal identity of the person who gives such directions [concerning posthumous reproduction]." "[T]he possibility of reproduction after their death could closely approximate the meaning which reproduction ordinarily has for individuals—the sense that they have contributed to the ongoing stream of life and that some part of themselves will survive death. The psychological effect might be akin to the satisfaction experienced by a writer who knows that his novels will survive his death.").

future. But to reproduce for the purpose of designating a living person as nothing but a "memento" is an example of selfishness, irresponsibility, objectification, and using someone solely as a means, rather than treating them as an end. It is fine to view children as chips off living blocks (or blocks who actually had a hand in nurturing them), but not acceptable to use a child as a photograph. This reflects pathological obsession with the memory of the dead, and the remedy is Prozac, not reproduction.

The arguments against posthumous reproduction are vulnerable, however. The risks to the child are not well established, and in any event, the alternative is nonexistence. More, the very descriptions offered may be question-begging: who says that the children are *mere* mementos, living photographs, used only as a sort of homage to the dead? What would this mean? Neither the motivation nor the means seem obviously illicit in any of the senses mentioned earlier. Unless one relies on rigid authoritative postulates such as cultural norms of certain sorts, the case for condemnation seems weak.⁹⁹

Have any risks been overlooked, after all? Apart from financial matters, prior children of the deceased may not want their emotional lives complicated by new siblings, especially if they dislike the intended live parent. But they might also welcome other children of their dead parent and cultivate a relationship with them. In any case, how should we *rate* the surviving children's preferences? Should posthumous gamete use rest on what these children prefer? Should a former wife's wishes count? Does the risk that a posthumous child will become a public charge or menace outweigh the decedent's wishes? Perhaps the risks of single parenting, whatever they are, are amplified by posthumous reproduction, and should be taken only when they are justified—as where the parent of an existing fetus is dying. But is it fair to limit the chance for posthumous parenthood to dying persons?

More generally: will the occasional "unnatural" practice of posthumous artificial insemination or inoovulation erode important social values? Reproduction that straddles life and death seems to challenge the worth of an institution favoring optimal child rearing by both a mother and father, preferably within a marriage entailing a "hands on" personal commitment and bond. Challenging this ideal, one

99. I am not urging that a strong liberty interest need be recognized for the decedent as opposed to the surviving would-be parent, and I take no position on it here. See generally Robertson, *Posthumous Reproduction*, *supra* note 98 (critically appraising claims for constitutional protection and arguing that some of them are weak).

might argue, will propel us into social chaos. To run that risk evidences both selfishness and irresponsibility.

It seems unlikely, however, that the occasional practice of posthumous reproduction will lead us to social chaos.¹⁰⁰ In any case, the risk is sufficiently speculative that attributions of selfishness or irresponsibility seem extravagant.

(6) *Posthumous Reproduction by Maintaining the Bodies of Dead Pregnant Women; and Reproduction by Women in Irreversible Comas or Permanent Vegetative States*

A few premises should be mentioned first. First, the initial issue concerns *dead* persons, not persons in comas or vegetative states, persistent or permanent. It is possible to maintain the bodies of dead pregnant women for at least several weeks, allowing the birth of the child.¹⁰¹ Second, there is a controversy about whether dead persons have interests. I will assume without citing authority that dead people don't feel anything. Still, some argue about whether dead persons can be harmed—through defamation, failing to follow the preferences they expressed in life, or mutilating their bodies, for example. One could well argue that the interests vindicated are either those of the living who contemplate matters arising after their deaths, or of their survivors. One could also refer to protecting the integrity of a normative system embodying respect for life and trying to maintain that norm by requiring respect for dead bodies.¹⁰² But I am not going to deal with all conceivable issues relating to posthumous reproduction. The emphasis here remains on claims about selfishness, irresponsibility, objectification, and violation of the Formula.

100. See generally Michael H. Shapiro, *What Rights Might Be Held By the 'Fertile Dece-dents'?*, L.A. DAILY J., Mar. 9, 1993, at 7.

101. See MICHAEL H. SHAPIRO & ROY G. SPECE, JR., 1991 SUPPLEMENT TO CASES AND MATERIALS ON BIOETHICS 205. For a case involving the delivery of a child by a comatose woman who had been raped, see Linda Yglesias, *Sad & Silent B'day For Mom in Coma*, N.Y. DAILY NEWS, Apr. 28, 1996, at 32.

102. See Hilde Lindemann Nelson, *The Architect and the Bee: Some Reflections on Postmortem Pregnancy*, 8 BIOETHICS 247, 258-59 (1994) ("She has an interest in respectful treatment of her body."). But cf. Joan Callahan, *On Harming the Dead*, 97 ETHICS 341, 351 (1987) ("[O]ur intuitions regarding the wrong of ignoring the express wishes of the dead involve other values like the rights and interests of persons and other sentient beings. . . . If maintaining the fictions of harm and wrong to the dead in our legal institutions is the most effective way of securing this comfort [in knowing that the law can contribute to the good of the persons and causes we care about] (as well as for ensuring respect for the entitlements of survivors and cared-about causes), then keeping them is exceedingly well justified.") *Id.* at 352.

Suppose, now, we know that the woman would have preferred to deliver the baby. Are her preferences of any value? This is not like encouraging the accumulation of wealth by enforcing wills. On the view that dead persons have no interests, what would be the point of worrying over what she wanted? Still, under the banner of autonomy, most would be inclined to defer to the preferences of the dead, if the price is not too high. The practice reinforces the value of autonomy—at least if not inspected too closely.

What would be the price of following her preferences? The “involuntary parenthood” of an objecting father? During the woman’s life, of course, he could not force an abortion. But the dead woman will neither be helped nor harmed by removal of the child. If the child is nonviable, why shouldn’t the father’s antiparental wishes be respected? One reason is that neither his nor his late mate’s bodily integrity is challenged by continuing the pregnancy. (Bodily integrity is one ideal at the foundations of *Roe v. Wade*¹⁰³ and *Casey v. Planned Parenthood*.¹⁰⁴) If the father wants the child, of course, there is no issue about forcing a living woman to continue her pregnancy. But would *he* be selfish for wanting to raise a child alone, rather than allowing the fetus to die? Again, there seems to be no compelling justification for an across-the-board tarring of such motivations. The child would promote the memory of his wife; she may share some of her traits strongly affected by genetics; and he will have the experience of child-rearing. Still, he would be incurring the costs of “life maintenance” on his dead wife, and helping project the image of woman as “flowerpot.”¹⁰⁵

Suppose next no one wants the child delivered—not the father, not the grandparents, and not the woman herself, who made it clear she did not want a motherless child to come into the world. If we are hunting for examples of selfish actions, perhaps hers is one: if she is not present to enjoy the companionship of the child, no one should have that opportunity. But is this likely to have been her attitude? Perhaps she feared for the child’s welfare because of her absence and the burdens on the father, particularly if there are other children. If she believed that neither the father nor any of the grandparents or anyone else she knew were willing and able to raise the child, one could understand this protective act, even while arguing that the child’s nonexistence is not necessarily to be preferred from the child’s

103. *Roe v. Wade*, 410 U.S. 113 (1973).

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

105. *See infra* note 231.

point of view. But if the father were capable of and wished for the child, shouldn't that trump the dead person's prior preferences—at least if selfishness and irresponsibility are the ruling standards? Choosing to be a single father doesn't automatically imply that one is either selfish or irresponsible.

I will defer the discussion of objectification and violation of Kant's Formula until later. I mention here only the point that if the woman is not dead, some issues pull harder: the image of "bodily abuse" and objectification/mere use risks; the lack of complete certainty about perception in various kinds of comas and vegetative states; and impairment of some degree of recovery by the woman.

(7) *Reproduction of Persons with Conditions Generally Thought Impairing by Unaffected Persons, in Substitution for Persons Who Would Not Have the Condition*

There have been reports that persons with certain conditions, such as hereditary hearing impairment or achondroplastic dwarfism, plan to abort fetuses that do not have the condition and are presumably otherwise unimpaired.¹⁰⁶ This may already have occurred.

At first view, and perhaps at later view also, many persons will find this quite disturbing. Questions about the moral status of potential life aside, it seems harsh and anomalous to abort a healthy fetus *because one wants—for whatever reason—a child affected with a specific characteristic generally considered impairing by the unaffected*. More traditional reasons for abortion may seem preferable to this—lack of readiness for parenthood, illness, even mere inconvenience, and so on. It's bad enough to abort on the basis of negative traits (the argument might continue), but to abort because of their absence is "trait-connected" in an even worse way, and for this reason threatens the ideal of noncontingent bonds to our children.¹⁰⁷

106. See Kathy A. Fackelmann, *Beyond the Genome: The Ethics of DNA Testing*, 146 *SCI. NEWS* 298 (1994) (discussing a couple who planned to abort a healthy fetus who wasn't a dwarf). See also Kathy A. Fackelmann, *DNA Dilemmas: Readers and 'Experts' Weigh in on Biomedical Ethics*, 146 *SCI. NEWS* 408 (1994) (discussing the same issue). See generally Amy Elizabeth Brusky, *Making Decisions for Deaf Children Regarding Cochlear Implants: The Legal Ramifications of Recognizing Deafness as a Culture Rather Than a Disability*, 1995 *WIS. L. REV.* 235 (referring to the claim "that deafness is not a disability to be cured, but rather a unique, linguistic subculture").

107. Such a focus on traits may reflect a form of reductivism and hence a partial objectification. See Part V, *infra*. It also may express disdain for "normals." There is a possibility, however, that the ideal of noncontingent bonds is in some respects promoted by aborting any undesired fetus, whether because it is or isn't affected, or for any other reason: parents who fear they may not bond with an affected child, thus arguably violating the

Another stage of the critique observes that the parents are creating a child who will be seriously handicapped in the larger society—all to satisfy their own arguably selfish and irresponsible desire to have the companionship of someone “like them” who will better understand them and be understood by them. This, then, may be an example of satisfying a preference for appropriate empathy between oneself and one’s children but thereby imposing unacceptable risks on those children. Parents are admittedly entitled to ample discretion in shaping the lives of their children.¹⁰⁸ Parents nevertheless *unduly* follow their preferences and visions without adequately considering the developing autonomy of the child.

Consider Ruddick’s example—which does not involve creating an affected person in preference to an unaffected one, but of failing to avoid or ameliorate a condition in an existing child. He imagines the birth of a dwarf and assumes the possibility of effective treatment, but the treatment is refused by the parents. The parents believed they were unable to properly raise a previous normal-sized child—“with the result that the child eventually became estranged from them, and in time ashamed of them and eager to leave the circus world in which they lived.”¹⁰⁹

On the one hand, it looks as if the parents’ prospective unhappiness is driving the decision to avoid treatment. If indeed that were *all* that inspired the decision, *and* one could show that the affected child would in fact live a terrible life, the ascription of selfishness would be at least plausible—as would the ascription of “mere use” and failure to treat one as an end. But this seems unrealistic. The prior, unaffected child was, by hypothesis, severely harmed by his parents’ relative incapacity. Their unhappiness may derive not just from the child’s view of them and their lifestyle, but from his or her misery. In turn, their distress may worsen the child’s situation further in a contin-

ideal, might be seen as avoiding situations in which the ideal would be openly impaired. One of the classic defenses of abortion rights, indeed, is avoidance of situations in which unwanted children remain unwanted. (“There is also the distress, for all concerned, associated with the unwanted child” *Roe v. Wade*, 410 U.S. 113, 153 (1973).)

108. We do not, after all, ordinarily remove children from their parents to avoid the supposedly stultifying effects of certain parental religious practices. Some threshold of abuse or neglect—terms not ordinarily applied to selection of common lifestyles—must be found. This is part of the meaning of cases such as *Wisconsin v. Yoder*, which permitted the Amish to withdraw their children from public schools past the eighth grade. 406 U.S. 205 (1972).

109. Ruddick, *supra* note 45, at 133. See also Robertson’s discussion of “intentional diminishment,” *supra* note 3, at 171-72.

uing cycle. Negative ascriptions of the parents' motivations may thus be at least partly off the mark.

Ruddick, however, specifies another assumption:

[The parents] agree that a child of normal size, even with the stigma of dwarf parents, might be happier than a dwarf child. But they are confident that they can raise a dwarf child to be self-reliant. They would like the child to live and work with them in the circus, but they would ensure that it had capacities for other lines of work in the increasingly tolerant outside world. Although their child would have fewer life possibilities than a normal child, there would be enough to cover the various futures they deem likely. Any of these prospects, if realized, would suit them and their child. The child will predictably wish that it were normal size, but hopefully in time it will come to respect their desire to be loving, caring parents and will appreciate the benefits of that love for it.¹¹⁰

He concludes that their plan does not violate his principle that parents "must foster life prospects which . . . jointly encompass the futures the parents and those they respect deem likely, and . . . individually, if realized, would be acceptable to both parent and child."¹¹¹

I have no decisive refutation for this principle or its application, but some questions are in order. First, the emphasis on "joint futures" seems to presuppose certain major moral conclusions about what "units of autonomy" or "units of moral appraisal" are involved. Is it "parent-child" or "parent and child"?

The requirement that the prospects must be "acceptable" to both parent and child also suggests a battery of inquiries. Why should there be such strong deference to what the parent finds acceptable, rather than close moral scrutiny of parental preferences? Recall that Justice Douglas dissented in *Wisconsin v. Yoder*, complaining that the interests of the children, as distinct from their parents, had not been adequately considered in assessing their removal from school.¹¹²

But now we need to distinguish between selection for birth, whether by abortion or choice among embryos or gametes, and refusal to ameliorate or prevent certain conditions in an existing child. In the former case, the unaffected potential child had no claim to existence superior to any other potential child's claim.¹¹³ But in Ruddick's ex-

110. Ruddick, *supra* note 45, at 133.

111. *Id.* (special formatting omitted).

112. *Wisconsin v. Yoder*, 406 U.S. at 241-46 (Douglas, J., dissenting in part).

113. I suppose one could argue that as between unconceived entity *X*, who will bear no conditions significantly disabling under specified circumstances, and unconceived entity *Y*, who will, that *X* has the superior claim to life. I do not know how to make this argument,

ample, we have a failure to treat an existing child whose possibly impairing condition can be eliminated.¹¹⁴ This seems a different matter, one that at least makes a stronger case for ascribing selfishness or violation of the Kantian no-mere-use/treatment-as-an-end imperative.¹¹⁵

Perhaps this picture derives too exclusively from seeing the glass as half empty. Suppose the parents have a good faith belief that their culture offers benefits unavailable in the general culture and that one's life without hearing or at far below average height may be preferable *overall* to life experiences by the *unaffected*. And suppose the culture generates superior traits in the affected persons. One could then argue that, contrary to appearances, the child's autonomy and other interests are being well promoted as compared to the norm. Might there be not only a moral privilege but an obligation to optimize the child's situation through their plan?

One might dismiss this view as a product of defensive arrogance by outliers—persons whose characteristics place them well outside the norm—but there is more to it than that. There *are* favorable things to be said about the lifestyle necessitated by having to work around limitations that others do not have, in a surrounding society that does not suitably accommodate special needs. There is a sense of community, mutual support and pride, and development of substitute skills and aptitudes that may place one above the norm in certain areas.¹¹⁶ Peo-

except possibly for the case in which *Y*'s life is not worth living. From the point of view of the community in which the child will live, it may well be preferable that *X* be born, but this does not necessarily entail a superior claim to life by *X*. Cf. *supra* note 63 (quoting Crocker, who distinguishes the interests of the child from those of other parties).

114. See *In re Sampson*, 326 N.Y.S.2d 398 (1971) (upholding lower court's decision to allow surgery for facial deformity despite mother's religious opposition); *Custody of a Minor*, 393 N.E.2d 836 (Mass. 1979) (upholding order requiring chemotherapy and prohibiting laetrile for child with leukemia). But see *In re Seiferth*, 127 N.E.2d 820 (N.Y. 1955) (refusing to authorize repair of cleft palate and harelip). See generally BARRY FURROW ET AL., *Health Law* 727-29 (1995); ANGELA HOLDER, *LEGAL ISSUES IN PEDIATRICS AND ADOLESCENT MEDICINE* 82-122, 239-40 (2d ed. 1985) and the cases she discusses.

115. See ROBERTSON, *CHILDREN OF CHOICE*, *supra* note 3, at 171 (discussing parents who decline to provide cochlear implants for children with hearing impairment or growth hormone for children of extremely short stature, and stating that "[s]uch actions would arguably harm the child and constitute child abuse, for the child would be denied a treatment essential for future functioning in society. . . . Unless it could be shown that children born to such parents are in fact better off if they share the parents' disability, stopping parents from prenatal lessening of offspring abilities would not, under the view presented here, interfere with their procreative liberty."). *Id.*

116. See Brusky, *supra* note 106, at 254-60. As noted before, Shepherd, *supra* note 58, at 798, in discussing parental selection for hereditary deafness or dwarfism, describes a possible rights formulation that might implement this view: "If belonging to the child, the right could be called the right to be created in such a way as to share, as desired by her parents, in her family's genetic identity and according to her family's values." Shepherd

ple bond when under siege. More, the affected person may develop a particular sense of identity that she is comfortable with and would be unwilling to give up.¹¹⁷ Perhaps the entire society is benefited by the existence of such persons and communities; perhaps, as George Will says, "Because of advancing science and declining morals, there are fewer people like Jon [his son, who has Down syndrome] than there should be."¹¹⁸

And as for the aborted unaffected child, a common view is that he or she had no special right to be born (if any), over and above any other unborn entity, and this is reflected in prevailing constitutional norms.

But to avoid the troubling discussion of fetal status, the examples can be changed. Assume that we are able to arrange prior to conception that the child born will indeed have a certain impairing condition. The unconceived entities who would be unaffected if born have no greater right to be born than the affected ones. The affected child born is in no position to complain, since the alternative is nonexistence.

Suppose next we enter a "preconceived entity bank." We are told that if we press button A we will get a child who will not be afflicted with any seriously disabling disorder, but if we press button B we will get someone who is impaired in some major way.¹¹⁹ On what

offers extensive support for this in her discussion of "attachment," *id.* at 799-811, but it is well to stress that the value of this "right" is precisely one of the issues in contention; the moral issue cannot be collapsed into the definition of the right, and requires the effort pursued by Shepherd. But what sort of "attachment" is it that permits parents to allow disabling conditions? The difficulties in ascribing "suffering" to the disabled cannot gainsay the view that in many cases, their conditions genuinely make life very hard. If the condition could be avoided in the selfsame child and is not, it is hard to see what true analytic work is done by referring to attachment and to resisting intrusions on it (say, through required prenatal surgery or wrongful life suits, *id.* at 803). The work done by attachment may simply be to cover over basic value conflicts.

117. "If I could snap my fingers and be nonautistic, I would not. Autism is part of what I am." Oliver Sacks, *Foreword*, in TEMPLE GRANDIN, THINKING IN PICTURES: AND OTHER REPORTS FROM MY LIFE WITH AUTISM, 11, 16 (1995) (quoting Temple Grandin).

118. George Will, *Jon Will's Aptitudes*, NEWSWEEK, May 3, 1993, at 70. See also JONATHAN GLOVER, WHAT SORT OF PEOPLE SHOULD THERE BE? (1984). From a communitarian standpoint, one might also think of the promotion of aggregate diversity values deriving from the presence of persons with various conditions.

119. See PARFIT, *supra* note 62, at 367-68. Parfit discusses a situation in which one group of women have condition *J* and another group have condition *K*. Both conditions will similarly handicap their children. With *J*, pregnant women can be tested and the condition prevented. With *K*, the handicap cannot be prevented but *K* disappears after two months. If there were a program to test pregnant women for *J*, the children would be born without the handicap. If there were instead a program to test for *K* (there isn't enough money for both programs), women would be tested prior to conception and warned if they

grounds would we condemn persons who chose button B—particularly if they were following the path of careful nurturing laid out in the above examples?

Now separate some cases. If button B were pressed to further a desire for entertainment involving the disability or solely to do research on it without regard for the subject's preferences, we would properly condemn the reproductive venture, even if the children would be treated well. But if we thought the child's and our own lives would be enriched by its having the condition under the assumed social circumstances, we would be faced with our main issue: what exactly is wrong with this? One cannot even say that society would be worse off for the choice, because it may not be true: if indeed the family unit does well, society itself may be better off than if the child did not have the condition.¹²⁰ If so, ascriptions of selfishness and irresponsibility seem less persuasive. Of course, simple utilitarian calculations would generally yield no firm result.

I add one more brief example here, suggested by Crocker, which illustrates that the very idea of an impairing condition is unclear: the use of a drug that would assure that a child would be heterosexual.¹²¹ For present purposes, we can expand the core example to include cases where one can identify the following: which children will have which sexual preferences if they remain undrugged; which fetuses are "at risk" for any particular preference; and which embryos and gametes can be selected for future sexual orientation. The person with minority sexual preferences may be disadvantaged in given cultures and advantaged in others,¹²² but in most cases he or she is not directly disabled.

Crocker concludes:

[D]rugs capable of altering the future sexual orientation of children should be made available when technically possible. They should neither be required nor banned by law unless there is very good reason to believe that the parents are not acting in the child's best

have the condition. In the former program, 1,000 children would be born normal, who would otherwise be handicapped. In the second program, 1,000 normal children would be born instead of 1,000 different handicapped children. Which is the better program? Parfit believes they are morally equivalent. (This is part of his general discussion of "the non-identity problem.")

120. See *supra* text accompanying note 118.

121. Crocker, *supra* note 63, at 145.

122. For example, gay males in some Native American tribes were assigned special, favored roles. Walter Williams, *Women, Men and Others*, 31 AM. BEHAVIORAL SCIENTIST 135, 136-37 (1987).

interest and that the electorate is in a better position to gauge that interest. The latter condition, it seems, is not currently met.¹²³

But the scenarios he describes are different from selection for adverse genetic traits, and his conclusion doesn't *necessarily* follow for our context.

Perhaps arguments loosely referred to as "symbolic" have some purchase here in assessing the selection of afflicted children for existence.¹²⁴ The situation *looks* to be one in which harm to a child is preferred by parents in order to make life better for them. The first reaction of many is horror, and this is not entirely dissipated by reflection. And although we may agree that unconceived entities have no right to life, some of them seem to have a sort of metaphoric executory interest in being born: they *would* be born if their parents would just get their heads straight. But the "afflicted" preconceived entities, of course, can make the same argument.

If there is a bottom line here, it is that the general perception of the practice will be in tension with certain values, attitudes and beliefs widely held, reflective debate notwithstanding. These values, attitudes and beliefs are that no one should be seriously harmed or impaired to satisfy the selfish whims of others. To the extent that this is what the practice in question *looks like*, it may indeed be harmful because it is a kind of reinforcement of an "I come first" ethic that is generally criticized though widely practiced.¹²⁵ The risk is even greater where abortion, rather than gamete or embryo selection is involved. But if this view is not solidly grounded in rational argument, then one might appropriately call for public debate to revise the perceptions.

(8) *Reproduction of Persons with Impairing Conditions—The Nonsubstitution Cases*

Suppose prenatal screening discloses that a child will be born with Tay-Sachs disease or Down syndrome. In some cases, there will be no abortion because the mother, father, or both reject it as morally wrong. In other cases, parents not opposed to abortion may think it uncalled for by Down syndrome. Because this condition is in many cases compatible with significant functionality, parents may escape the strongest denunciations for continuing the pregnancy, though many

123. Crocker, *supra* note 63, at 153-54.

124. See Part IX, text accompanying notes 307-325, *infra*.

125. A parallel argument can be made for banning the use of steroids and other performance enhancers. Cf. Shapiro, *The Technology of Perfection: Performance Enhancement and the Control of Attributes*, *supra* note 68, at 84-94 (discussing "normative-systemic" arguments for prohibiting use of performance enhancement technologies).

observers will have reservations. But parents may well be criticized for letting a fetus with Tay-Sachs come to term, because the condition is incompatible with long-term survival and functioning and the affected child suffers. If the parents are not against abortion and have ample resources, but simply “want the experience” of caring for a severely disabled child, what do we say about their motivations? Here, one might well urge that the child’s nonexistence is indeed preferable from this point of view, and that the harm caused by the procreative act is disproportionate to any reproductive or companionship interest the parents might have.

But dealing with a “polar” case does not settle the issue. Robertson argues that “as long as persons who choose to ignore genetic information in reproducing are able and willing to rear affected offspring, the costs of their reproduction are unlikely to be sufficient to support a charge of reproductive irresponsibility.”¹²⁶

This seems plausible for many conditions, including Down syndrome. It seems less plausible for Tay-Sachs for the reasons given above: the child is truly harmed and the compensating benefit to the parents or others does not seem to outweigh this harm. If the parents are not opposed to abortion but nevertheless have the child with Tay-Sachs, should we simply say that if they are willing to bear the costs, for whatever reasons, nothing further can be said against them?

What of intermediate conditions, such as severe spina bifida (open neural tube), or forms of mental retardation more severe than Down syndrome, but still compatible with sufficient enjoyment of life to blunt the nonexistence-is-preferable argument? It is not entirely clear that such parental reproductive decisions are immune from charges of selfishness or irresponsibility. But it is hard to see how such reservations can—or should—be captured in legal constraints.

IV. NRTCs Often Entail or Result in the Improper Treatment of Persons (Especially Women and Children) as Mere Means and Not as Ends, in Violation of the Second Formulation of Kant’s Categorical Imperative

A. Introduction

The second formulation of Kant’s Categorical Imperative is often invoked in bioethical settings, particularly those involving reproduc-

126. ROBERTSON, CHILDREN OF CHOICE, *supra* note 3, at 152.

tive technologies, experimentation with human subjects and human embryos, and organ transplantation.¹²⁷ Ryan, for example, argues broadly that a regime of “unlimited procreative liberty . . . fails to respect offspring as autonomous beings, as ends in themselves.”¹²⁸

The usual translation of the Formula is this: “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means but always at the same time as an end.”¹²⁹

127. E.g., Samuel Hellman & Deborah S. Hellman, *Of Mice But Not Men: Problems of the Randomized Clinical Trial*, 324 NEW ENG. J. MED. 1585 (1991) (stating randomized clinical trials violate the Formula); Michael Lockwood, *Tissue Donors and Research Subjects To Order: Some Kantian Concerns*, 3 REVUE INTERNATIONALE DE PHILOSOPHIE 265 (1995) (finding Kant’s Formula does not forbid described uses of human embryos).

128. Ryan, *supra* note 8, at 6. I assume the author had Kant’s Formula in mind here, at least in part. It is not apparent why NRTCs across the board violate this principle of respect, though some uses of some of them may do so. See *infra* text accompanying notes 205-218. Ryan continues: “Although we might grant that the experience of reproduction appropriately fulfills the needs and desires for the adults involved, advocating a model where children are brought into this world *chiefly* for that purpose gives too much weight to parental desires and too little to the protection of the offspring’s essential autonomy.” *Id.* at 7-8. What this means is not clear. If the parents do not regard the child as autonomous persons-to-be, that is one thing. But the “needs and desires” of prospective parents generally include the prospect of producing autonomous children. If a particular NRTC or its application does not reflect this (as where, say, parents produce children to be sold into slavery) it is of course highly suspect. However, simply to suggest that using NRTCs warrants an inference that parents “fail[] to respect offspring as autonomous beings” is unjustified. The mechanism of autonomy impairment that would warrant such an inference is not evident in Ryan’s argument. “The experience of reproduction” probably does not refer simply to the experience of pregnancy and birth (few women reproduce simply because they want to be pregnant and deliver a child). Experiencing reproduction is about giving birth and having the companionship of children.

129. THOMAS E. HILL, JR., *DIGNITY AND PRACTICAL REASON IN KANT’S MORAL THEORY* 38-39 (1992) (citation omitted) (describing “the second formulation of the Categorical Imperative”).

There are several phrases in use here which sound much the same but may bear somewhat different meanings: “using persons”; “treating/using persons as means”; “treating/using persons as mere means.” For present purposes I need not discuss the differences at length, but a few points are worth noting and are reflected in the text. One “uses” children to generate opportunities that produce great satisfaction (think of one’s feelings at seeing a child graduate or get married or win recognition). Such satisfaction, however, does not necessarily amount to the sort of selfishness or purely self-regarding activity that one associates with treating someone as a means, “mere” or otherwise. The very use of “use” itself is open to question here because of its pejorative connotations, and the phrase “treat/deal with as mere means” is uncalled for—though to “use” in any sense entails that what is used is a “means.” (This usage too is troubling.) A somewhat different use of “use” is involved in saying that one also uses plumbers, but, depending on the circumstances, no inferences about treatment as means or mere means follows, despite the differences between “using” one’s children and “using” one’s plumber.

In any case, the very proclivities of human beings for mutual and self-benefit through associations of various sorts underlie the point of the distinction between “using” and “us-

First, some general comments about its meaning: I note in advance the frequent charge that surrogates and the children born of surrogacy are used as mere means, and in particular, that they are used as instruments to further male reproductive goals.¹³⁰ The same claim is often made against many NRTC's generally. The nature of these charges displays the conceptual links between the Kantian Formula and the arguments from selfishness, irresponsibility, and illicitness discussed above,¹³¹ and the arguments from objectification and commodification discussed below.¹³²

B. Exploring the Formula

At the very least, a minimally adequate understanding of the Formula requires some knowledge of what Kant may have meant by persons, by treating persons as ends, by treating persons as means, and by treating persons *only* as means (a key qualification sometimes omitted in loose restatements of the Formula). I will say very little about what a person is, and what treating persons as ends is. I address mainly the following questions: What is the significance of concluding that *an individual* has violated the Formula? If an individual does violate the Formula while acting within an institution, practice or network of activities, does that institution violate the Formula? *Can* an institution, practice, or network of activities violate the Formula? This issue may depend on the reigning and related philosophies that inform various social, economic and political institutions.¹³³

ing as a mere means." The former term does not uniquely signal unacceptable ways of "treating" or "dealing with" other human beings. (The differences between the bare terms "use," "treat," and "deal with" may themselves be worth pursuing, but not here.)

Finally, "treat as means" and "treat as mere means" signal a critical point in the Formula which reflects recognition that we properly may take benefits from others without necessarily violating it. (The fact that taking such benefits is inescapable helps confirm this point.)

130. *E.g.*, Rothman, *supra* note 43, at 216 ("Our society's approach to reproduction grows out of a patriarchal analysis that seeds are precious and the genetic tie between generations is a very important one. In this analysis, mothers are essentially fungible. You can plant the seeds here. You can plant the seeds there. It doesn't make a lot of difference. They grow a baby. . . . From the man's perspective, the only connection is the seed, that genetic tie, not where it is planted.").

131. See Part III, text accompanying notes 58-126, *supra*.

132. See Part V, text accompanying notes 229-273, *infra*.

133. See ONORA O'NEILL, CONSTRUCTIONS OF REASON: EXPLORATIONS OF KANT'S PRACTICAL PHILOSOPHY 124 (1989) (discussing capitalist and Marxist constructions of the formula and referring to "those that view all maxims as specific to individual agents and deny that the market itself can be thought of as grounded in maxims."). She suggests, however, that one purpose of her discussion is "to show how Kantian ethical reasoning might be extended to the activities of institutions." *Id.*

(1) *Individuals and Networks; Discrete Acts and Acts In Context*

I first distinguish between ascribing Formula violation to an individual person and Formula violations that characterize a social system of some sort. More basically, I raise the issue of *just who or what is said to be violating the Formula*. If I improperly use someone merely as a means but I am part of a large network of transactions dealing with that person within some identifiable domain of activity, *does this taint the entire transaction?* The issue is depicted in this passage by O'Neill:

The popular view that we can readily be used or treated as less than persons both in intimate relationships and at work can be sustained in a Kantian framework. In each context we may be faced with proposals to which we *cannot* possibly give our consent either because we are deceived or because we are coerced. But the characteristic ways in which we may be treated as less than persons even when not used are quite different in the two contexts. In intimate relationships everything is there that would make it possible to treat the other as the particular person he or she is, by respecting and sharing his or her pursuit of ends. Here if we fail to respect or to share the other's ends, the failure is imputable to us. But contemporary employment relations are set up on impersonal principles. Employer and employee have only "relevant" information about one another, and need only slightly coinciding ends. Hence when employees are not treated as the particular persons they are, the failure does not standardly rest with a particular employer, who may correctly think that he or she has done all that an employer should. The demand that we be treated as the particular persons we are on the job is a *political* demand for a "maxim of employment" that acknowledges our desire and perhaps need to be treated more as the persons we are, and less impersonally . . . ¹³⁴

I warn first that I am not attempting rigorously to compare and contrast Kant's political works with his moral works, or even to defend the distinction.¹³⁵ Nor am I critically evaluating the Kant scholarship.

134. O'NEILL, *supra* note 133, at 125. See also notes 140-141, *infra* (mentioning the "problem of evil" and its connection with "taint").

135. Cf. Herman, *supra* note 2, at 61 (discussing Kant's ideas of property, and stating that "[w]e need an *institution* of property—conventions, conditions of enforcement—because there is no natural 'right way' to allocate possession. But not just any institution of property will do."). Herman, however, expresses doubts about this institutional focus of Kant: "The chief obstacle for me in Kant's account comes from doubt about the idea of 'moral institutions'—that is, institutions that transcend the power relations that reside in the practices they 'govern.' . . . How can introducing an institution to protect the moral interests of sexual partners do other than preserve the essential social nature of those interests and the embedded relations of power and exploitation?" *Id.*

I start with a question about the propriety of research with human subjects. Suppose an investigator views a human research subject simply as an object to be manipulated—a tool for expanding knowledge, whether for the world's sake, or for his own personal satisfaction and reward.¹³⁶ Despite the investigator's assumed lack of virtue, there is a network of statutes, regulations, judicial decisions, and genuinely concerned persons that make it hard to conclude that the subject is indeed being used merely as a means.¹³⁷ Recall O'Neill's suggestion that "Kantian ethical reasoning might be extended to activities of institutions."¹³⁸ One might argue here in addition that for Kant, legal institutions promote liberty, independently of the Formula, but I do not examine this further.¹³⁹

This reference to context, however, doesn't end the matter. One could argue that nothing good comes from evil, and that the investigator's lack of virtue taints the entire transaction. This is one version of the problem of evil, frequently encountered: actions that seem permissible or even obligatory are made possible, facilitated or are otherwise linked to other actions that are evil. The Nazi experiments on humans are a standard example. There is a literature on this (especially on the hypothermia experiments), which investigates matters of moral stain, complicity in evil, and encouragement of evil,¹⁴⁰ but it

136. There is an issue about whether his willingness to treat the subject humanely in certain respects—to deal adequately with adverse effects in a clinical trial, for example—takes away from the "mere use" ascription, but I will leave this aside with the suggestion that it does not: an institution of beneficent slavery would still seem to violate the Formula. Using people as sources of lampshade material may be a stronger case for mere use, but it is not representative of the only sort of case for Formula violation.

137. See, e.g., 45 C.F.R. Part 46 (human subjects regulations). See generally FURROW, *supra* note 114, at 839-50 (discussing regulation of research on human subjects). But note the discussion of the views of Cocking and Oakley on informed consent to research, text accompanying notes 160-167 *infra* (criticizing research of certain sorts under Kant's Formula).

138. O'NEILL, *supra* note 133, at 124.

139. See Herman, *supra* note 2, at 53-54.

140. See Shapiro, *Fragmenting and Reassembling the World: of Flying Squirrels, Augmented Persons, and Other Monsters*, *supra* note 14, at 784-88 (discussing the possibility that regulation of evil will further it).

There are several linked but distinct strands to the "problem of evil" as described here. One of the questions regularly addressed is "whether good can come from evil" or, put otherwise, "whether evil or its products can be used for or result in good." Part of the difficulty, of course, is understanding what "good" and "coming from evil" might mean. For some, the idea of good arising from evil seems at least in many cases to be a conceptual/logical impossibility because of some notion of taint or stain: to the extent that the putative good is part of the entire collection of aspects and consequences of some evil transaction, it is contaminated and cannot be a constituent of good. Other connected concepts concern "ratifying," "compounding," "furthering," and "encouraging" evil, all of

seems unnecessary to discuss these issues. It would be odd, however, if the attitude of a single person, even the principal investigator, could justify tarnishing a large project of considerable social worth. Much would be lost if we ceased all activities so affected. Although the assumed attitude of the investigator might well condemn him under the Formula, there is some reason to believe that the institutional context could, in Kant's view, leave the overall project politically justified.¹⁴¹

The ideas of networks and institutional frameworks were suggested to illustrate the point that analysis of "singletons" (persons or acts) won't do in evaluating NRTCs: we need to attend to the complexes in which the singletons are contained. This holds not just for collections of persons, but for collections of acts (and dispositions to act) that characterize a person's conduct. Thus, as Nussbaum points out, one cannot properly judge whether a sexual encounter involves either or both parties objectifying the other: one needs to consider surrounding attitudes, prior conduct, and anticipated future conduct.¹⁴² And for this reason, it is questionable whether one can even properly speak of a single act or transaction as amounting to objectifi-

which bear different meanings and suggest differing underlying moral theories, consequentialist and nonconsequentialist.

141. See Herman, *supra* note 2. Consider *Bailey v. Lally*, 481 F. Supp. 203 (D. Md. 1979), where the court held that a program of medical research on prisoners did not violate any of their constitutional rights. The prisoners had claimed that adverse prison conditions rendered consent involuntary. The court quoted an information sheet given to prisoners: "Above all, you are not guinea pigs. We will explain every study to you at least twice before it starts. This means we will tell you why we are doing the study, what exactly is going to happen, and what risks are involved. If you have questions, we will answer them. There will be no operations or special tests that would be hard on you. Every study has to be approved ahead of time by a special committee at our university. We feel that all this is important, especially because some of you have been worried in the past. None of the studies will make you sick for a long time or sterilize anyone or do any of the things that get spread around by rumors. Some of you may get sick, but we will provide early and complete medical care. In 15 years of these studies we have never had a serious complication. [¶] If you want to join, fill out the application. The assistant warden's office will call you down to our ward and explain the studies to you, including how much we pay for each study." *Bailey*, 481 F. Supp. at 207. I am not specifically evaluating this program or considering whether the court's ruling, given the facts, was sound. I am simply giving a live illustration of the operation of a network surrounding an individual's participation in research. Nor do I address the propriety of monetary inducements.

142. See Nussbaum, *supra* note 37, at 265 (discussing one lover using the other's stomach as a pillow: "The overall context of the relationship . . . becomes fundamental . . ."). Later, she suggests that "objectification can be rendered harmless only if sexual relations are restricted to a relationship that is structured institutionally in ways that promote and, at least legally if not morally, guarantee mutual respect and regard."). *Id.* at 268. Here, she refers to Herman, *supra* note 2, at 62-63. *Id.* at 268 n.36.

cation or reductionism. (These last two terms are not synonymous, but are obviously connected, as discussed later.¹⁴³)

One might add here that not all putative “reductions” really are such; and if they are to be so called, they are not necessarily illicit mere uses of persons. Nussbaum, for example, criticizes Kant for suggesting that when focusing on bodily parts during sex one is “reducing” another to bodily parts. If this is indeed reductionism and thus a form of objectification, perhaps then, it is permissible or even desirable, *in context*.¹⁴⁴ In any event, to restate the suggestion made earlier: even if aspects or “phases” of a transaction or institution seem to fall under the Formula’s ban, this may not be enough to corrupt these larger units of human conduct.

The relevance of institutional contexts to evaluating NRTCs is clear, but the outcomes of analysis less so. In the context of surrogacy, for example, the transactions are generally voluntary—no one is kidnapped or impressed into service (though Ms. Whitehead did go into hiding with the child); there are generally agreements to pay medical and other expenses, as well as the fee; the surrogate remains an independent, autonomous person; and in most realistic visions of surrogacy she cannot be specifically compelled to abort or avoid abortion, or to undergo or avoid prenatal diagnosis, cesarean section, *in utero* therapy, and so on.¹⁴⁵ It is true that the juxtaposition of a *transient* relationship with *deliberate reproduction* may be disturbing because it mixes images—marriage with rape, for example. The roles of the surrogate in the lives of the custodial parents, and theirs in hers, are a temporary and expected part of the institutional practice of surrogacy. But because of the network of actors and relationships, the governing rules (such as they are at present), and the overall context of action, it is difficult to see how surrogacy emerges as nothing but the reduction

143. Part V, text accompanying notes 229-273, *infra*.

144. See Nussbaum, *supra* note 37, at 275, 276, criticizing Kant’s view that a focus on another’s bodily parts during sex reduces that person to those parts, and asking: “Why is Lawrentian [referring to D.H. Lawrence’s descriptions of sexual encounters] objectification benign, if it is? We must point, above all, to the complete absence of instrumentalization, and to the closely connected fact that the objectification is symmetrical and mutual—and in both cases undertaken in a context of mutual respect and rough social equality. The surrender of autonomy and even of agency and subjectivity are joyous . . . [T]o be identified with her genital organs is not necessarily to be seen as dehumanized meat ripe for victimization and abuse, but can be a way of being seen more fully as the human individual she is.” Later, she states that “[d]enial of autonomy and denial of subjectivity are objectionable if they persist throughout an adult relationship, but as phases in a relationship characterized by mutual regard they can be all right. . . .” *Id.* at 290 (emphasis added).

145. See generally CARMEL SHALEV, *BIRTH POWER* 86-104, 120-45 (1989) (describing and endorsing possible regulatory regimes for surrogacy).

of a woman to a reproductive vessel—her mere use as an instrument—rather than her treatment as an end in herself. It is simply not that simple.¹⁴⁶ Nussbaum is right in insisting that “In the matter of objectification, context is everything.”¹⁴⁷

I asked earlier whether an institution, practice, or network of activities could violate the Formula, and I close this subsection by returning to it. Two obvious questions are, What does the question mean?, and Why does it matter?

To take the latter first: Perhaps it doesn't matter. At the risk of begging quite a few philosophical questions, perhaps we should say that what really matters is what individuals do to individuals, and so the focus on institutions is simply to call attention to the fact that if most people are treating you well under a set of principles, standards and rules, the personal attitudes of a few, arguably inconsistent with the Formula, doesn't matter. It's a matter of balance, though not a complex one.¹⁴⁸

This seems to leave out too much, however. Chess and baseball require more description than “people getting together to play.”¹⁴⁹ The participants have ideas about and act in ways that reflect enduring rules, principles and standards (some formal, some customary) that govern the ways in which they interact. They assign praise and blame partly in accordance with the dictates of chess and baseball so understood. In human subjects research, praise and blame are also assigned partly under the aegis of an institutional structure. Such intra-institutional moral ascriptions may involve variables that seem to dissipate (or concentrate) personal responsibility. And in such enter-

146. Cf. Nussbaum, *supra* note 37, at 269 (“If the two parties [engaging in sex] are bound to support one another in various ways, this ensures a certain kind of respect for personhood that will persist undestroyed by the ardors of lovemaking, though it is apparently Kant's view that this respect and ‘practical love’ can never color or infuse lovemaking itself.”).

147. Nussbaum, *supra* note 37, at 271. And as Herman says (*supra* note 2, at 61), “The idea [in Kant's work] seems to be that through mediation by law, the natural tendencies to objectification, and so dominance and exploitation, in sexual relations are blocked. The institution of marriage in this way resolves the moral difficulty arising from sexual activity.” I use this observation to show the importance of the general idea of looking beyond the naked transaction. I am not endorsing the idea that the use of NRTC's outside marriage is necessarily improper.

148. One thinks here of “the utilitarianism of rights”—if there is enough treatment in accord with principle, it may “outweigh” the treatment violating it. Cf. ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 28-29 (1974).

149. Cf. Stanley Fish, *Professor Sokal's Bad Joke*, N.Y. TIMES, May 21, 1996, at A13 (stating that balls and strikes are socially constructed, but they are “real” and are “in the world”).

prises, the very idea of acceptable uses of persons—the meaning of “treatment as a mere means” and “treatment as end”—is determined in part by the existence of the ongoing structure. For example, the acceptability of a given risk to subjects might depend on whether injuries to them proximately resulting from the research project are to be treated at low or no charge. Individual researchers may not be able to bear such a burden, and so it is the existence of the institution that ultimately allows the project to be deemed acceptable under the Formula (or some other standard). On the other hand, the existence of the institution, by attenuating responsibility, may precipitate an increase in the incidence of Formula violations by individuals. It might also result in inappropriately assigning various forms of liability without fault responsibility.

As for the very meaningfulness of asserting that institutions can or cannot violate the Formula, much depends on what moral and other philosophical theories drive the analysis. If one focuses on personal moral appraisal and questions of individual virtue, then the institution is less likely to be viewed as a (non)violatee, although its operations may affect our appraisal of the individual actor. Yet from the standpoint of any affected individual, the “X” that is treating her (im)properly includes not simply certain individuals, but “it”—the network of persons, practices, rules, and entities that identify the institution.

There thus seems to be no definitive reason to reject the locution “the institution violated/didn’t violate the Formula,” though it might not meet Kant’s approval. But there are too many embedded philosophical issues to make it profitable to continue this inquiry here,

(2) *Treating Persons as Means and as Ends-in-Themselves, and the Nature of the Connection Between These Two Forms of Treatment*

(a) Means and Ends

To understand what the phrase “using persons as means” signifies, we need to compare our dealings with persons as opposed to things. “To treat something as a mere means is to treat it in ways that are appropriate to things. Things, unlike persons, are neither free nor rational; they lack the capacities required for agency. They can only be props or implements, never sharers or collaborators, in any project.”¹⁵⁰

150. O’NEILL, *supra* note 133, at 138.

This suggests that not treating someone merely as a means is strongly linked (but not identical) with treating her as a person. And, whatever the latter means, it seems to entail presumptive respect for her autonomy—her opportunities to pursue her preferences in a rational, self-directed manner. But this suggests the concept of treating one as an end: “To respect you as an end in yourself is to recognize that you have value apart from whatever use I might be able to make of you. It is, moreover, to recognize that your goals and purposes have validity independent of whatever goals and purposes I may have and to acknowledge in my action that your goals and purposes have an equal claim to realization.”¹⁵¹ As practically every commentator holds, then, a doctrine of informed consent of *some sort* is required for many important transactions—a point obviously applicable to questions of, say, medical treatment and use of one’s procreative and sexual capacities.¹⁵² Without such a doctrine, it is hard to see how a person’s “goals and purposes” can be realized.

Nevertheless, not treating one as a mere means and not treating her as an end are not necessarily the same thing. The Kantian Formula does not simply state that we are not to use persons merely as means; it states that we are at the same time to treat humanity (which probably includes fetuses *scheduled* to be born)¹⁵³ as ends. One can well ask whether there is some forbidden “middle” where, in a given transaction or process, one does not use a person merely as a means but also does not treat her as an end. Treating a person as an end might seem, on some views, to entail that one is not using her merely as a means, but does non-mere-using entail that one is treating her as an end?¹⁵⁴ The point is potentially serious when applying the

151. John Hardwig, *In Search of an Ethic of Personal Relationships*, in *PERSON TO PERSON* 63, 65 (George Graham & Hugh LaFollette eds., 1989).

152. “A deeper and historically more important understanding of the idea of treating others as persons [as compared to matters of “tone and manner”] sees their consent to actions that affect them as morally significant. On this view it is morally objectionable to treat others in ways to which they do not consent. To do so treats another as a thing or tool, which cannot, so does not, consent to the ways in which it is used; such action fails to treat others as persons, who can choose, and may withhold consent from actions that affect them.” O’NEILL, *supra* note 133, at 106.

153. See Lockwood, *supra* note 127, at 279 (stating that it is not plausible under Kant’s Formula to treat a “future person”—i.e., what will “develop in due course” into a person—as a mere means to an end).

154. O’Neill apparently thinks there is no logically excluded middle. “Not to treat others as mere means introduces minimal, but indispensable, requirements for coordinating action in a world shared by a plurality of agents, namely that nobody adopt fundamental principles to which others cannot possibly consent. To treat others as ends may require further action when dissent is in principle possible, but those who are actually involved

Formula, because establishing non-mere-use would be only a necessary but not a sufficient condition for morally validating someone's treatment of another under the Formula. So we have to acquire some fairly complete independent notion of treating persons as ends.

But that is for another project. Here, it is enough to say that one will have gone far toward treating a person as an end if one acts with respect for her preferences and goals.

I note one additional point about dealing with another's aims. A frequent characterization of treating one as an end refers to respecting *and* "sharing" of goals. "The 'positive' aspects of treating others as ends-in-themselves require action on maxims of sharing others' ends."¹⁵⁵ If this is a separate requirement, what does it mean? In what sense do I share an end with the plumber hired to install new pipes? To say that we both want the pipes installed says nothing beyond the terms of the contract. To say that I hope he finds satisfaction in completing the work and getting paid (and that he hopes I find satisfaction in a well-ordered home hydraulic system) says a little more. But is *that* what it takes to share a person's goals and so treat her as an end—to care about his or her satisfaction or happiness?

Apparently the scholarly view is that the core of "sharing of ends" of others is to recognize that such ends are indeed the *others'* ends, to help further them, and to respect these ends because of the respect due the rational faculties of persons.¹⁵⁶ But this does not seem to add much more to our understanding of "sharing goals."

(b) The Role of Limits on Consensual Capacities

Of course, the broad requirement of respecting ends bears major qualifications: your duties may take on quite a different form if, for

have limited capacities to dissent." O'NEILL, *supra* note 133, at 114. She also argues that "[i]n employment, as in other activities, being used is only one way of being treated as less than a person. A great many complaints that workers are not being treated as persons can be traced not to the ways in which they may straightforwardly or unstraightforwardly used, but to the degree to which contemporary employment practices make a point of treating workers uniformly, and so not as the particular persons that they are." *Id.* at 124. One wonders, however, whether this places too great a burden on the Formula: there are limits to individuation in various forms of employment, as on some assembly lines where the series of repetitive tasks by similarly situated persons promotes overall efficiency. Note also Kant's stress on the common characteristics of "humanity"—i.e., we are the same in our humanity: perhaps he is not as oriented to serious individuation of personal preferences as others are. To treat one as a person may mean something different in certain respects for O'Neill and for Kant.

155. O'NEILL, *supra* note 133, at 115. See also John Laird, *The Ethics of Dignity*, 15 PHIL. 131, 134-37 (1940).

156. O'NEILL, *supra* note 133, at 115.

example, the person is incompetent and hence more likely to act irrationally.¹⁵⁷ But treating persons as ends, so it is argued, requires a finer calibration in the NRTC context than that entailed by a sharp competent/incompetent dichotomy. O'Neill, for example, argues that "[t]o treat human beings as persons, rather than as 'ideal' rational beings, we not only must not use them, but also must take their particular capacities for agency and rationality into account."¹⁵⁸ The emphasis here is on recognizing the limitations on a given person's capacities for rational choice: failure to do so fails to treat the person as an end (perhaps in part by annulling their "true" ends). One must, on this view, recognize the impairments of full rationality that characterize differing individuals.

Here, the key terms "capacities," "limits," and the like are plainly value laden. If someone is raised to think and feel in certain ways and to want certain things, is this part of their full array of rational faculties—an empowerment—or is this a limitation, or both? Clearly, this depends on the circumstances—but in what ways? What does one *do* to "take account" of such limits, assuming some way of recognizing them? Prevent persons from acting on their preferences? If this escapes treating them merely as means, does it also treat them as ends? Does the fact that Ms. Whitelhead was less well off financially than the Sterns in the *Baby M* case suggest some sort of limit that forecloses the transaction? Note that Kant stressed that one does not benefit another as judged by one's own concept of happiness, but only by the other's. This is evidently an antipaternalistic stance that rejects supplanting another's ends—a constraint on loose applications of "incapacity."¹⁵⁹

I mention one example of what I think is overuse of the Formula; it rests on a questionable view of capacity to consent. Cocking and Oakley urge that randomized clinical trials (RCTs) are vulnerable to attack under the Formula because of ineradicable human cognitive deficiencies affecting the consent process.¹⁶⁰

157. Dealing with incompetent persons by making certain decisions for them is not necessarily inconsistent with their status as persons, nor with autonomy values. Indeed, dealing with them in certain ways—even without their assent—would seem to be required by their status as persons and by connected autonomy values.

158. O'NEILL, *supra* note 133, at 115.

159. O'NEILL, *supra* note 133, at 116.

160. See generally Dean Cocking & Justin Oakley, *Medical Experimentation, Informed Consent and Using People*, 8 *BIOETHICS* 293 (1994).

One aspect of their argument is instructive: it reminds us of the now well-known problems of framing¹⁶¹ in generating cognitive error and applies them to the problems of informed consent. The article as a whole, however, displays the often paradoxical nature of trying to protect autonomy: they seem to have run away with a good idea and offered suggestions that, if implemented, might impair what they wish to protect. In the name of autonomy and personhood, their recommendations could weaken both, because their argument may prove too much: on their view, few serious decisions taken by human beings, at least in the realm of human subjects of research, can be autonomous. Looking at their account, which deals with autonomy, rationality, pathology, and use of persons, may illuminate the Formula's limits in assessing NRTCs. They argue:

1) Because problems in framing of information or ideas may reflect manipulation of "irrational" preferences, persons choosing whether to enter a program of human research or experimentation—especially in the form of RCTs—do not actually give genuine informed consent.¹⁶²

2) If they do not give genuine informed consent, then they are being impermissibly used. Thus, "a person is used as a mere means, generally speaking, when it is in virtue of her nonautonomous involve-

161. See generally Amos Tversky & Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981). See also RUTH FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT 319-23 (1986) (discussing the impact on understanding and thus on autonomy of framing or formulating matters in certain ways). Faden & Beauchamp state that because it is hard to assess framing effects, professionals trying to promote informed consent (in the sense of "autonomous authorization,") should provide patients and subjects "with both sides of the story—the half-full and half-empty presentations, the mortality and the survival frames—in the hopes of avoiding the gaps in understanding that framing effects may produce." *Id.* at 277. More generally, they state: "It has been widely appreciated that people's choices between risky alternatives can be predictably influenced by the way the risk information is presented or framed. Whether the proverbial glass is described as half *empty* or half *full* establishes a frame of reference against which risky outcomes and contingencies are viewed as either losses or gains." *Id.* at 319.

However, the example offered by Cocking and Oakley does not seem to be exclusively or even predominantly about framing effects. See note 165, *infra*.

162. "[T]he problem is not a withholding or a lack of information to which a person could then give fully informed consent. Rather, the problem concerns the manner in which the information is put to them, or, . . . the 'framing' of the relevant information. We believe that the autonomy of persons as experimental subjects can be violated *either* through an investigator's failure to obtain a subject's informed consent, *or* through the manipulation of a subject's irrational preferences by an investigator's framing of the relevant information." Cocking & Oakley, *supra* note 160, at 294. It is not clear whether "manipulation" is meant to refer to culpable efforts on the investigator's part, or simply the effect of the framing, which may have been offered in good faith, and even with due care.

ment in the circumstances of the case that the agent is able to pursue his ends. So, when a person's nonautonomous involvement in the circumstances of the case is necessary for the success of the agent's intended plan, then that agent uses that person as a mere means."¹⁶³

3) The authors question the idea that framing problems can be dealt with by assuring that alternative frameworks are presented.

4) The authors then propose to have research and NRTC's more suitably "monitored." (It is not clear what they are to be monitored for, given the attack on the very foundations of consent. What are the monitors to monitor?)

Here is an example they offer: a person who is "pathologically" fearful of being left alone in old age is "manipulated" into marriage by a woman who trades on this vulnerability. He doesn't want children, but she threatens to leave him unless they have a child. He capitulates. He is thus being "used" impermissibly because his choice is not based on affection and a rational evaluation of marriage: he is "in the grip" of his preferences.¹⁶⁴ ("Gripping" is what preferences do, more or less, else they wouldn't be preferences. The "more or less" is crucial here.)

A parallel argument concerning NRTC's might be that, say, a postmenopausal woman suffers a similar fear of being left alone, or simply has what one might call an "irrational—perhaps pathological—urge to nurture." Or, a person preferring posthumous reproduction by saving gametes for use after death has a crazy view about immortality, or a fear of actual companionship with children, but his ego drives him to want to leave something behind.

As for Cocking and Oakley's own example, which does not seem to rest predominantly on framing problems:¹⁶⁵ their account is not a

163. Cocking & Oakley, *supra* note 160, at 304. The authors briefly refer to possible counterexamples to this formulation. *Id.* at 300 n.14.

164. Cocking & Oakley, *supra* note 160, at 307. The authors were not specifically discussing the example in the text when using the "in the grip" language, which appears at 305.

165. Although framing effects may be involved, their example seems to deal primarily with a sharp tension between preferences. Of course, the framing process itself presupposes conflicting tugs. One can speak of this with optical illusions also, but in our context with important preferences. More, how one resolves these tensions may depend in part on the issues involving how these competing preferences are framed. Still, the example offered seems to sound more in serious conflict of preferences than in pure framing effects. Thus, in a typical medical informed consent case, a patient who prefers being slightly ill to undergoing painful surgery may misjudge the issues because of formulations that suggest the surgery will involve great pain or "understate" the expected discomfort of his condition unremedied by surgery. But whether the issues are more about framing or conflict of preferences is not crucial to the discussion here.

fully plausible application of the ideas of autonomy, pathology, rationality, and use. Consider:

a) Why are the subject's feelings about the need for care later in life "irrational"? This cannot be answered by saying it's an assumption *arguendo*: What would be the basis for a routine assumption to that effect? In fact, it seems to be a very questionable assumption. For one thing, we are offered no explication of "pathology." If you want or fear something very much, is that enough to make it "disordered?" Suppose Mr. A is an indecisive and lonely person. Given these characteristics, his desire for care as he grows older is perfectly rational. If one tries to say that indecision and loneliness are sure signs of pathology and irrationality (I don't suggest anyone in fact holds this view) then Mr. A's personhood seems disrespected. More, what difference does it make if some preference falls short of ideal rationality?

More fundamentally, the idea that being influenced by one particular framework or preference more than others represents irrationality is seriously questionable. So is the claim that the taint of "irrationality" automatically renders autonomous action impossible. On what theory of irrationality or autonomy?¹⁶⁶ Suppose Ms. B, who suffers from a gravely impairing and painful disorder, is told by her physician that there is a 50% chance she will completely recover with treatment X. She is pleased with this and is ready to go ahead. Then the physician says: "I am bound to tell you, however, that there is a 50% chance you will not completely recover, and a 10% chance you will die from the treatment. Without treatment X, you will live out a large proportion of your lifespan, but your disorder will not improve and may get worse."

Ms. B ponders this and continues to regard the 50% chance of complete cure to dominate the adverse risk. She cannot tolerate the thought of continued disability and pain and discounts the 10% risk of death as worth the price. On what theory is this irrational?

The central point here is that her desires, fears, and general frameworks cannot be *loosely* characterized as pathological, irrational, or otherwise nonautonomous without risking violation of the Formula. To credit weak critiques of a person's autonomy is not to treat the

166. See FADEN & BEAUCHAMP, *supra* note 161, at 321 (arguing that "[f]raming effects do not invariably diminish understanding in ways that render acts less than substantially autonomous"). However, they acknowledge that "formulation effects" can diminish autonomy. *Id.* at 320. "Framing effects" and "formulation effects" seem to be used interchangeably here.

person as an end. To ignore, displace, or try to alter preferences on slender showings of pathology or irrationality similarly violates the Formula. If someone is more swayed by one perspective or another, a great deal must be shown before concluding that this is inconsistent with autonomy. Strong preferences do not necessarily mean one is not autonomous. (Some may argue it suggests the opposite.)

Finally, how does this bear on evaluating the conduct of the manipulative woman in Cocking and Oakley's example? "[T]he fact that the success of [the woman's] plan of action depends upon [the man's] nonautonomous involvement shows just as clearly that she has used [him] as a mere means here. . . . [His] pathological fear moves him to choose *against* what he really wants or values. . . ."¹⁶⁷

This is not very convincing. One could argue that the if the man rejected the woman, he would simply be discarding her because she interfered with his preferences. More generally, many human interactions involve the collision of preferences. Life could not go on very well if persons—especially persons intimately involved with each other—did not *regularly* do things they *really* didn't want to do, because they have a supervening preference to preserve the relationship. Indeed, one could with acceptable accuracy say that the man, if he agrees to marry, wants companionship more than he doesn't want children.

(c) A Note on Treating People Well

One can treat a thing well, but still be treating it as a thing. If our bowling ball needs cleaning, we do it on our own account, not the bowling ball's. If we don't use it, we simply put it aside. A "thing" has no needs.

Consider slavery. It is entirely possible that some things a slaveholder does to preserve the lives and health of her slaves is done on their account, not just hers. Some slaveholders were kinder and gentler than others. According to Laird:

[W]e should not be treating any being *merely* as a means if we paid the smallest attention to its pleasure or to its suffering. . . . A slaveowner whose humanity led him to see to the comfort of his slaves for other than market reasons, who passed the time of day with them when he met them, who had them baptized, would, in all such acts, be treating them not merely as means. In other words, Kant's principle, as he states it, is too thin for his purpose. [¶] Such a comment, I may be told, is grossly unfair. Kant's principle should be read in its entirety. If that is done, it plainly appears that a being

167. Cocking & Oakley, *supra* note 160, at 307-08.

is being treated merely as a means if its *rationality* is not respected (supposing that it *is* rational). [¶] That is just my trouble. I say that the alternatives of paying regard to rationality as such, on the one hand, and of treating any man or animal merely as a means are nothing like exclusive. Any grain of what we often call 'humanity,' any tenderness for animal suffering, eludes both alternatives. And that is not all, or nearly all. Man's dignity is not an affair of his reason and of that only. We should also respect a man's courage, his generosity, his taste, his sympathy, his human-heartedness. None of these is mere reason. All may acquire dignity. The principle of human dignity would not normally be understood in the pure rationalistic form that Kant gave it. I would now suggest that it is untenable in that restricted form.¹⁶⁸

Laird's point reflects a position that is not clearly derivable from the Formula. Paying some slight regard to the personhood of a slave might not be enough to forestall the mere use ascription.¹⁶⁹ Arguably, just as treating a slave well does not abrogate his slave status, treating a surrogate well is not inconsistent with her mere use or her nontreatment as an end. But, to turn things around, the presence of one person as a mere user in a larger network may not taint the entire network of conduct as a violation of the Formula.

(d) The Residual Indeterminacy of "Treat as a Mere Means" and "Treat as an End"

Applying Kant's Formula to certain novel reproductive relationships encounters at least two serious blockades. One is that the general concept of "use" in this context is not a morally neutral, empirical description. ("*Mere use*" is obviously non-neutral.) For example, it is permissible for physicians and plumbers to require payment for their services. This can be characterized as permissible use by these providers, which in turn can be characterized as not-mere-use or use under

168. Laird, *supra* note 155, at 137.

169. This is a kind of all-or-nothing view. Cf. D.D. RAPHAEL, *MORAL PHILOSOPHY* 56 (1994): "A slave is treated merely as a means. A slave, said Aristotle, is a living tool. When I use a carpenter or a restaurateur as I might use an instrument, I do not treat him merely as a means. I ask him what is his charge and I agree to pay the charge." However, Raphael was not specifically confronting Laird's point, and it is not clear what either would say to the other. See also O'NEILL, *supra* note 133, at 107 (stating "slavery and forced labor and various forms of economic fraud use others and do not treat them as persons, but a contractual relationship like that between employer and employee does not use others or fail to treat them as persons.").

A bare possibility of a slavery system consistent with the Formula might arise if, say, there were religious beliefs that slavery was a desirable status that merited post-life rewards. The slave masters would then arguably be treating the slaves not as mere means but as ends in themselves by furthering their rational desires for post-life rewards.

circumstances where one is nevertheless treating another as an end.¹⁷⁰ (Depending on one's preferred use of "use," it may not be use at all, though it seems a plausible term to use here.) But which description is the soundest is not a matter of simple observation.¹⁷¹

Another is that the novel relationships involved in NRTCs do not come bearing clear characterizations. There are those who think that in a surrogacy relationship, the hiring parents are obviously merely using the surrogate as a mere means.¹⁷² I do not think this is obvious at all, but the contrary view is widespread. The dispute over whether this is forbidden use does not seem to rest mainly on open empirical questions about harm to children or women or anyone else; it presupposes certain unspecified moral conclusions about interpersonal links and their accompanying duties and privileges. So, we need to consider whether we can get any purchase out of the Formula here at all: where it is arguably the most needed as a guiding instrument, it is arguably the least applicable, and perhaps cannot be rationally applied without begging important questions.

(3) *Applying the Formula to NRTCs—In General*

(a) The Conceptual Apparatus

We now need to map some of the ideas and distinctions discussed above to NRTC issues: the individual versus network/institution distinction; the personal/impersonal relationship distinction; the idea of using people as mere means while at the same time attending to some of their needs for their sakes; and the meaning and role of consent. I suggest that few, if any, NRTCs can be condemned *across the board* through the use of any of these analytic paths, and that the Formula's use here is largely restricted to establishing boundaries against abusive

170. The idea of mere use as means is also sufficiently vague that it might seem to allow for "tone and manner" of treatment to determine whether one is merely using a person. *But cf.* O'NEILL, *supra* note 133, at 106 (describing the view and criticizing it). *See also* the references to slavery, text accompanying notes 150-151 *supra*.

171. As before, I do not dwell on the possibility of a middle where the use is not "mere" but one is still not treating one as an end. *See supra* note 154 and *infra* note 208. *See also supra* note 129 on the term "use."

172. Indeed, if one is going to press the "use" argument, the surrogate is also "using" the hiring parents. *Cf. In re Baby M*, 537 A.2d at 1236 (arguing that "[b]oth parties, undoubtedly because of their own self-interest, were less sensitive to the implications of the transaction than they might otherwise have been. Mrs. Whitehead, for instance, appears not to have been concerned about whether the Sterns would make good parents for her child; the Sterns, on their part, while conscious of the obvious possibility that surrendering the child might cause grief to Mrs. Whitehead, overcame their qualms because of their desire for a child."). The support for these remarks—a showing of selfishness and irresponsibility and the disproportionate risk imposition entailed by this—is not apparent.

or coercive actions. I reject any effort to describe NRTCs as logically entailing abuse or coercion as hopelessly trivial.

Consider the claim that, in general, “the offspring [in reproduction involving donors and gestators] as a particular child is treated not as an end in himself or herself, but as the means to a goal (a fulfilling parental experience).”¹⁷³ This seems quite off the mark. Pursuing a fulfilling *parenting* experience seems quite compatible with treating children as autonomous ends and not using them as mere means. Surely the Formula does not insulate only procreation pursued from a sense of duty and in dread of its consequences. In fact, such procreation may treat *oneself* as a mere means, rather than an end. One does not *per se* treat children as ends when reproducing to fulfill one’s self-regarding wishes for parenthood.¹⁷⁴ If the Formula condemns this, then it seems to condemn virtually all reproduction. If so, so much the worse for the Formula.¹⁷⁵

(i) *Personal and Impersonal Relationships Generally and within the Context of NRTCs*

There are many cases in which the personal/impersonal distinction is sensible. Most of us count the parent-child relationship created by customary reproductive measures as an intimate one. Even parents intending to give children up for adoption bear strong duties of care to them; they cannot simply be left for someone to pick up.¹⁷⁶ Certain paradigmatic personal or intimate relationships *entail* certain sorts of duties and expectations, as these relationships are generally understood. Most of us view random commercial relationships as nonintimate, though subject to various small duties. The *absence* of certain duties and expectations also seems to be an *entailment* of certain relationships or institutions as culturally understood: there is, for example, no anticipation of love among the members of a market. Still other relationships fall in between—a long-standing physician-patient or plumber-customer relationship, for example.

173. Ryan, *supra* note 48, at 11.

174. Elsewhere, Ryan suggests this herself. Cf. Ryan, *supra* note 48, at 7 (stating that persons should have a protected “right” to control how they reproduce and to “be free to shape familial life in a way meaningful for them”).

175. See *supra* text accompanying notes 142-147 (Herman’s discussion of sex). Even in the case of sexual relations, Kant does not conclude that they are always and necessarily violations of the Formula; the institutional setting of marriage rescues them from this fate, at least in part.

176. Cf. JAMES BOSWELL, *THE KINDNESS OF STRANGERS: THE ABANDONMENT OF CHILDREN IN WESTERN EUROPE FROM LATE ANTIQUITY TO THE RENAISSANCE* (1988) (describing historical practices of abandonment).

But here we are not dealing with locating familiar relationships along a point on a linear continuum. We are dealing with relationships that, while not entirely unprecedented, are nevertheless different, and perceived as such. We thus cannot simply assert that some reproductive transaction is or isn't the sort of traditional (non)intimate transaction that entails the absence or presence of some duty. More crisply, a given reproductive arrangement may straddle the personal/impersonal relationship dichotomy. Think of the relationship between a hiring father and a surrogate, traditional or gestational;¹⁷⁷ between known sperm or ovum donor and the recipient; between children and their deceased parent's posthumous offspring; and so on.

This parallels the point made earlier about the very meaning of the idea of use-as-mere-means as applied to NRTC's. The nature of the personal/impersonal relationship here seems less a matter of description than of conscious designation and creation. What sorts of duties *should* we consider entailed by these novel collaborations? The standard traditional patterns of relationships and duties are instructive, but hardly decisive.

(ii) *Consent in Personal and Impersonal Relationships*

Those who object to some or all NRTC's can take any of several stances concerning consent.

One is that in at least some cases the confirmation of valid consent is a matter of reasonably straightforward empirical confirmation: whether all material information was transmitted to and understood by the proper party, and whether he or she voluntarily assented. There will of course be cases in which one must make value determinations concerning how carefully these elements of informed consent must be confirmed, but many cases will be relatively simple. Did the patient understand that the medicine should be taken with food?

Some "simple" matters are not so simple, however. Did the surrogate understand that she might develop an attachment to the child-to-be but must nevertheless transfer the baby at birth? What does "understand" mean? Was there a vivid appreciation of the risk of regret? Is there some sort of "harsh subculture" that compromises the

177. Cf. T. Corraghesan Boyle, *Caviar*, in *GREASY LAKE AND OTHER STORIES* 12 (Penguin ed. 1986) (presenting a short story concerning the relationship between a genetic surrogate mother and the genetic father).

reproductive decisions of surrogates or other collaborators in a reproductive transaction?¹⁷⁸

Even with such risks of consensual impairment, it is not obvious that recognizing a notion of fair or conscionable assent must be rejected on Kantian grounds. The ideal of genuine, nontainted consent takes on different forms within different political philosophies bearing differing views on the nature of choice and the strength of free choice values. Some believe, for example, that all decisions by incarcerated persons are tainted by their “coercive circumstances.”¹⁷⁹ A capitalist Kantian and a Marxist Kantian, both relying on the Formula, may have radically different views about impaired consent—what counts as an impairment, and whether a particular “degree” of impairment is enough to displace the imperfect decision process.¹⁸⁰

Another stance on the moral and legal status of consent is to count it as simply irrelevant in certain contexts. This seems to be what the court did in *Matter of Baby M*, when, as we saw above, the court suggested that the surrogate’s “consent is irrelevant. There are, in a civilized society, things that money can’t buy.”¹⁸¹ It is unlikely that the opinion’s author is a thoroughgoing statist who thinks personal autonomy is valueless, but he had no difficulty identifying a domain where personal choice was of little or no value.

Yet another stance is to emphasize the conceptual and normative indeterminacies in evaluating issues of consent. One could argue that autonomy, contrary to appearances, is not vindicated by particular transactions involving “enhanced opportunities”; or that autonomy is less important than hitherto believed, given the competing values that the conceptual indeterminacy suggests. Thus, O’Neill raises the question of the very scope of consent: “Like other propositional attitudes, consent is opaque. Consent may not extend to the logical implications, the likely results, or the indispensable presuppositions of that which is explicitly consented to.” She then introduces as an example the question “how far consent to a particular constitution . . . consti-

178. “[W]hen we remember the institutional context of much (at least contemporary, Western) prostitution, including the practice of pimping, brothel keeping and various forms of social ostracism and consequent dependence on a harsh subculture, we may come to think that not all transactions between prostitutes and clients are uncoerced; but it may not be the client who coerces.” O’NEILL, *supra* note 133, at 118-19.

179. For a discussion, see MICHAEL H. SHAPIRO & ROY G. SPECE, JR., *BIOETHICS AND THE LAW: CASES, MATERIALS AND PROBLEMS* 237-39, 247 (1981).

180. See O’NEILL, *supra* note 133, at 122-25 (discussing Marxist and capitalist applications of the Formula).

181. *In re Baby M*, 537 A.2d at 1249.

tutes consent to particular governments formed under that constitution. . . ."¹⁸² In a medical context, she suggests:

A third range of difficulties with taking actual consent as pivotal for treating others as persons emerges when abilities to consent and dissent are impaired. Discussions in medical ethics show how hard it is to ensure that the consent that patients provide to their treatment is genuine. It is not genuine whenever they do not understand what they are supposedly consenting to or lack the independence to do anything other than 'consent' to what they think the doctor wants or requires. Patients cannot easily understand complex medical procedures; yet if they consent only to a simplified account, they may not consent to the treatment proposed.¹⁸³

But these reservations about "genuineness" of consent meld together too many separate strands. There are of course cases of mental impairment and defect that clearly are inconsistent with the possibility of informed consent on certain matters, although the question is not simply empirical because conceptual indeterminacy may affect "competence" determinations. Lack of understanding of complex procedures, however, is not simply a matter of "incompetence" as usually understood, and O'Neill does not argue otherwise. Why should a patient be expected to understand "fully" how a particular procedure does what it does? Here we have a question of what is morally relevant to the idea of "informed consent."

A fourth stance concerning consent urges neither its irrelevance nor its simple failure through lack of information, basic understanding, or assent. It focuses on the very set of preferences one holds. O'Neill, for example, refers to persons who "lack . . . independence."¹⁸⁴ What does this mean? Some persons are indecisive and seek guidance. Some persons do not understand that they have a right to question another's authority or expertise. Some people are in thrall to others and do not feel they ought to act independently of them, even if they have a right to. These questions of "independence"—as compromised by character traits, "false consciousness," or simply being caught in constraining relationships—do not fit easily into the idea of ability or capacity to consent. Even if we recognize that consent in these situations will fall short of some ideal, should this failure be routinely invoked to justify intervention into an agreement or transaction? More fundamentally, just what does the "ideal" entail?

182. O'NEILL, *supra* note 133, at 107.

183. O'NEILL, *supra* note 133, at 108.

184. *See supra* note 183.

Some may want to call this a conceptual dispute about the meaning of "consent," and it may be so. But there is a more vital point: the moral question of what strength to assign to an ideal of supremely informed, immensely intelligent consent, and of how to rate departures from it. One can mount a parade of horrors indicating that excessive attention to the deficiencies of consent would invalidate most life transactions. (Think of "informed consent to marriage.")

Defenders of NRTCs are likely to say that if such reservations about consent are taken to defeat an agreement, autonomy takes a severe beating—despite the fact that the reservations themselves are meant as defenses of autonomy. Each side invokes different aspects of autonomy. Consider O'Neill's comment:

Others' apparent consent, even their apparently informed consent, may *standardly* be insufficient to show that we treat them as persons when we interact with them. The problems of the defeasibility and indeterminacy of consent, of ideological distortions and self-deception, and of impaired capacities to consent are forms of one underlying problem. The deeper problem in this area is simply a corollary of the opacity of intentionality. When we consent to another's proposals, we consent, even when fully informed, only to some specific formulation of what the other has in mind to do If we want to give an account of genuine, morally significant, consent, we need to explain *which* aspects of actions must be consented to if nobody is to be used or treated as less than a person.¹⁸⁵

Such problems of genuineness of consent are rightly invoked to question whether we are indeed respecting autonomy and treating persons as such. The difficulty lies in the ease with which we accept various claims of impairment. In some cases, accepting the claim defeats autonomy; in other cases, accepting the claim promotes it.¹⁸⁶ Without a comprehensive theory of autonomy, few of these disputes can be satisfactorily resolved.

(iii) *Creating Persons under the Formula: Procreational Purposes and Subsequent Treatment of Offspring*

The problem here is to apply the Formula to the very making of a person: when are particular reasons for creating persons suspect as reflecting and ultimately generating mere use?¹⁸⁷ To what extent can subsequent dealings with children—our attitudes toward them and treatment of them generally—attenuate whatever taint persists from

185. O'NEILL, *supra* note 133, at 108-09.

186. I do not pursue the conceptual links between autonomy and personhood.

187. See generally HEYD, *supra* note 16 (reviewing philosophical issues and paradoxes concerning the creation of life).

the originating purposes? The best-known examples of such problems concern the creation of children and fetuses for use as sources of transplantable tissue.¹⁸⁸ But before investigating these issues, some prior questions require attention.

—*Are there NRTCs to which the formula cannot sensibly apply?*

Does it make any sense to apply the Formula to NRTCs at all? The problem is that in many cases, the specific children born would not exist at all, so, whatever their lives are like, they are not harmed unless their lives are less preferable than their nonexistence.¹⁸⁹ As Heyd states (referring to what is here called Kant's Formula):

This prescription [the Formula] cannot be extrapolated to genesis problems, because a decision of whether to conceive a child cannot be guided by respect for it. The idea of respecting a person in creating him or her is logically puzzling. In fact we strongly and intuitively feel that the decision to bring a child into the world is the only one in which the child is taken purely as a means, usually to the parents' satisfaction, wishes and ideals. Respect for persons might be a moral guide to the way we should treat people once they are born, but it is of hardly any help in deciding whether and how many of them should be born. And to take the argument further to the wilder realm of science fiction, we may raise the question why should we create *nonrational* humans if we can choose to engineer rational robots? We might have perfectly rational grounds for creating nonrational beings: we might equally choose to create rational beings on the ground that we want 'them' to become ends in themselves. But we cannot say that being potentially ends in themselves creates a claim on the part of our potential children to be born.¹⁹⁰

I do not deal with the long-standing question of whether we can solve certain consent problems by creating persons to have whatever

188. On the creation of children for such purposes, see Anastasia Toufexis, *Creating a Child to Save Another*, TIME, Mar. 5, 1990, at 56; Lance Morrow, *When Can One Body Save Another*, TIME, June 17, 1991, at 44; Michael H. Shapiro, *Can Children Be Used as a Means to an End?*, L.A. DAILY J., Mar. 22, 1990, at 7. On the use of fetuses as sources of transplantable tissue, see John Robertson, *Fetal Tissue Transplants*, 66 WASH. U.L.Q. 443 (1988); Michael H. Shapiro, *The Good of Evil*, L.A. DAILY J., Feb. 1, 1989, at 7.

189. This is one aspect of the "non-identity problem." See PARFIT, *supra* note 62, at 351-79.

190. HEYD, *supra* note 16, at 52-53. For Heyd, genesis problems "raise the unique logical metaphysical and therefore ethical puzzle of the status of *potential* beings, that is to say beings whose existence is not only remote in time but totally dependent on our choice." *Id.* at 11. Heyd argues that such problems are "unique, not in being new, or in requiring novel adaptation of ethical principles, but in the fact that they resist any kind of ethical treatment." *Id.* at 12. The term "genethics" is taken to refer to "the field concerned with the morality of creating people, that is, decisions regarding their existence, number and identity." *Id.* at xii. The "pure" genesis problem arises when there are no humans in existence. The "impure" form concerns "contexts where there already *are* human beings and the question is whether to create any *more*, of what kind, and how many." *Id.* at xii.

traits we wish, including the desire to be slaves or teddy bears. But there are other aspects of Heyd's claim that require attention here. He says, for example, that decisions to conceive or not to conceive children "cannot be guided by respect for [them]." But the issue here is not whether we owe anything to the unconceived by way of causing or preventing their existence.¹⁹¹ The issue is whether we owe duties that provide, in effect: "Apart from the issue of a duty to give you or deny you life, there is a contingent duty of this sort: if we give you life, our *reasons* for doing so are subject to moral analysis, and we may conclude that agents have acted improperly if they act for certain reasons when creating life." After all, if we are talking about actual reasons for trying to bring persons into existence, we are talking about persons who will exist and will in fact be treated in certain ways, not about unconceived entities.¹⁹²

The idea of this duty contains no contradiction and is not incoherent. There is nothing in the Formula that keeps us from stating that someone who, say, procreates a "standard" person for the specific purpose of providing a concubine enslaved to a potentate violates its terms, even if the concubine is treated "well."

There are indeed difficulties we can identify when we vary the example and consider not only the reasons for reproduction but certain methods. Consider, for example, hard-wiring the person created to love slavery. But the fact that conceptual difficulties attend *some* forms of creation doesn't mean that they attend all, leaving their moral analysis freighted with paradoxes and incoherences. We are not bound, in order to avoid paradox, to say that there can be no im-

191. It is not necessary to discuss the "wrongful life" cases directly, though the debate surrounding them reflects some of the paradoxes about "genesis." See generally Turpin v. Sortini, 643 P.2d 954 (Cal. 1982) (claiming to reject the wrongful life theory and denying general damages, but awarding special damages nevertheless).

192. Not every effort to produce a child will succeed, but a very high fraction of them do. We are easily entitled to forecast persons who will in fact exist, even if we cannot say just whose children they might be. Consider the "prenatal tort" cases, in which negligent actions prior to conception may be actionable if they proximately cause injury to a subsequently conceived child. E.g., Renslow v. Menmonite Hospital, 367 N.E.2d 1250, 1255 (Ill. 1977) (recognizing the right to be born free from foreseeable prenatal injuries caused by breach of duty to mother prior to conception). Out of a set of preconception mishaps that could result in a badly injured child, a number of such children are likely to come into existence.

This is more or less the position articulated in JOEL FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 95-104 (1984) (discussing prenatal tort cases as vindicating "prenatal rights" that are "contingent upon later birth"). These cases seem to fall within Heyd's category of "actual persons": the child's birth was not contingent on the very decision whose moral qualities are disputed.

proper reasons for creating persons. It is not meaningless to question whether a family acts properly in having a child to provide bone marrow to an existing sibling, even if we ultimately conclude that this is indeed permissible, at least under certain circumstances.

As for Heyd's remark that in procreation, "the child is taken purely as a means,"¹⁹³ it is not clear what this means. There may be an equivocation at work in the very idea of being taken "purely as a means." The argument seems to be that the unconceived child, being unconceived, cannot be regarded as an end in itself, and so in being created the child is necessarily used as a pure means. There is no available middle.

But this is all too simple. The parents of course reproduce because *they* want to, not because the child wants to. The fact that *their* motivation is decisive, however, entails neither that the child's creation represents its use merely as a means, nor that it is not being treated as an end.

This dispute has nothing directly to do with duties to the unborn or with wrongful life issues involving the comparison between existence and nonexistence. The issue is about whether it is meaningful to raise certain moral issues concerning procreation for certain reasons or under certain circumstances. The fact that the resulting child may have a life that is worth living, regardless of parental purposes, is not to the point. The only question is whether the moral agents who created her acted improperly in doing so. If the Formula "asks us to consider maxims from the point of view of those who are treated in accord with the maxims,"¹⁹⁴ then we are to judge the actor by determining if she is adequately taking account of another person's point of view, whether or not the person scheduled to be born is presently in existence.

Still, the nonexistent person has no point of view, right? Right, but not clearly relevant. We are, by hypothesis dealing with situations in which *decisions to reproduce are made, and are made for certain reasons*. Decisions to reproduce are very often followed by actual reproduction. We are entitled to believe it highly probable that presently unconceived entities will in fact come to be. It is not apparent

193. See *supra* text accompanying note 190.

194. HILL, *supra* note 129, at 45. Hill states: "The first formula of the Categorical Imperative asks us to test maxims from the agent's point of view; the second . . . asks us to consider maxims from the point of view of those who are treated in accord with the maxims. But the main question is the same: Is the maxim one which any human being can, without irrational conflict of will, accept when applied to oneself and to everyone else?"

why their future points of view—indeed, their entitlements to the respect due to autonomous persons—cannot be taken into account without plunging into incoherence.¹⁹⁵ It is one thing to say that “there is no duty to keep the unconceived unconceived.” It is quite another to say that acting morally requires that the decision to conceive be taken for proper reasons, and that if such reasons do not hold, reproduction is wrong because of the treatment-to-come of the person-to-be. (If the treatment does not in fact occur, the reproduction is arguably still wrong, but I do not discuss this.) To say that such reproduction may be wrong does not entail the existence of a duty to keep the unconceived unconceived.

The issue can be pursued further by distinguishing, as does Heyd, between actual and possible persons. The former are persons who exist now or will exist in the future regardless of the specific reproductive decisions in question. Possible persons are those whose existence rests on our reproductive decision.¹⁹⁶ In the latter case, the child’s birth is contingent on the very decision under moral appraisal is in question.

Suppose a societal decision is made that all children born within a given time frame will be enslaved.¹⁹⁷ These children are for Heyd actual persons: they are scheduled to be born. There is apparently no creation paradox associated with applying the Formula, whatever else might ail its application. One can thus coherently argue that producing such children would violate the Formula.

Suppose next, however, a person faces the question whether to have a child to place in slavery, or not to have a child at all. (There are two variations here. In one, there is a mandatory enslavement rule in place and children must enter slavery; in the other, it is up to the parents whether to send the child into slavery.) The child falls into the “possible person” category, and so the potential person’s interests are in Heyd’s view not to be considered in the reproductive decision.

195. Cf. Doran Smolkin, *Book Review*, 104 *ETHICS* 629, 630 (1994) (questioning Heyd’s “argument that it is logically inappropriate to explain the wrongness of genetical choices by appealing to the rights of possible future people,” and concluding that “it is difficult to see why a rights-based view of this sort [as in cases of bringing a seriously impaired person into being] should be ruled out as logically incoherent”).

196. HEYD, *supra* note 16, at 11, 97. See also Peter Singer, *Book Review*, 7 *BIOETHICS* 63, 64–65 (1993) (reviewing Heyd’s book and describing the distinction). Singer also questions Heyd’s conclusions concerning the limited use of ethical analysis in genesis problems. *Id.* at 67.

197. Ignore incentive effects on the birth rate resulting from the decision.

Note the difference between this case and the case where we know that if a child is born it will have severe disabilities. There are no alternative forms of existence for the child. But there are alternative forms of existence for both the “actual” and “possible” children. Society could rescind the mandatory slavery order; or the prospective parents could secrete the child; or, where there is no mandatory enslavement rule, they could simply change their minds about enslaving the child and have him anyway, a decision that can be made before or after conception. None of these changes necessarily affects matters of timing, so there is no logical exclusion of alternative circumstances of existence: the conditions in question are not part of the child’s very structure or necessary to his existence. The selfsame child could thus be born, but under different conditions and with different parental and societal attitudes.

The Formula may have a practical as well as a theoretical role in analyzing the slavery scenarios. Even when success is unlikely, it makes sense to challenge prospective parents by exhorting them to revise their intentions. It may be part of the function of invoking the Formula to move people to alter their motivations. If the outcome is that they decide not to reproduce, the formerly actual future child is now, for Heyd, a possible child, but it is hard to see how this “change of status” affects whether the Formula is properly applicable.

One can thus question the very point of the distinction between actual and potential persons. Once decisions are made to reproduce, persons are scheduled to come into existence, and one can then raise questions about the fate of the children—who now seem to be actual future persons, not just possible ones.¹⁹⁸ Why is it relevant that prior to the decision to reproduce, the existence of the child was contingent on the reproductive decision?

A parallel criticism is made by Singer, who raises the example of deciding whether to have a child who will live and suffer for six months and then die (compare Tay-Sachs). Under Heyd’s view, Singer argues:

198. Heyd himself acknowledges such puzzles, noting the “relativity” of the actual-potential distinction. HEYD, *supra* note 16, at 100 (“Unfortunately, the actual-potential distinction is beset by conceptual difficulties. It is in a profound way relative, that is, contingent upon the identity of the subjects making the decision, the scope of their knowledge, and their willingness to interfere with those decisions. . . . A future actual person may become potential for me at the moment I gain knowledge about the way I can control the process leading to conception.”). But this sort of “relativity” seems pretty extreme, and moves one to ask how much work the distinction can do. There are different degrees of relativity, and some may be fatal to certain claims.

Before they [the prospective parents] have made any decision to have the child, their interests count but those of the child do not. Now the child becomes actual, and its interests count. Therefore they should not have the child, for the child's suffering [by Singer's hypothesis] outweighs their interest in having the child. So they do what they ought to do, and decide to have the fetus aborted. But once a decision is made to abort the child, the child ceases to be actual, becomes merely possible. Therefore the child's interests no longer count, and from that moment, the couple's interests again lead to the conclusion that the pregnancy should be continued; but then . . . and so on.¹⁹⁹

This cycling of course arises from the fact that "actual v. possible" is a function of what decision is made, and decisions that are made can be unmade and remade endlessly. It is perfectly sensible to assert that someone should not be brought into existence for a specific reason or purpose—even though that person's existence was contingent on the decision to reproduce for that reason. If this seems odd, bear in mind that the Formula applies *whether or not the results are beneficial to the person treated merely as a means and not as an end*. Kant is no simple utilitarian. If there is anything difficult to understand, it is the idea that one does wrong when acting for certain reasons, even if the results are unexceptionable on a simple consequentialist view. But this reflects familiar issues about assessing the moral status of "similar effects" arising from conduct that was inspired by sharply different states of mind.

I add here that Kavka has dealt with the problem of applying the Formula to creation of persons by revising the Formula: "The modified imperative would forbid treating rational beings *or their creation* . . . as a means only, rather than as ends in themselves. This principle directly condemns the couple's actions in the case of the slave child, for they use the creation of the slave child solely as a means to their ends."²⁰⁰ Heyd no doubt would reject the revision as embodying the paradox he discusses. In any case, the justification for Kavka's revision lies at least in part in his denial that "human existence, and the power to create, [are] commodities that may be sold for whatever the market will bear."²⁰¹ One might add, however, that a difficulty remains: nonexistence is the only alternative for the slave child, whose life, despite slavery, may be worth living and so preferable to nonexis-

199. Singer, *supra* note 196, at 65. See also John Harris, *Book Review*, 103 MIND 199, 201 (1994) (criticizing Heyd's distinction).

200. Gregory S. Kavka, *The Paradox of Future Individuals*, 11 PHIL. & Pub. Aff. 93, 110 (1982).

201. *Id.*

tence. One justification for the revised Formula is a sort of "normative-systemic" one:²⁰² the avoidance of practices that deal with persons as if they were commodities and so reinforce inappropriate attitudes and behaviors. The revised Formula thus encourages a broader range of personal moral virtue and of right actions. (I do not know if Kavka would concur with this characterization.)

Kavka applies this revision to a situation in which a couple, not otherwise bent on reproduction, have a child so as to provide a kidney to be transplanted into the father. He holds this to be "a clear case of using the creation of a person solely as a means to an end," and argues that it would be wrong even though "the child would receive a net benefit, for it would not have existed otherwise."²⁰³ I will refer back to this in the next subsection, where I mention the parallel problem of creating a child to provide a bone marrow transplant for an elder sibling.²⁰⁴

—*Problems of multiple characterization and suspect reasons in the creation of persons: the Ayala bone marrow case.* The problem of selecting the most appropriate among multiple characterizations is a familiar one.²⁰⁵ Each characterization may be legitimate but incomplete—and the degree of incompleteness may determine whether it is sufficiently accurate for given purposes. "I gave her something to drink" may be true but systematically misleading if the drink contained poison and was provided in order to cause death.

Consider this example of characterizing surrogacy: "The child is conceived, not because he is wanted by his biological mother, but because he can be useful to her and others. He is conceived in order to be given away."²⁰⁶

202. The term "normative-systemic" is taken from an earlier work. See Shapiro, *The Technology of Perfection: Performance Enhancement and the Control of Attributes*, *supra* note 68.

203. Kavka, *supra* note 200, at 111.

204. See text accompanying notes 207-218 *infra*.

205. See the discussion in Shapiro, *Fragmenting and Reassembling the World: of Flying Squirrels, Augmented Persons, and Other Monsters*, *supra* note 14, at 341. See generally ALVIN I. GOLDMAN, *A THEORY OF HUMAN ACTION* (1976) (discussing, among other things, problems in act description).

206. Herbert Krimmel, *Surrogate Mother Arrangements From the Perspective of the Child*, 9 *LOGOS* 97, 98 (1988). See also O'DONOVAN, *supra* note 17, at 37 (discussing adoption, and saying, "Notice that we do not have to introduce the notion of payment to make it repugnant [having children "for the sake of" the parents who are to take custody]. The suggestion of a commercial transaction merely underlines what is already present in the deliberate purpose of incurring a parental relation in order to alienate it." Cf. Sanger, *supra* note 30, at 451 (criticizing some criticisms of surrogacy, but stating that "[s]eparating

This account is not full enough: it describes what on one plausible view is a mechanism, elides it into a purpose, and then stops. It is more accurate and more complete to say that the child is being created for the standard purpose of being integrated into a nuclear family, and this is accomplished by transferring the child from the birth mother to the father.

I do not, however, have an algorithm for distinguishing suitable and unsuitable characterizations. Nevertheless, the idea that there are more and less accurate or useful characterizations is clear enough for present purposes.

To return now to the purposes of creating children, consider the well-known project of the Ayala family. Mr. and Mrs. Ayala had a child in order to obtain blood-producing stem cells for a seventeen-year old daughter with leukemia. (Note the difficulty of even describing what they did without begging the question.) Despite the 75% odds against compatibility of siblings and the difficulty of reversing vasectomies, the enterprise succeeded.²⁰⁷

How *should* one characterize this enterprise? Was the child created *solely* to be a mine for organs? That was the sole *precipitating* purpose. Is it enough to contaminate the reproductive enterprise as a violation of the Formula?

"Solely" can be a tricky term. If the intention was to mine the baby for the needed tissue and then literally discard her, "solely" or "merely" seems appropriate. The action would seem to be a fairly clear case of violating the Formula: a child has been used as a medicine supply box and then thrown away, thus using the child merely as a "means" and not treating her as an "end." But in fact, there never was any intention of discarding the child or treating it differently from an already existing child whose tissue was used. It thus seems inadequate and incomplete to say without more, as I did above, that the Ayalas reproduced "in order to obtain blood-producing stem cells" for their older daughter. That description seems to suggest that the child's entire value was exhausted by its use as a medical supply unit. That claim seems wrong, however. It is inaccurate to say, in either the Ayala case or where one uses an already existing

permanently from one's child is the very point of surrogacy"). As argued in the text, however, these are incomplete and unduly tendentious descriptions.

207. See *supra* note 188. Bone marrow transplants, although requiring anesthesia and causing significant but transient pain, are relatively safe and painless. The bone marrow regenerates. This should be contrasted with the parallel example of creating a child to provide a kidney for transplanting.

child's tissue, that the child has merely been used, or has not been treated as an end. The contemplated full lifeline of the child and her setting seem to foreclose this. One might reject this maneuver of selecting a "larger unit of characterization" to include comprehensive views of context, lifelines, institutions, and so on. If so, then an initial moral stain on reproduction might endure, whatever the subsequent history. But just why should the more inclusive description be rejected?

Suppose next that upon fetal testing it was determined that the child-to-be's bone marrow would be incompatible with her older sister's, and the fetus was aborted. (The Ayalas denied that they would have aborted an incompatible fetus.) The child was not otherwise scheduled to be born, so one cannot simply say the Formula applies because a child likely to be born was knowingly and avoidably damaged for life, say, by extracting fetal tissue in a way that leaves the resulting child impaired for life.²⁰⁸

Still, the driving occasion for conception in the Ayala case is quite unlike that in most other reproductive ventures. In "standard" situations, few think about or seek specific reasons for reproduction and have only vague and uncertain thoughts about them. If reasons are reviewed, they track common purposes such as the pleasure of children's companionship, carrying on the family name, and so on. The Ayalas' reason was *specific* and *narrow*, and here specificity is suspect because it gives the appearance of *limitation*, and hence of *reduction* of a person's value to a particular use; the person is then arguably *objectified*. So, the very inchoacy of "reasons for reproduction" may reflect a dimly felt intuition that being too definite or precise creates these risks of inappropriate uses of children.

Again, the Ayalas maintained that, once conception occurred, their general attitude toward and treatment of the child was to be identical to that of any other child born of a standard reproductive process: they intended to nurture and raise her as they would any

208. I do not directly address "non-Formula" arguments for avoiding certain uses of reproductive mechanisms, or for faulting the intentions of the parents(s). As suggested, however, arguments from selfishness, irresponsibility, and objectification seem conceptually linked to the Formula. One example for analysis elsewhere is ingestion of large quantities of alcohol by a pregnant woman. Here, the fetus or child-to-be is probably not being used as a mere means—it is not an instrument furthering the goals of liquor consumption—but it is clearly not being treated as an end. The incidental damage to it is the product of indifference or lack of control by the mother, whose preferences engulf any consideration for the child scheduled to be born. Such recklessness seems better characterized as inconsistent with treatment as an end rather than as mere use. It also invites consideration of non-Formula perspectives.

child they bore under standard circumstances.²⁰⁹ But there remains the problem mentioned above concerning the enduring moral blemish of the suspect reason for reproduction: assuming *arguendo* that the reason is morally suspect, is the “taint” removed by the ultimate treatment of the child as a person? As Lockwood states it:

Suppose that, at the time when she was first trying to conceive a bone marrow donor, Mary Ayala were to have responded to expressions of Kantian unease . . . along the following lines: ‘Certainly, the *only* reason why I’m trying to have another baby is to save my daughter’s life. But once the baby *exists*, I shall of course regard her like any other mother would her baby, loving the child for its own sake.’ The ambiguity has to do with the question whether Kant’s principle applies only to actions that presuppose the (present or future) existence of human beings, or whether it applies also to actions directed toward bringing human beings into existence.²¹⁰

Lockwood then goes on to compare other explanations for reproduction—the need for an heir, for example.²¹¹ He also invokes a sort of “subtraction principle”: “[O]ne would never, from a Kantian perspective, be entitled to use a child as a tissue donor, having conceived it with that end in view, unless one would equally have been entitled to use it thus, had it not been conceived for that purpose.”²¹²

209. James J. Rodriguez, *Woman Leads Fight to Save Sick Children*, L.A. DAILY NEWS, Jan. 31, 1996, 1996 WL 6544981 (quoting Anissa Ayala-Espinosa, who was saved by the bone marrow transplant: “[My sister] knows she is the queen and princess who saved my life”; Anissa now assists others in obtaining transplants.).

210. Lockwood, *supra* note 127, at 279-80. Lockwood raises the closely related issue about the relevance of parental states of mind—in particular, their attitude toward the child. As he puts it, there is the possibility that the Ayalas “saw a behavioural disposition not to abort as partially constitutive of an attitude towards the procreative process which sufficed to absolve them from the charge of violating the Kantian principle. It is as though they were saying: ‘Even though we are bringing a child into the world in the *hope* that it will be able to save our other daughter, we’re not, in so doing, treating human life merely as a means to an end. And the proof of this is that we are prepared to accept and cherish *whatever* life the process (not interfered with) produces, regardless of whether it can save our daughter.’” Lockwood, *supra* note 127, at 283.

See also ROBERTSON, CHILDREN OF CHOICE, *supra* note 3, at 215 (describing the charge that “conceiving a child to donate tissue treats the child as a mere means who is not being valued for himself, but solely as a source of tissue for another,” and responding that “[i]n cases in which the parents intend to rear the child who is conceived for donation, this charge seems greatly exaggerated and out of touch with the complex motivations that lead parents to have children”).

211. Lockwood observes that in many transactions our primary motivation entails treating a person as a means (but not a mere means?)—purchasing a ticket from an agent rather than a vending machine because of lack of change, for example. Lockwood, *supra* note 127, at 280.

212. Lockwood, *supra* note 127, at 280. He goes on to say: “And roughly speaking, one is so entitled provided it is reasonable to suppose that if, per impossible, one had been able to consult the child’s later (rational) self, it would have given its consent.” *Id.* at 280.

One might nevertheless argue that the narrow focus of the reason for conception threatens the normative ideal of noncontingent bonds between ourselves and our children: not all parents will conduct themselves as did the Ayalas. There is at least an aura of both mere use and failure to treat as an end. This is publicly observable and, to some, very threatening. Lockwood refers to “[t]he spectacle of a baby being brought into the world not, it seemed, as an end in herself, attended by all the sentiment and sanctity that people supposedly accord a new life. Rather the baby was ordered up to serve as a means, as a biological resupply vehicle.”²¹³ Although it is unlikely that there will be a massive breakout of such procreative acts, the image of mere use and failure to treat as an end would be amplified by multiple cases.²¹⁴ Our attitudes, so the argument would go, might then gradually shift toward viewing each other even more as mere means than we already do. But this point is perhaps too empirically contingent to be material under the Formula.

One might also argue that creating a person to save a person, despite its apparent narrowness, represents a far better reason for procreation than having a child because it’s expected of us.²¹⁵ Certain kinds of specificity or restrictedness of procreative motivations then might be said to save the venture from condemnation under the Formula, despite the reductivist risk.

Although the matter is not entirely clear, I suggest that Ayala-like enterprises do not violate the Formula. The best case for violation arises from the questionable characterization that in such actions the *entire value of a person is exhausted by a single use*, and the child’s value is *reduced* to its therapeutic utility. One could argue that the very plausibility of the reason for conception as compared with customary reasons *is precisely what suggests that the Formula has been violated*: the clarity and vividness of the discrete lifesaving goal emphasizes the limited purpose for the person’s existence and her reduction to the value of some of her parts. If so, perhaps one’s attitude

213. Morrow, *supra* note 188, at 44, *quoted in* Lockwood, *supra* note 127, at 270.

214. For references to cases similar to the Ayalas’, see Lockwood, *supra* note 127, at 270; *Baby’s Bone Marrow May Help Sister*, L.A. TIMES, Nov. 22, 1994, at A20 (“A baby conceived in the hope that her bone marrow would halt the leukemia that is killing her 5-year-old sister has been born in Cleveland. . .”). For an umbilical cord case in which a child was conceived for lifesaving purposes, see *Leukemia Patient, 5, Goes Home After Umbilical Cell Transplant*, L.A. TIMES, May 12, 1995, at A24. The Ayala’s efforts seem to have been successful, as we saw. See *Where Are They Now*, TIME, Nov. 28, 1994, at 116 (reporting that the two sisters are in good health). See also Rodriguez, *supra* note 209.

215. See Lockwood *supra* note 127, at 283 (endorsing this point).

and subsequent treatment of the child do not avoid violation of the Formula.²¹⁶

But I used a slippery qualification above: “Ayala-like enterprises.” What about Kavka’s example of the child born to provide a kidney for transplanting.²¹⁷ Here, the “calculus,” such as it is, is different: kidney extraction is far more intrusive and risky than bone marrow extraction, and kidneys do not regenerate, placing the child at elevated risk for the rest of her life. The term “mere use” suggests a component of disproportionate risk imposition—a factor already encountered when discussing selfishness and irresponsibility. Kidney transplantation thus seems less consistent with our view of children as ends in themselves because of the risks it imposes, although there is still the major compensating benefit of saving the transplantee. (The benefit may be assigned less value, however, if the beneficiary is a stranger, rather than the child’s father. Or should it cut the other way?) Disproportionate risk imposition, then, seems to suggest both mere use and failure to treat as an end. Thus, even if in all other respects the child would be treated as would any other child, as in the Ayala case, the issue remains unclear.²¹⁸

But it may be that the conceptual apparatus contained within the Formula does not speak to this puzzle about the circumstances of creation—not because of Heydian paradox, but because of irresolvable indeterminacies in the very ideas of mere-use-as-means and treatment of persons as ends in themselves. Still, I suggest that the child is not being used merely as a means, and that she is being treated as an end in herself, despite the confined rationale for her birth.

(b) More Examples of Applying the Formula to NRTCs—In Brief

The Ayala case is one example of how the Formula might apply to creation of persons, and it illustrates the connected problem of multiple alternative characterizations of reproductive ventures. Here are several others.

i) Consider whether *germ line augmentation* violates the Formula. It was already suggested that such intervention does not necessarily reflect unacceptably selfish motivations, though it poses

216. This line of analysis could be converted into an “argument from symbolism”: the suspect appearance of the transaction is a reason for criticizing it because it mediates undesirable learning and behavior. See section IX, text accompanying notes 307-325, *infra*.

217. Kavka, *supra* note 200.

218. Kavka, as noted, thinks the kidney case a clear violation of his revised Kantian Formula. Kavka, *supra* note 200, at 111-12.

risks of the sort already described: conveying the impression that the value of a person is linked or reduced to specific traits, thus imperiling the ideal of noncontingent bonds between ourselves and our children.²¹⁹

A number of theoretically possible cases of germ-line alteration seem to be good candidates for proscription under the Formula. Creating seriously impaired children for amusement might be one example.²²⁰ (Rejecting unaffected fetuses and preferring affected ones is a different matter, discussed again later.) Constructing beings to be impressed into some specialized service relying on engineered traits also seem questionable under the Formula—again, even where the resulting beings' lives are, to them, worth living. We might, for example, produce persons of very short stature, suitable for exploring small caves. But I defer further comments about germ line engineering to the discussion of objectification.²²¹

ii) Consider next the case of *parents affected with a condition traditionally thought disabling who selectively abort unaffected fetuses until they carry an affected one that they bring to term; or who select embryos or gametes that are affected and discard the others*. In the case of embryos, the situation is changed if the unaffected embryos are "adopted" by others. Determining whether gametes are "affected" is possible for various conditions but does not seem fully practicable at present. The examples of such selective procreation and companionship usually involve certain forms of dwarfism and deafness.

219. Cf. Ryan, *supra* note 48, at 8 ("I share the fear that this understanding of procreative liberty incorporates a notion of children as products, on the assumption that individuals have a right to a particular kind of child . . ."). My argument, however, takes as a standard of evaluation the challenge to the ideal of noncontingent bonds, and does not rest on loose notions of children as "products." Nor does it reject the idea of a presumptive right to have children of a particular kind—though much turns on what kind of "kind" is in question. Is it improper, say, for an African-American woman contemplating artificial insemination by donor to insist on insemination with sperm from an African-American man?

220. Ryan, *supra* note 48, at 7 ("A couple is not free to alter genetic material in a way that would cause serious harm to the offspring (that is, harm so great as to make its life not worth living.")). See generally Robertson's discussion of "intentional diminishment," *supra* note 3, at 170-71. Compare, however, the creation of persons with unusual conditions that would make them particularly suited for certain environments—though not for "normal" ones. Assuming such persons are not impressed or improperly manipulated into service, the case for interdiction under the Formula is weaker here: it is possible that tailoring children's traits to their projected environments promotes their future autonomy and recognizes them as ends in themselves without merely using them. Under standard conditions, in fact, we would think it important to promote personal adjustment with one's environment in order to further autonomy and personhood.

221. Part V, text accompanying notes 229-273 *infra*.

Consider Lockwood's assessment of these possibilities: "[O]ne might think it a violation of the [Kantian] principle deliberately, for some ulterior end, to choose to have a child whose expectations, as regards the likely length and/or quality of its life, were less good than a child they could just as easily have had instead."²²²

What does "ulterior end" mean? If we suppose that dwarfism is selected to help raise an army of persons who will be conscripted into exploring tiny enclosures—or rescuing people trapped in them—with no concern given to their individual preferences, life choices, or ultimate welfare, there seems to be little problem with condemning this under the Formula, assuming it applies to creation of persons at all.²²³ To be sure, one could imagine scenarios in which this is not so—for example, a repressive society in which the only hope for escape is to become a cave explorer. One might respond that, working with Heyd's example of persons "created so as not to care about longevity and pain,"²²⁴ no one is harmed by being created with disabilities which one accepts or even prefers. But the Formula may nevertheless forbid this.

Applying the Formula is not, of course, the sole step in moral analytics concerning NRTCs. For example, if the unaffected potential child is "replaced" by the affected one, then a utilitarian analysis might conclude that replacement was wrong because it failed to optimize the balance of good over evil. Thus, even if the affected person's life was worth living, if it would not represent as many aggregate utiles as that of the unaffected child's life, the replacement would fail under

222. Lockwood, *supra* note 127, at 282.

223. See text accompanying notes 187-204, 217-218, *infra* (discussing Heyd and Kavka on the application of the Kantian Formula to creation of persons). See ROBERTSON, CHILDREN OF CHOICE, *supra* note 3, at 171: "When one deliberately tries to have a less than healthy child to serve extraneous goals, the reproductive interests that are ordinarily valued are so diminished that a meaningful conception of the values underlying procreative liberty appear to be absent. Indeed, the scenario here treats the engineered individual as an object or thing to serve the fabricator's interests, rather than a new person desired in part for her own sake." As Robertson acknowledges in the accompanying footnote, however, there are some complications. In applying the Formula, suppose the creator cares for the creatures created and treats them well. Suppose also the creatures like their lives. See generally Kavka, *supra* note 200, at 100-11 (discussing "the case of the slave child" and related topics). See also D.H.M. Brooks, *Dogs and Slaves: Genetics, Exploitation and Morality*, 88 ARIST. SOC. PROC. 31 (1987-88) (positing happy slaves). Because of the overwhelming importance of autonomy under conditions where the "authenticity" of one's preferences is not in doubt, it is unlikely the Formula would sanction such a situation. There are of course serious problems in analyzing "authenticity" and it may be in question in this example. See generally FADEN & BEAUCHAMP, *supra* note 161, at 237-38, 262-69 (1986) (discussing authenticity—"one's own" actions, character, beliefs, and motivation").

224. HEYD, *supra* note 16, at 172.

this utilitarian analysis. But here one has to insert the possibly greater number of parental utiles in the "replacement" case and so on.²²⁵ More, one has to consider the possibility that the lives of affected persons within affected communities would generate greater utility overall than the lives of unaffected persons within those communities.

iii) Finally, think once more about *surrogacy*. Suppose Mr. and Mrs. Stern "merely used" Ms. Whitehead and she "merely used" them. Indeed, assume she—as opposed to the Sterns—merely used the child. The child, after all, was simply a means of earning money for her, as some say. I suggest that despite the "mere use," the overall transaction—the creation of a person integrated into a family unit for standard reproductive purposes—remains morally intact under the Formula. This does not mean the Formula has no application; one can imagine reproductive transactions in which, say, the child is produced for enslavement, or the surrogate is a captive.

However, it seems quite overdone to assume loosely that either the Sterns or Ms. Whitehead *did* use each other merely as means or that either—especially the Sterns—similarly used the child. Did Mr. Stern view Ms. Whitehead *in part* as an instrument for reproduction or *entirely* as such a tool? Did she regard him *solely* as an instrument for providing money? Even if so, it is not clear that this corrupts the resulting relationship between the Sterns and the child.

There is still more to suggest that the Formula does not clearly condemn surrogacy. Such transactions have always been subject to traditional legal strictures against coercion, undue influence, and both common law and constitutional constraints against bodily intrusion. No one forced Ms. Whitehead to continue an unwanted pregnancy or prevented her from terminating it. There is no persuasive case that her consent reflected false consciousness. And no one compelled her to enter the transaction in the first place. She was paid to provide a service, and it is not apparent why paying someone to provide a service is in general a violation of the Formula. If it is said that this service is special, one can agree, but this premise does not help to establish a Formula violation absent a more complete account of such specialness. As Herman suggests, "If what I desire is that you perform some use-to-me service, morality requires that I take your voluntary participation as a condition of your action. Whatever my instrumental interest in you, I may not regard you as a mere instru-

225. See PARFIT, *supra* note 62, at 351-79 (discussing the non-identity problem).

ment.”²²⁶ But if another party’s voluntary participation is indeed a condition for entering into a transaction with you, and you acknowledge this and act on it, are you viewing her as a mere instrument? This seems unlikely.

(4) *Individuals and Networks Revisited*

The Formula is obviously meant to apply at least to individual moral agents. And there are at least hints in the Kant scholarship suggesting that the Formula applies to institutions and networks of practices.²²⁷ There is also the possibility, mentioned earlier, that there is a political dimension to full Kantian analysis that legitimizes certain networks and institutions despite condemnation of some of their constituent elements. A transaction or practice is thus not necessarily polluted by the lack of virtue of some of the moral agents involved.

But for the sake of argument, suppose otherwise: if any individual moral agent violates the Formula, an entire transaction may be tainted, despite its being nested within a network of relationships. Here, “tainted” means sufficiently marked by immorality that the transaction should be disallowed. If the taint involved is endemic to such transactions, perhaps the overall practice it reflects should not continue.

If this is indeed what the formula entails, one would have to seriously question its independent role in moral analysis. Most employment relationships would fail because of the overwhelming probability that at least one person in a major position of authority would be acting contrary to the Formula. I will continue to assume, however, that the Formula may be used to appraise social practices,²²⁸ and that such practices are not necessarily to be disallowed because of individual violations of the Formula. Nevertheless, it is well to keep the issue in mind: if major actors within some network violate the Formula, their actions *may* in fact have such an impact that the overall transaction should be condemned. This is likeliest when the violation involves coercion or undue influence. It is true that the Formula is not essential to condemn such actions, but it furthers the analysis and arguably should escape Ockham’s razor.

226. Herman, *supra* note 2, at 62.

227. See text accompanying notes 134-149. There is also the question, mentioned earlier, that I do not examine: even if the Formula applies intact to individual moral agents whatever the surrounding network of actors and institutions, there may be a political dimension to full Kantian analysis that legitimizes such networks and institutions despite condemnation of some of their constituent elements.

228. See *supra* text accompanying notes 134-149.

V. Objectification and Commodification

It is often charged that use of NRTCs may objectify persons. I suggested earlier that there are important conceptual and moral links between this claim and the claims that NRTCs may violate Kant's Formula, or reflect selfishness and irresponsibility of the NRTC protagonists. I do not attempt a unified field theory, but simply try to give some nonexhaustive account of what is being claimed by critics of NRTCs.²²⁹

A. The Nature of the Arguments from Objectification and Commodification²³⁰

(1) *The Work Done by the Argument from Objectification*

The argument from objectification, such as it is, is not usually presented as a true argument, nor illuminated by an explication of the central term. A picture is presented—one which is said to capture an instance of objectification confirmable by simple inspection or by some (easy and quick) inferential leaps. It is as if we were dealing with a simple process of perception in which it is only slightly more difficult to see that "*X*ing is an instance of objectification" than it is to observe that "*X* is red." Objectification is virtually a given: either you see it or you don't.

In these conclusory forms, however, ascriptions of objectification do not illuminate much. For example, some notion of objectification seems to lie behind Nelson's "flowerpot argument":

To what extent . . . should the common good of refusing to perpetuate images of women as maternal backgrounds or flowerpots constrain a prospective father's preference for sustaining a postmortem pregnancy for more than a few days?²³¹

229. I have discussed this in some prior works. See Shapiro, *How (Not) to Think About Surrogacy and Other Reproductive Innovations*, *supra* note 58, at 661-63; Shapiro, *The Technology of Perfection: Performance Enhancement and the Control of Attributes*, *supra* note 68, at 32-33; Shapiro, *Fragmenting and Reassembling the World: of Flying Squirrels, Augmented Persons, and Other Monsters*, *supra* note 14, at 350-57; Shapiro, *Regulation as Language: Communicating Values by Altering the Contingencies of Choice*, *supra* note 14, at 760-61.

230. "Commodification" is treated here as a subspecies of objectification where matters of trade and commerce (and certain forms of property) are of major importance. *But cf.* Nussbaum, *supra* note 37, at 284 (stating "commodification" refers to "instrumentalization/ownership"). For a brief description of objectification claims, see Lauritzen, *supra* note 36, at xiii-xiv.

231. Nelson, *supra* note 2, at 134. Flowerpots are also mentioned in Rothman, *supra* note 3, at 1603 (attributing the metaphor to Caroline Witpick: "Women are . . . just the flowerpot in which men plant it [i.e., "the little person"].").

I will return to this entertaining but deeply flawed remark later. But first it seems important to indicate what a true argument from objectification might be. Here is one rough formulation:

1) Under most of the foundational theories that might underpin our views, certain concepts are critically important in morally evaluating human conduct. Among them are the ideas of "person" and "object." These notions are morally material because of a principle embedded in these foundational theories: we are presumptively required to treat others as persons and not as objects. Objectifications link to the Kantian Formula and to matters of selfishness and irresponsibility seems plain in this light. Some may think the principle and the Formula are identical, or at least extensionally equivalent. Although neither "person" nor "object" seem to be all-or-nothing ideas, the usual view is that treating one as a person and treating one as an object are mutually exclusive. Of course, in describing complex interactions we might wish to say that "X is treating Y as an object in respect Z but not respect W." Even so, the treatment must be tilted far more toward treating Y as a person than as an object in order to avoid nearly automatic moral condemnation.²³² 2) Certain transactions wholly or partly treat persons as objects, and, being observed as practices or institutions, make us come to see various persons or groups as objects. One can confirm treatment as an object by investigating the putative user's inappropriate intentions and attitudes and her lack of respect for the other party's autonomy and bodily integrity; her nonrecognition of the other party's independence and separateness; her failure to take account of limitations on his capacities; and by actions and attitudes that bespeak treatment of the other party as property. (These are overlapping and nonexhaustive variables.) 3) Among these transactions are various NRTCs. 4) Therefore, many of these transactions are presumptively wrong. 5) Because no legitimate countervailing considerations are ordinarily available in these transactions, the presumption is not overcome. 6) Because legal policy should track moral characterizations concerning *serious* moral wrongdoing or rightdoing, at least some NRTCs should be discouraged or banned, with suitable enforcement mechanisms.

This account offers at least a bit more than a conclusory assumption. It is clear, however, that much more is required to evaluate the argument from objectification—and even to describe what it claims. For one thing, protagonists should have to say *something* about foun-

232. Cf. HERMAN, *supra* note 2, at 59 (asserting that "[w]e cannot have rights of disposal over persons because persons are not things").

dational theories and their application. In what does the evil of objectification lie? The unhappiness or pain of the person objectified? Even in nonconsequentialist theories, we know it is too much to state that consequences are irrelevant. Still, it often seems to be of lesser importance in such theories than in consequentialist theories to investigate matters of legally compensable harm such as emotional distress, psychological disablement, or whatever specific components of ruined lives one can think of. On nonconsequentialist modes of evaluation, treating someone in certain ways may be intrinsically wrong, even if such harms do not occur or cannot be shown to occur. The outcome of applying Kant's Formula, for example, does not seem to rest exclusively on such showings.

There is ample authority for the idea that we should recognize as legal wrongs a variety of assaults on personhood and allied concepts such as dignity and privacy, even if nothing harmful in a simple sense can be discerned. Recall, for example *Moore v. Regents of University of California*,²³³ which called for compensation on a melded fiduciary obligation/informed consent theory where a patient's cells were used without his knowledge to construct a valuable cell line. The driving concept was the conflict of interest afflicting a physician-investigator; a showing of harm was not a central focus of the decision. Perhaps the ultimate justification for rules recognizing "intrinsic harms" is actually consequentialist; it may promote a net benefit of good over bad.²³⁴ But the NRTC literature goes beyond asserting intrinsic harms: it adds that treating persons as objects causes them pain and suffering and psychologically, politically and economically damages entire classes of persons—notably, women, unadopted children, siblings of children transferred by surrogates, and the transferred children.

I do not think that either arm of analysis — NRTCs as intrinsically or as instrumentally harmful — establishes that any of the most commonly used NRTCs are morally infirm across the board. Indeed, I don't think it is even a close case. So I try to find where the discussion has gone wrong.

233. *Moore v. Univ. of Cal. Regents*, 793 P.2d 479 (Cal. 1990).

234. On comparing consequentialist and nonconsequentialist arguments, and fitting rule-utilitarianism into this schema, see, e.g., Samuel Freeman, *Utilitarianism, Deontology, and the Priority of Right*, 23 PHIL. & PUB. AFF. 313 (1994). Freeman notes that "the teleology/deontology distinction does not mark a contrast between moral conceptions that take consequences into account and those that do not. No significant position has ever held consequences do not matter in ascertaining what is right to do." *Id.* at 348. See generally SAMUEL SHEFFLER, *Consequentialism and its Critics* (1988).

- (2) *The Systematic Errors In the Objectification Literature: The "Fragmentation of Perception" (Multiple Perspectives Ignored); Reductivism Exaggerated; Terminology Misinterpreted; and "Fragmentation and Reassembly" Misconstrued*

I think the argument from objectification has gone wrong in the following ways.

(a) Objectification Is Rarely Defined²³⁵

We are simply offered examples that are said to embody it, at least in their respective contexts. As suggested, the characterization is often thought to be no more problematic than simple sense perceptions: one either apprehends the characteristic (objectification) or one is missing the point or having an inverse hallucination. Certain actions in their contexts, we are told, simply reflect or are constitutive of objectification: they *amount to* treating or viewing a person as an object.²³⁶ If it is not a transaction that "in itself" constitutes objectifi-

235. Nussbaum's work is an exception. See *supra* note 37, at 258. She describes it as a cluster concept, and cites as generally independent criteria the ideas of instrumentality; denial of autonomy; inertness; fungibility; violability; ownership; and denial of subjectivity. Much of her discussion revolves around certain literary texts describing sexual activity.

Note that there is a family of terms to be sorted out here, and their logical interconnections are not always apparent: objectification, commodification, dehumanization, instrumentalization, reduction, treatment as mere means and not as an end, and so on. Which ones are criteria for the others may be difficult to determine in any given case. I do not add to Nussbaum's account here.

The meaning of "reductionism" here is obviously related to but not identical with any of its linked meanings as used in philosophical and scientific analysis. For careful accounts, see the paired articles jointly titled *Reductionism: Ned Block, Philosophical Analysis*, 4 *Encyc. Bioethics* 1419 (1978), and Ruth Macklin, *Ethical Implications of Psychophysical Reductionism*, 4 *Encyc. Bioethics* 1424 (1978). "Reductionism" in the NRTC context is less a matter of true ontological commitment about what exists and in what form than it is about ways of seeing and dealing with persons "as if" they were "just" Xs or Ys (where X and Y are narrow, exclusionary descriptions). Macklin distinguishes between "ontological" and "ideological" reductionism, *id.* at 1427. See also Daniel J. Kevles, *Vital Essences and Human Wholeness: The Social Readings of Biological Information*, 65 *S. CAL. L. REV.* 255-57 (1991) (discussing views on physicochemical reductionism in connection with the Human Genome Project).

236. See ROYAL COMMISSION, *supra* note 82 ("The premise of commercial preconception contracts is that a child is a product that can be bought and sold on the market. . . . The commodification of children *entailed* by preconception arrangements ignores these essential values [that children are not commodities or instruments]. . . . Commercial preconception contracts by their nature—the exchange of money for a child—contradict one of the fundamental tenets of the Commission's ethical framework.") (emphasis added). Cf. Marcus, *supra* note 43, at 214 (quoting Barbara Katz Rothman's comment "Surrogacy *entails* the notion that one can rent a womb and can affix an arbitrary price tag on pregnancy, often \$10,000.") (emphasis added).

cation, the context of the transaction may nevertheless embody power and domination of one person or group over another, in a way that is inconsistent with ideals of personhood.²³⁷

But "objectification," "object" and cognate terms badly need explanations of the following sort: What propositions does "*X* is an object" entail? That *X* can be held and disposed of at will, assuming a certain battery of legal rights, such as property rights? That *X* can be used for various purposes without addressing its interests? More particularly, we need know what "*person X* is being treated, or viewed as an object" entails. That the person is being used simply as an instrument, without attention to her preferences, needs, bodily integrity, . . .? That the person is reduced in value to some particular component of her existence? Of course, what *these* claims mean is itself hard to determine. We need to know also whether these specifications are necessary or sufficient conditions, or describe a cluster of relevant indicators, and so on. And we need to know more about the relationships between members of the family of terms: "objectifica-

Cf. also Sanger, *supra* note 30, who notes the argument "that surrogacy harms children by virtue of the intentional and permanent separation between a newborn and its birth mother," *id.* at 453-54, and responds by saying that "[t]he argument is striking in that none of the traditional concerns associated with developmental harm in consequence of maternal absence—that the child has been left in inadequate circumstances or that the separation occurs after the formation of an intense mother-child bond—seem to apply in the case of surrogacy If none of the traditional factors is in play, how then does surrogacy harm children? The common answer is that the fact of surrogacy, rather than the circumstances of any particular case, creates the problem. Harm derives from the set of relationships that surrogacy sets up and then demolishes; the arrangement itself puts children at risk," eventually damaging all children. *Id.* at 254. But this too is a claim hard to nail down: surrogacy does not occur in the abstract, and we still need a better account of the case for either intrinsic or instrumental harm.

But see Ruddick, *supra* note 45, at 124-25 ("[A] child is a parent's product, the result of intentional effort, but a product with the unique capacity to become the equal of its producers. Hence, child-producers may not treat children as if they were and would remain artifacts or property."). There are, in short, products and products, and to call children "products" in specified limited senses suggests little or nothing about how they are to be treated—never mind that they resemble toasters. *See* Ruddick, *supra* note 45, referring to the "product-origin" coexisting with its "autonomous future." *But cf.* Crocker, *supra* note 63, at 151 ("A word like 'investment' is out of place [referring to parental sacrifices in contributing to their children's welfare], since it suggests that the child is a piece of property."). It "suggests" a (very) partial similarity to, say, a real estate investment (lumping at work)—but not much more (splitting at work).

237. *See* Herman, *supra* note 2, at 57 (characterizing the work of Catharine MacKinnon, and saying that "[a]s she sees it, even if it is not of the nature of sexuality to objectify, objectification is a truth about sexuality as it functions in the gender structure of male dominance"). *See also id.* at 58 (objectification problems remain in the branch of feminist critique assessing "sexuality as-we-know-it, whether it is in the nature of sexuality to cause objectification or whether sexual practice expresses objectifying social structures").

tion,” “dehumanization,” “instrumentalization,” “treatment as a mere means and not as an end.” Which are criteria for which?

(b) “Objectification” Is Used as a Bottom-Line Word of Critique

Objectification is frequently taken simply as absolutely wrong, not something that might be justifiable, permissible or desirable in context.²³⁸ But just why is this so?²³⁹

This is a familiar sort of problem. One can insist, for example, that a claim of right is defeasible, or instead that a claim of right presupposes that all countervailing matters have already been considered. One can even urge that some claims are absolute, without regard to circumstances.

Here, one thinks again of the Formula and its insistence that use as a means is not per se impermissible—only use merely as a means. Is the logic of objectification like the logic of use? Why can’t there be objectification “in some respects” as well as use “in some respects”? In any event, without further specification of the core meaning of “objectification,” it is difficult to settle this issue.

(c) Comparisons to Commercial Transactions Are Made Clumsily

We are trying to find relevant indicia of what constitutes *turning a person into an object* from the viewpoint of others, and from the person’s own viewpoint. This may be aided by a *comparison* between a given transaction and standard instances of treating something as an object or *turning* it into an object. (We rarely speak of objectifying something already an object. As Nussbaum points out, “objectification entails inaking into a thing, treating *as* a thing, something that is really not a thing.”²⁴⁰) But such comparisons are rarely made, and when made are often done clumsily, by focusing only on *some* aspects of the transaction or relationship and affirmatively *excluding* others.²⁴¹ Such selective inattention to concurrent characteristics,

238. See text accompanying note 144, *supra* (discussing the circumstances in which “reduction” and “objectification” are harmless or even aspects of a larger, desirable process).

239. As Catharine MacKinnon asked concerning pornography, “if a woman is subjected, why should it matter that the work has other value?” American Booksellers Ass’n v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985) (quoting Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 21 (1985)).

240. Nussbaum, *supra* note 37, at 257.

241. In appraising Marx’s discussion of treatment of workers under capitalism as “objectlike,” Nussbaum suggests: “This tendency to equate [relations] that may be subtly distinct is closely related to MacKinnon and Dworkin’s tendency to efface distinctions among different types of sexual relations.” Nussbaum, *supra* note 37, at 263 n.21.

whatever the causes, does not make for sound evaluations. If the argument is that the differences ignored are irrelevant, then we are in need of a theory of relevance—one that establishes which features of a transaction or process are essential for some conclusion to hold. When procreation is divided and recombined and we try to fit the reassemblage into our forms of thought, it is not always apparent what elements are critical to recognition of parenthood, custody, companionship, and treatment of persons as ends. When we see a standard commercial transaction, a traditional reproductive venture, and a surrogacy transaction, on what basis does one conclude that the basic core of “commercialness” attaches to surrogacy but the basic core of humanness in reproduction has been lost? It is much too simple to say that women and children are commodified and dehumanized by surrogacy simply because of the transfer of money.

Still, NRTCs *do* resemble standard commercial transactions in certain ways, and this rightly makes us nervous. The similarities remind us that the distinction between persons and objects is perilously hazy,²⁴² and that we are all too ready to deal with each other as useful objects. If we “buy” someone to use as a slave, we are likely to see him as a thing and treat him accordingly, apart from the very recognition of legal “ownership.” And even if we don’t treat him cruelly, the practice of purchasing people can cascade into forms of behavior we now disdain and want to discourage. We may *learn* to do the wrong things and become less worthy persons. Yet because the literature is so bent on stressing similarities and not difference between NRTCs and standard commercial transaction—a preference for lumping over splitting—it cannot accurately gauge the risks in using NRTCs. Some modest attention to empirical observation may help avoid overdone claims that babies are being treated as sofas and pork bellies.²⁴³

There is also a tendency, in drawing comparisons, to engage in heavy-handed literalism in order to establish objectification. Consider, for example, the phrase “the right to acquire a human being

242. See Bruce Mazlish, *The Fourth Discontinuity*, *TECH. AND CULTURE*, Jan. 1967, at 1 (“In this version of the three historic ego-smashings [caused by Copernicus, Darwin and Freud], man is placed on a continuous spectrum in relation to the universe, to the rest of the animal kingdom, and to himself. He is no longer discontinuous with the world around him. . . . Yet . . . a fourth and major discontinuity, or dichotomy, still exists in our time. It is the discontinuity between man and machine.”).

243. Cf. FURROW, *supra* note 114, at 834 (describing the anti-surrogacy argument that “such a change in the nature of the reproductive processes dehumanizes the surrogate mother and harms the relationship between the child and the mother. The leads to the commodification of babies, who are treated as a market commodity not substantially different from sofas, pork bellies, or anything else that can be traded for money.”).

(and one with particular characteristics).”²⁴⁴ Ryan argues that a procreative right “should not be understood as unlimited, as extending as far as acquisition of a concrete human being.”²⁴⁵ This suggests the high risk of treating children as “property”²⁴⁶—which would arguably violate Kant’s Formula, depending on what one means by the term “property.” But the significance of the term “acquisition” is highly exaggerated: the use in reproductive contexts of terms that *also* are used in commercial contexts hardly entails that all aspects of meaning are carried over from one domain to the other. One indeed “acquires” children by adoption and by biological reproduction. It does seem a bit odd to use the term for biological reproduction, but its use simply does not establish objectification. Rhetorical flourishes are not necessarily outcome-determinative.

Similarly, loose talk of what “rights talk” involves in reproductive contexts also confuses the issues. Invoking rights claims is thought by some to sully the procreative process with a commercial aura. Ryan states, for example: “The success of Robertson’s argument depends upon accepting the view that persons can be the object of another’s right.”²⁴⁷ “[T]he very language of rights, implying as it does some exclusive access to property, must be seen as inappropriate when describing the structure of the family.”²⁴⁸

This is not persuasive. To talk of rights is to talk, among other things, of rights to control. Thus, parents presumptively have the right to manage their child’s nurturing as against the rest of the world, and they have the right to control the use of their toaster. But talking of rights in both contexts does not assimilate children to toasters (or the reverse). Only a misunderstanding of rights claims can explain the odd view that rights do not apply to questions of family structure. The term “rights” is used in related but nonetheless different ways in different realms. It is not confined to matters of “property.” Someone with custody of a child clearly has rights to govern the course of her life that others do not have, but this does not transmogrify the child into a piece of personal property. If one insists on calling any “bundle of rights” a “property” right, so be it: the obvious response is that there is property and there is property. Perhaps the error here is to

244. Ryan, *supra* note 48, at 7.

245. Ryan, *supra* note 48, at 7.

246. Ryan, *supra* note 48, at 10.

247. Ryan, *supra* note 48, at 7.

248. Cf. Robertson, *Posthumous Reproduction*, *supra* note 98, at 1039, 1046 (discussing “property rights” as matters of scope of control).

think that the term "rights" is synonymous through all varieties of discourse with the term "property." But the property-as-bundle-of-rights idea should not be viewed as transplantable intact across all such boundaries.

(d) Claims of Objectification are Often Driven by Particular Moral Frameworks and Ideologies

These frameworks and ideologies involve a strong aversion to particular form of reductivism: the identification of persons, especially women, with certain of their traits, thus fragmenting them into their "components."

This fear of reduction is by no means irrational: a woman may be looked at, dealt with, and valued largely on the basis of her capacity for childbearing and child rearing, and on her sexual role.²⁴⁹ And children born of NRTC's will be looked at and dealt with, at least in part, on the basis of their capacity to provide a return on one's financial and psychic investment in using the NRTC's. In the case of posthumous reproduction, for example, perhaps children will be evaluated on the degree to which they remind one and honor the memories of dead genetic parents.²⁵⁰ Such reductivism may be an integral part of a "technological imperative":²⁵¹ the pull to use the technology is bound up with a vision of the "product" and its projected

249. See generally Ryan, *supra* note 48, at 6 ("As persons whose self-identity and social role have been defined historically in relation to their procreative capacities, women have a great deal at stake in questions of reproductive freedom."). *Id.* at 6. In something of an overstatement, Ryan refers to "arguments for an unlimited right to procreate raised most cogently by John Robertson." *Id.* at 6. Robertson does not argue for a completely unrestricted right, though he urges an expansive procreative liberty. He has criticized Ryan on this point. Robertson, *Posthumous Reproduction*, *supra* note 98, at 1028 n.4.

Men are at some small risk for such reductivism also. See Murphy, *supra* note 16, at 387 (describing the view of various feminist commentators "that patriarchal perspectives have treated women fetishistically as mechanisms of reproduction rather than as metaphysically equal beings in their own right. Might the tables be turned here and it be plausibly argued that the practice of SH [sperm harvesting] for postmortem fatherhood had the same kind of reductive effect, not for women this time but for men? In the way women have been reduced to 'incubators,' would men be reduced by SH and postmortem fatherhood to mere 'sperminators?").

See generally Lauritzen, *supra* note 36, at 5-6 (discussing the Vatican's ideal of "unified totality" and warning of "one of the central difficulties of reproductive medicine: it approaches human reproduction as if it were nothing more than the union of bodily parts, namely, of gametes").

250. See Murphy, *supra* note 16, at 392 (discussing the possibility that, in using sperm harvesting and artificial insemination, "worthiness of children is established by their genetic fatherhood and the utter certainty of that link").

251. See text accompanying notes 15-16, 36-37, *supra*.

uses. The image of person as diminutive cave explorer subject to our control—an object of sorts—is part of the lure of genetic control, and thus of the “imperative” that drives us.

Yet in NRTC critiques there is only limited recognition that there are NRTCs of varying degrees of risk, some of which may be negligible. And there is often only a bare sense that objectification is not just a matter of getting concepts straight but of attending to facts. You can say that women and children are *necessarily* objectified in the context of a given NRTC, but when a child born IVF or surrogacy is raised as other children are, and takes her place in the community, and her genetic and gestational forbears continue their lives as free and independent persons, *what exactly are critics talking about when they claim that NRTCs necessarily objectify anyone or anything?*

(e) Reductivism Is Perceived to Be Driven Largely by Patriarchy and Male Domination Generally

On this view, little account is taken of the role of women in reproductive decision making: their participation is often loosely viewed as the result of undue influence, coercion, or false consciousness.²⁵² So, although there are indeed reductivist risks, the looseness of the arguments may result in greatly overestimating them.

Still, it is well to remember that reductivism is—or is a criterion for—a kind of objectification.²⁵³ We like bowling balls mainly for their capacity to knock down bowling pins, and little else. We like food for its capacity to nourish us, provide pleasurable sensations, fa-

252. See Shapiro, *Fragmenting and Reassembling the World: of Flying Squirrels, Augmented Persons, and Other Monsters*, *supra* note 14, at 390-91 (discussing autonomy and false consciousness).

253. See generally Nussbaum, *supra* note 37 (mentioning the idea of reductionism at several points in her discussion of sex (“Molly reduces Blazes Boylan to his genital dimensions”)) indicating that this is an example of a case in which “a human being is regarded and/or treated as an object, in the context of a sexual relationship”). *Id.* at 254. See also Nussbaum, *supra* note 37, at 264 (stating that “the very toollike treatment inherent in the institution entails a certain sort of fungibility, in the sense that a person is reduced to a set of body parts performing a certain task, and under that understanding can be replaced by another similar body, or by a machine”). She expressly links the idea of objectification to reductionism by noting that, in the work of D.H. Lawrence, “objectification is frequently connected with a certain type of reduction of persons to their bodily parts.” *Id.* at 274.

I add that this does not describe most NRTC situations, looked at as a whole and in context.

See also Herman, *supra* note 2, at 61 (“The problem leading to the institution of marriage in [Kant’s] *Rechtslehre* is . . . the reduction of person to thing—the surrender of self (rational personhood)—inherent in sexual activity.”). Once again, however, the application of this idea to NRTCs is shaky. See *supra* note 235 (references on reductionism).

cilitate personal relationships, and so on. For any given *object* or class of objects, we can construct a relatively short list of things for which they are valued. This limited range of value is partly what explains the fact that we use objects, trade them, and believe we cannot harm them.

(f) NRTC's Straddle Categories, Which Partly Accounts for Problems in Characterizing and Evaluating Such Transactions

"We have this neurotic need to have stuff in certain places,"²⁵⁴—that is, neatly placed in discrete bins. This is a partial explanation of "formalism", which insists on sharp classification in order to reduce uncertainty (an often illusory enterprise). Processes and things that resist such placement are often viewed with disdain.²⁵⁵ We thus are driven to lump and split and to achieve closure about how to think about something. But failure to acknowledge the difficulties in doing so often leads to inappropriate confidence in the strength of our categories and of the accuracy with which we locate things within them.

(g) What Is Being Objectified?

It may make a considerable difference in our evaluations whether we think it is a person or group that is being objectified, or some relationship or process: the latter form of objectification does not inevitably lead to the former.²⁵⁶ If we think markets objectify persons in their market roles, it does not follow that such persons are objectified, in some global sense.

(h) The Impact of Fragmentation of Life Processes Is Overestimated

In earlier works, I suggested that many problems we identify as "bioethical" share a certain family resemblance. Various biological technologies enable us to sever some portions of integrated, continuous life processes from others: sex from reproduction, genetics from gestation, personhood from persistence of organic life processes, de-

254. Jane Gross, *UC Berkeley at Crux of New Multiracial Consciousness*, L.A. TIMES, Jan. 9, 1996, at A1 (quoting Nicole Giusti, a college student of African-American and white ancestry).

255. MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO* 196-97 (Pelican ed. 1966). See also Shapiro, *Fragmenting and Reassembling the World: of Flying Squirrels, Augmented Persons, and Other Monsters*, *supra* note 14, at 338-44.

256. Note the identification of "a market whose commodity is the means of producing children" in Radhika Rao, *Law and Equality: Constitutional Misconceptions*, 93 MICH. L. REV. 1473, 1474 (1995) (reviewing JOHN ROBERTSON, *CHILDREN OF CHOICE*, *supra* note 3).

velopment and enhancement of some traits as opposed to others, and so on.

What are the consequences of such splitting and re-lumping? For one thing, it produces anomalous entities and, in so doing, makes it difficult to resolve real world disputes *because our criteria have been partially nullified*—or at least severely challenged. The criterion for presumptive custody of children, for example, is natural parenthood. But who is the natural mother in a gestational surrogacy, the genetic mother or the gestational one? Moreover, the disassembly-modification-recombination process looks in some ways like what we do with things, and so may contribute to our viewing and treating “reassembled” entities less as persons and more as objects.²⁵⁷

But this has led some to quick and easy conclusions about objectification and reduction: when making comparisons, one cannot properly suggest resemblances without offering differences, and vice versa: Lumping and splitting can't be split from each other for very long without risking serious error. Yet in the literature we find, over and over, claims that the reproductive fragmentation process *itself* either amounts to, or leads immediately to, some significant harm. By its very nature (at least in certain contexts), it objectifies.

Paul Ramsey, for example, responded to the following argument defending use of reproductive technologies: “[N]either the biological nor personal dimension is absent [when using biological technologies]. Procreation has only been debiologized.” He answered: “But to be debiologized and recombined in various ways, parenthood must first be broken or removed. When the transmission of life has been debiologized, human parenthood as a created covenant of life is placed under massive assault and men and women will no longer be who they are.”²⁵⁸ And after referring to “put[ting] radically asunder what God joined together in parenthood when He made love procreative,” Ramsey concluded that “[a] science-based culture, such as the present one, *of necessity* erodes and makes nonsense out of all sorts of bonds and connections which a Christian sees to be the case.”²⁵⁹

“Of necessity?” Only on certain stipulations of meaning, none of which is identified or obvious, and which are unlikely to be sound.

257. See generally Shapiro, *Fragmenting and Reassembling the World: of Flying Squirrels, Augmented Persons, and Other Monsters*, *supra* note 14, at 333, 373.

258. PAUL RAMSEY, *FABRICATED MAN: THE ETHICS OF GENETIC CONTROL* 135 (1970). See also Ryan, *supra* note 8, at 422 (characterizing Ramsey as saying that if the biological and personal aspects of procreation are divided, the possibilities for recombination have no discernible limits).

259. RAMSEY, *supra* note 258, at 39 (emphasis added).

Even on a Christian perspective, precisely what are the theological premises on which one concludes that AID or IVF (both of which Ramsey complains of) “mean[] a refusal of the image of God’s creation in our own.” Or is this simply a “primitive,” “incorrigible” perception? This is argument by definition or by authority. It is right to begin by distinguishing persons and objects when arguing about the link between fragmentation and objectification. Ramsey and others are to be thanked for raising questions about the link between fragmentation/reassembly and objectification, but how much has the discussion improved since 1970, when Ramsey wrote?²⁶⁰

Lauritzen is more circumspect about the nature and causes of objectification, arguing that the difficulty in resisting “the goal-oriented ‘production’ mentality” in infertility treatment, while not establishing commodification claims, “does lend some support to the claim that, once procreation is separated from sexual intercourse, it is difficult not to treat procreation as the production of an object to which one has the right as the producer.”²⁶¹

But how does this support commodification claims? *Of course* one has the right to custody of the child under the IVF scenario (his own and his wife’s) that Lauritzen describes. But how did the child to which one has such a right come to be seen or “treat[ed]” as an “object,” in any sense, “to which one has the right as the producer”? Simply because one has the right to the “separated” child—that is, to view it as one’s own child? The argument that a “right to [take custody, then raise and nurture after successful IVF]” entails the objectification of the child doesn’t work: the existence of a custodial right attending IVF is a nonstarter in the commodification/objectification argument.

260. Similarly, Nelson argues: “In the act of relinquishing the child at birth, as in the act of disowning, the contract birthgiver refuses to honor the causal and personal relationships that bind her to the child.” Nelson, *supra* note 2, at 130. Whence the “binding?” This follows only on a particular view of relationships as fixed by nature and “causality,” or some other authoritative criterion, and which cannot be undone by human choice. But this is not a given, and the claim begs the question. Arguments that fail to absorb *all material parts of an interaction* are partly responsible for the uneven character of some NRTC debates.

261. Lauritzen, *supra* note 36, at xiv. Lauritzen also comments on the Vatican’s ideal of a “unified totality.” *Id.* at 5-6. He goes on to say that noncoital reproduction “turns our bodies into mere instruments of our wills—thereby dividing us against ourselves—and disembodies procreation in a way that sets the stage for the objectification and commodification of reproduction. . . . [I]nsofar as assisted reproduction disembodies procreation, it is deeply flawed.” *Id.* Once again, these are conclusions that bypass needed work: investigating cognitive, perceptual, and evaluative processes to work out what objectification could amount to operationally. Colorful characterizations won’t do, and Lauritzen’s own recommendations so indicate.

So, once again, the fragmentation/reassembly image is useful in explaining some of the difficulties we have in describing and evaluating various life science technologies, and to explain in theory what risks they bring; but it cannot be used to reach conclusions in the way Ramsey does, or even in the more cautious way that Lauritzen does.

Lauritzen continues his argument by referring to the Vatican's ideal of "unified totality" and warning of "one of the central difficulties of reproductive medicine: it approaches human reproduction as if it were nothing more than the union of bodily parts, namely, of gametes."²⁶² This too is a fragmentation argument: given the possibility of seeing life forms and processes as an infinitude of jigsaw puzzles of our own design, we are at risk for reducing ourselves to a collection of parts, each of which is valued as a commodity but with no incremental value assigned to the integrated assemblage. It is a junkyard.

But why is this characterization apt? Lauritzen is not only analyzing, he is reporting personal experience. Perhaps some personal experiences are "incurable" in the weak sense that others are in no position to question certain propositions. But one is not recording a simple matter of perception when urging that IVF treats human reproduction as nothing but the rearrangement of the elements of reproduction. It *does* rearrange things. But its use does not alter the fact that the reproductive enterprise is an intentional human act designed to produce a child in an effort to *follow the same path as others* who can use a traditionally integrated process. (One can hardly use it by accident.) Even less does it "reduce" persons to reproductive factors and in turn to little pieces of this and that. There is no evidence that IVF has objectified anyone or anything in the specific sense that the resulting child is viewed or treated by others or by itself as an object to be used at will.

Lauritzen, however, does conclude that although caution is warranted, "the basic opposition to reproductive technology is misplaced,"²⁶³ and he argues his points more carefully than do many others. Indeed, he states that "I do not accept the claim that separating procreation and intercourse is intrinsically dehumanizing. . . . Separating procreation and intercourse does indeed open the door to treating persons as objects and to putting profits before people. *But to open the door is not necessarily to step through it.* . . . It is possible to distinguish among the various forms of assisted reproduc-

262. Lauritzen, *supra* note 36, at 5-6.

263. Lauritzen, *supra* note 36, at xv (discussing IVF and artificial insemination with a husband's sperm).

tion, and making distinctions and drawing boundaries is what moral decision making is all about.”²⁶⁴

(i) “Dehumanization” Is Too Loosely Assumed

Nelson, discussing maintenance of dead pregnant women, states:

[W]hen the pregnancy is carried on in the woman’s absence, we intuitively feel that something creepy is taking place. *The uniquely human characteristics of bringing a baby to term have all died away*, leaving a mechanical and pharmacological mimicry of what the pregnancy should have been. . . . It is an imitation of pregnancy that should not be encouraged, much less insisted on in every case that stands a remote chance of success. [¶] Postmortem pregnancy is creepy because it exaggerates what is already a false model of pregnancy—the model of the bee, which is blind to all the ways in which the human pregnancy is purposive and creative. The image of the bee undercuts and diminishes women’s agency not only in pregnancy, but in human endeavor as well. It is the image of the women as passive, as unconscious, as instinctively rather than deliberately nurturing.²⁶⁵

Well, if the enterprise can’t be perfect, reject it. If the fetus within the dead woman can’t be produced in a culturally standard way, throw it out. And the reason for the imperfection of the reproductive process? Look closely at the transaction—but *not at the whole thing: it could ruin the analysis*. “The uniquely human characteristics of bringing a baby to term have all died away”

Look again. For one thing, there is a fetus growing in pretty much the regular physiological way. This is no “mechanical and pharmacological mimicry,” at least no more than what is now commonplace in “standard” pregnancies. Recall that routine pregnancies now involve spinals, drugs to induce or retard labor, and a variety of implements. Creepy.

Flowerpots, however, don’t come up with children. More, there are health care personnel in attendance, and they, to all appearances, are alive and well, doing human (though perhaps not uniquely human) things such as nurturing and caring. Still more, what happened to the

264. Lauritzen, *supra* note 36, at 25. Cf. James Lardner, *Thinking Big: Thomas Kuhn and the Nature of Scientific Inquiry*, WASH. POST, July 31, 1982, at C1 (quoting Thomas Kuhn, “frameworks must be lived with and explored before they can be broken”). Or, one might add, be shown to condemn what doesn’t squarely fit them.

265. Nelson, *supra* note 102, at 266. See also Leon R. Kass, *Making Babies—the New Biology and the “Old” Morality*, 26 PUB. INT. 18, 49 (1972), quoted in Ethics Committee of the American Fertility Society, *Ethical Considerations of “Assisted” Reproductive Technologies* 13S (1994) (62 Fertility and Sterility, Supp. 1) (“I am arguing that the laboratory production of human beings is no longer human procreation, that making babies in the laboratories—even ‘perfect’ babies—means a degradation of parenthood.”).

father? Despite a few fleeting references to fathers, *there is no specific mention of his interests*: outweighed or not, they exist. His perspective seems distinctively human also, but he is not in the picture: he is split off, all significant moral issues lumped into the maintenance of the dead body.²⁶⁶

Finally, no account is taken in the printed passage of the image that potential life is being *discarded*. Here, it is not to the point that the unborn may have no right to life, at least before viability. It is what is *seen* by some as throwing life away that is in question. Nelson, after all, is talking about images, among other things. Of course, not all see it this way: some see bodily intrusion though the woman is dead; some see the waste of fetal life; and some see *both*.²⁶⁷ But completeness of analysis doesn't seem to be part of the standard critique of NRTCs.

As for the idea of dehumanization: How is it that reproduction where the chief protagonists are human beings using human-created implements for the purpose of producing human beings is not "uniquely human"? There is *more than one* uniquely human way of having children.

- (j) Little attention is paid to distinguishing objectification as implemented or embodied in particular acts from long term objectification processes.

The distinction here is between individual perceptions or ascriptions, and the long-term effects of repeated observation of institutions and practices—effects that may include our coming to view persons as objects. That, in turn, may have various behavioral consequences. If such learning processes occur, one can try to observe them empirically and evaluate them in light of moral criteria.

This dimension of analysis is apt because some transactions may not clearly "objectify" anyone in any given case, but an open and observed practice of pursuing such transactions may have effects on attitudes, preferences, and behavior.

266. Perhaps Nelson is influenced here by views such as Rothman's, *supra* note 3, at 1607: "From a woman's perspective, every woman has her own child. We do not bear the children of other people. *We do not bear our husband's children*. We do not bear a purchaser's children. . . ." (emphasis added).

267. Cf. David Heyd, *Artificial Reproductive Technologies: The Israeli Scene*, 7 ΒΙΟΕΤΙΚΗΣ 263, 264 (1993) (discussing use of technologies "motivated almost exclusively by the particularly high value attached by the Jewish tradition both to existing life and to the creation of new life," but noting the opposition to such use also).

(3) *Objectification and What We See: A Review*

Recall that much of what was just said is a commentary on how we view things: such matters of perception form an element of objectification processes and of allied matters such as ascribing selfishness and violation of the Formula. But an incomplete picture for purposes of investigating cognitive/perceptual processes may also be an incomplete picture for moral analysis—and impermissible fragmentations of perception may lead to unsound moral conclusions. There are many important considerations in the analysis of maintaining the bodies of dead pregnant women that are insightfully discussed by Nelson: the woman's likely preferences under the changed conditions involving her absence; and the impact of the birth and life of the child on the survivors. The analysis, however is hampered by incomplete characterizations. There is of course no way any complex transaction can be *completely* characterized by any finite collection of words, but one can make sound choices among the multitude of descriptive accounts.

Overly narrow descriptions of the maintenance of dead pregnant women are likely driven in part by high sensitivity to the status of women in patriarchal societies. These mordant formulations are linked to the reductivism of the objectification process. It is infuriating, particularly after years of political struggle, for women to perceive a backsliding—an emphasis on reproduction at all costs, with an escalating emphasis on women as nothing but breeders. But this sensitivity ought to be used to find what aspects of the transaction ought to be “italicized”—not to omit consideration of other aspects that are part of what many see and are unquestionably morally relevant.

As for the enterprise of maintaining dead pregnant women appearing creepy: get over it. One person's creepy may be another person's baby.

There is nothing intrinsically silly about the argument from objectification, understood rightly. Women have been objectified before and will be again. Nelson and others are right to worry about pictures that “testif[y] to and reinforce . . . social attitudes toward women that are demeaning.”²⁶⁸ But as presently formulated, the argument from objectification against NRTCs is very weak, despite the need for the perspectives it reflects. The anti-NRTC commentary persistently refuses to acknowledge the uncertainties in the ideas of person and object, the pull of unmentioned alternative perspectives, and the empirically exaggerated fears of reduction.

268. Nelson, *supra* note 102, at 262.

B. Repairing the Debate

However reasonable it is to raise objectification risks, the usual formulations of arguments from objectification are, as we saw, too ham-fisted to be persuasive. But the arguments can be reformulated to suggest their strengths as well as their weaknesses, especially with certain NRTCs.

In a consequentialist mode, the argument from objectification requires close attention to matters of cognitive psychology—how and why we perceive things as we do. How does a given NRTC strike us—at first, at second, at some reflective equilibrium. How we view a transaction is a function of what we see, and what we see is a function of both external matters and internal cognitive frameworks and perspectives. Take a standard surrogacy transaction. *Who sees what?*²⁶⁹ If we all see different things, from different perspectives, how should we construct and judge the assembly of different perspectives?

There are images central to the surrogacy transaction that reflect its different constituents and the contending values—images that can have significant learning effects, shaping our very attitudes toward these values. They include:

1) The image of the mother, genetic or gestational, willingly giving up her child. For most of us, this is a horrific vision, at war with the idea of a noncontingent bond between parent and child. Our judgments of people who abandon or sell their children are unambiguously harsh. Yet we tolerate certain exceptions to the nonseverance ideal. Women who give up their children for adoption because they feel seriously unable to raise a child are still excused and are even praised by some because they avoid abortion and act in their child's best interests. They are viewed quite differently from those who simply discard their offspring. But the surrogate is ordinarily not giving up her child because of some self-perceived deficit. Nor is she discarding it. She is giving up the child for . . . the sake of helping a couple complete their family? . . . for money? . . . to promote a strong pro-natalist ethic . . . for what? Our knowledge of the surrogate's motivations are still incomplete and some suspect and condemn her for shattering our image of mother-love as an absolute.²⁷⁰

269. The next few paragraphs are adapted from Michael H. Shapiro, *Benefits of "Baby Selling" Outweigh Its Risks*, L.A. DAILY J., July 20, 1988, at 4.

270. See LORI B. ANDREWS, *Surrogate Motherhood: The Challenge for Feminists, in SURROGATE MOTHERHOOD: POLITICS AND PRIVACY* 167, 171-76 (Larry Gostin ed., 1990) (discussing women's decision making in surrogacy).

2) The image of a child being ripped from its mother's grasp if a surrogacy agreement is specifically enforced.²⁷¹

3) The image of a father receiving the child into his family. This, so far, is an image often ignored.²⁷² Perhaps it is indeed less vivid than the idea of a woman giving up her child, or having it ripped from her hands, but the weakness of this image may simply reflect an assumption about division of labor: fathers aren't expected to be nurturers of children in the way women are.

4) The image of a father wanting but not receiving the child from its mother. This is yet another idea often lost through selective inattention. *Exactly why is this (non)image downgraded?* Is it truly invisible? It may simply reflect the fact that one event's absence—failure of the father to receive the child—may be harder to discern than another event's occurrence—the removal of the child from the mother. But there is more to it: the comparative entitlements of mothers and fathers are not viewed as equal—or anywhere close to it. In any event, we can't just rest on how we see things now. We can consider questioning the very assumptions that underlie the perceptions. No moral or epistemological theory takes all perceptions, all “seeings-as,” as legislative.

5) The image of a poor woman, not really knowing what she's doing, putting her body in service for an affluent man and, generally, his wife.

6) The image of the siblings of the transferred child worrying over their own fates—to be sold or given away?

7) The image of people freely pursuing their preferences, alone or in combination with others willing to participate. Perhaps this idea of liberty in action is a bit abstract to be an “image”—but as we have seen, liberty claims are often overlooked or downgraded in the critiques against NRTC's, and ought to be better attended to.

271. See *infra* note 301 (describing the wresting of a child from her biological parent's arms).

272. See *Moschetta v. Moschetta*, 35 Cal. App. 4th 1218, 1235 (1994). After declining to enforce a traditional surrogacy agreement, the court stated: “The result is disquieting. Much has been written in the surrogacy area of the pain visited on the birth mother who contemplates giving up her child. Not so much appears to have been written about the disruption to the intended parents, who have—to put the matter in classic estoppel language—relied to their detriment in deciding to bring a child into the world. Let us be blunt here: Marissa would never have been born if Robert and Cynthia Moschetta had known Elvira Jordan would change her mind.” *Id.*

8) Finally, the series of images of a child developing his or her personhood in a nuclear family—in short, the image of a new human being's lifetime.²⁷³

These are *all* integral parts of a whole transaction. Any argument condemning the use of NRTC's that fails to attend to these constituents is likely to be infirm. Even if one concludes rightly that certain NRTC's ought to be discouraged or banned, reaching that conclusion through systematically flawed reasoning and observation is accidental and unreliable. One way to improve the debate is to look harder at what we think we see.

VI. The Claim That There is No Constitutional Problem if the State Refuses to Enforce Agreements Concerning NRTC's Because No One is Obligated to Assist Others in Trying to Reproduce

A. The Varieties of "Affirmative Assistance"

Some argue that governmental refusal to enforce agreements concerning surrogacy or other collaborative NRTC's cannot impair a liberty interest in procreation because there is no constitutional right to affirmative assistance in securing that interest.²⁷⁴ I am not investigating here whether there is such a liberty interest, or what its scope

273. There is also the image of children who may not be adopted because of the success of the surrogacy transaction.

274. Cf. Ryan, *supra* note 48, at 7 ("Many people have taken issue with this position [of broad individual rights of procreative liberty, say, to manipulate gametes] on the grounds that a right to assistance in reproduction simply does not follow from the right not to be compelled to bear a child. It is one thing to say that no one ought to be made to reproduce, or no one ought to be prevented from reproducing by decree; it is quite another to say that society ought to provide whatever is necessary for reproduction to occur."). There are, however some important examples of affirmative rights in other constitutional areas. The liberty interest in freedom from physical confinement by the state is furthered by certain affirmative rights—to counsel, waiver of fees, and so on. See, e.g., *Douglas v. California*, 372 U.S. 353 (1963) (requiring state to appoint counsel on first appeal for indigent criminal defendant); *Griffin v. Illinois*, 351 U.S. 12 (1956) (requiring state to provide trial transcript to indigent criminal defendant on appeal). See generally CHARLES WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE* 759-61 (3d ed. 1993). In the reproductive context, Ryan's phrase "society ought to provide" is not entirely clear. It may refer to government action affirmatively assisting reproductive effort. But what is principally at stake here is the assistance of private parties, also part of "society" in the sense that they are "outside" the prospective reproductive unit. (Still another possibility is the assistance of private insurance companies.) The issue is whether that sort of assistance belongs within the general framework of legal enforcement of private agreements and of property and tort claims.

might be, or what standard of review it might generate. I am simply assuming some significant constitutional protection for reproductive decisions generally and for those NRTC's that are the "closest" to the paradigm of reproductive rectitude in particular.²⁷⁵

Perhaps there is no right to affirmative assistance, but what exactly does this proposition mean? Consider first what sort of "affirmative assistance" is in question. It is certainly not news that distinctions such as "affirmative/negative" and "action/omission" are plagued by conceptual and moral difficulties, though they are not thereby rendered vacuous *in general*. Despite supposed counterexamples showing the distinction useless, there are plenty of quite plausible uses for it.²⁷⁶

The abortion funding cases are classic rejections of a claim that government is obliged to provide positive help in securing some liberty interest's object. *Maher v. Roe*²⁷⁷ held that declining to fund abortions, even though childbirth was funded, did not "impinge" on the fundamental right to abort, and thus did not violate the equal pro-

275. For extensive analysis of the constitutional status of procreative liberty, compare ROBERTSON, CHILDREN OF CHOICE, *supra* note 3, at 22-42 (endorsing presumptive primacy of procreative liberty across a wide range of reproductive enterprises, and elaborating this position throughout the book) with Rao, *supra* note 256, at 1473 (questioning the constitutional foundations of such a principle). See also ANDREWS, *supra* note 270, at 167; Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 673-78 (1991).

276. Actions may provide a more frequent basis for arousing suspicions on the circumstances of death, for example. Think of assisted suicide through lethal injection as opposed to solitary refusal by the patient of nutrition and hydration. Still, there are circumstances in which the distinction's importance is attenuated. One can be persuaded by others to decline nutrition and hydration. Compare pushing a child (who stands between you and an inheritance) under water versus seeing him slip and fall under and not assisting him. Cf. James Rachels, *Euthanasia, Killing, and Letting Die*, in *ETHICAL ISSUES RELATING TO LIFE AND DEATH* 146, 154-55 (John Ladd ed., 1979) (describing the former example). But, to say that there is no difference between, say, shooting your enemy and not calling 911 when he has a heart attack, overstates the similarities between different ways of participating in a result. The former act generally entails a clear and deliberate choice to take a life, and suggests (though it does not flatly establish) homicidal disposition greater than in the latter case. (One could of course argue that some impulsive killers are more culpable and dangerous than some of those who premeditate their crimes.) Is "pulling the plug" an action or an omission to provide further care? In *Barber v. Superior Court*, 195 Cal. Rptr. 484 (Ct. App. 1983), the court adopted the latter characterization—partly to negate a prosecution for murder. If unplugging is in context an omission, and there is no duty to provide care within that context, then the elements of murder cannot be satisfied.

277. 432 U.S. 464 (1977) (sustaining a Connecticut law excluding nontherapeutic abortions in a program funded by Medicaid). See also *Harris v. McRae*, 448 U.S. 297 (1980) (extending this outcome to various medically necessary abortions); *Rust v. Sullivan*, 500 U.S. 173 (1991) (authorizing Cabinet Secretary to promulgate regulations prohibiting abortion counseling in federally funded family planning programs).

tection clause. In effect, noninterference rights were sharply distinguished from welfare rights.

Plainly, in our system of government and under reigning cultural norms, neither private individuals nor public officials are bound to donate or obtain gametes or supply technical expertise or tools to help anyone reproduce.²⁷⁸ We might hesitate over whether, say, a woman is duty-bound to assist her sister by donating an ovum or even bearing a child for her, or whether a man is duty-bound to assist a brother by donating sperm to be used by his sister-in-law, or indeed whether husband and wife are bound to assist each other in reproduction, but we are likely to say there is no duty, even if the idea seems appealing to some.

But suppose that a woman agrees to enter a surrogacy transaction as in *Matter of Baby M*²⁷⁹ or *Johnson v. Calvert*.²⁸⁰ In the former case, one might argue, the state of New Jersey had no duty to enforce the contract in order to avoid burdening the Sterns' or Ms. Whitehead's procreational liberty interests. Failure to do so did not impair those interests because the state is not obliged to "assist."

But this is a quite different form of "assistance" from supplying or securing gametes or medical services, tools, and technology. New Jersey was not asked to bear a child or provide gametes or pay for health care. New Jersey was in no danger of becoming pregnant or being subjected to a cesarean section. The "assistance" asked of New Jersey was that it *enforce the surrogacy contract in the way it enforces other contracts*.

Are these forms of assistance *relevantly* different? The term "affirmative assistance," I suggest, should not be used in the same context to apply both to government "provision of wherewithal" such as funds, workers, tools, or services; and to enforcement of duties entailed by the creation of legal relations in accordance with the preexisting law, as in *Johnson v. Calvert*.²⁸¹ Of course, one may state that

278. Ryan, *supra* note 48, at 12. Ryan asks: "If individuals have a right to a genetically related child, do others have an obligation to donate genetic material, and how will the extent of the obligation be determined?" But for such a question to make sense presupposes a ham-fisted idea of a right, and fails to distinguish between non-interference rights and affirmative assistance rights. (In addition, "affirmative assistance" is itself misconstrued to apply to simple contractual enforcement, as argued in the text here.)

279. 537 A.2d 1277 (N.J. 1988).

280. 851 P.2d 776 (Cal. 1993).

281. There is some question about how to characterize the California Supreme Court's stance on the gestational surrogacy contract. The intentions of the parties were held to be, in this case, determinative of the meaning of "natural parent" under the Uniform Parentage Act, CAL. FAM. CODE §§ 7600-7954 (West 1995). The court then referred to the con-

assistance is assistance and the enforcement of contract, tort and property law is a major "service," whether positive or negative. But enforcement of such basic elements of the law is presumptively a matter of general application, not of specifically targeting some personal enterprise for compelled affirmative cooperation by others in the form of supplying services or goods. If one enters into a contract or suffers an injury, the matter is automatically cognized by the legal system, and the state's refusal to provide a remedy must be justified independently once the *prima facie* case is made out.

"Public policy" might be invoked to block enforcement of an agreement, or constitutional constraints might be thought to do so. *Shelley v. Kraemer*²⁸² is an example of the latter, and possibly the former. But the decision to refuse enforcement of the racially restrictive covenant was not based simply on the idea that no one is entitled to "affirmative assistance" in vindicating contractual or property rights. It rested on separate matters of constitutional law. No such countervailing constitutional argument structures prevail for positive help in procreation. The similarities between providing tools and enforcing contracts are there, but so are the differences. At the very least, the current state of the law requires us to attend to the distinction.²⁸³

tract in order to establish these intentions. This is, in one sense, "upholding the contract" as such. Still, as the Court of Appeal put it in *Moschetta v. Moschetta*, 30 Cal. Rptr. 2d 893, 900 (Ct. App. 1994):

[T]he [California Supreme Court] did not actually hold that the gestational surrogacy contract at issue in *Johnson v. Calvert* was enforceable as such. Rather, the court stated that such a contract is a proper basis on which to ascertain the intent of the parties because it does not offend public policy 'on its face.' . . . In *Johnson v. Calvert*, the function of the surrogacy contract was to serve as a vessel in which the parties could manifest or express their intention. . . . The gestational surrogacy contract was never held to be enforceable per se. . . . [C]ases of gestational surrogacy are properly analyzed in terms of parentage as it is determined under the Act. Hence there is a need for some tie-breaker because genetic-but-not-birth mothers and birth-but-not-genetic mothers have equal claims to maternity under the terms of the Act.

This court refused to enforce a traditional surrogacy agreement, and reversed a joint custody order. See also *Adoption of Matthew B.*, 284 Cal. Rptr. 18 (Ct. App. 1991) (allowing child born of traditional surrogacy agreement to remain in custody of biological father and adoptive mother, after ruling that surrogate mother need not be permitted to withdraw her consent to stepparent adoption; court expressly declined to rule on validity of surrogacy contracts).

282. 334 U.S. 1 (1948).

283. The relevance of the distinction seems to be implicitly rejected in *Rao*, *supra* note 256, at 1485-87:

[R]ecognition of a negative right to procreate does not imply a positive right to call upon the apparatus of the state for assistance in procreation. Therefore, even if *Skinner v. Oklahoma*, 316 U.S. 535 (1942), holding that reproduction is a "ba-

Professor Rao, however, urges that “[i]f government need not supply the financial resources necessary to exercise the right to procreate, it is not clear why government must supply the judicial resources necessary to exercise the right either.”²⁸⁴

sic liberty” and that strict scrutiny—in an equal protection mode at least—is required when that liberty is impaired] does create a constitutional right to be free from state interference with the use of reproductive technology, it does not follow that the state possesses an affirmative obligation to assure the exercise of procreative choice by placing its prestige and power behind the enforcement of pre-conception contracts. If government need not supply the financial resources necessary to exercise the right to procreate, it is not clear why government must supply the judicial resources necessary to exercise the right either. Robertson attempts to evade the logic of the abortion funding cases by simply labelling state enforcement of procreative contracts as a negative rather than a positive right . . . , yet he fails to provide any reason why this form of state assistance should be so characterized. Robertson could have argued as follows: state withdrawal from the procreative enterprise by means of selective refusal to enforce procreative contracts would interfere with the negative right to procreate in the same way that selective refusal to enforce contracts providing abortion services in exchange for payment would interfere with the negative right to abort. This argument depends, however, upon whether the state’s decision not to enforce procreative contracts represents a deviation from traditional precepts of contract law or whether it comports with common law contract rules. In short, the line Robertson draws between negative and positive procreative rights is less clear than he suggests.

But why would anyone, in the first instance, assume this refusal to enforce wasn’t a “deviation” from general contract law? One must show that the field of reproduction is so special that contractual enforcement cannot be presumed—and the positive-negative distinction does not help to show this.

The requirement of filing fees and the practical need for legal assistance in litigation does not refute my point. The fact that the state’s assistance in contract enforcement is contingent on “entry” fees establishes a general limit on the availability of a general remedy—but it is a remedy available to all, regardless of subject matter. Still, for the state to pay filing fees or to award attorneys’ fees would indeed be a form of affirmative assistance. In some instances, the state is indeed obliged to provide legal assistance for those who cannot afford it—even in the civil area. See *Boddie v. Connecticut*, 401 U.S. 371 (1971) (indigent couple seeking divorce could not be barred from doing so for inability to pay court fees and service of process costs). See also *supra*, note 274.

284. Rao, *supra* note 256, at 1485-86. Rao notes the discussion in LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1360 (2d ed. 1988), where it is argued that the right to privacy doesn’t “automatically” entitle the infertile to purchase genetic material or gestational services. I don’t know who claims it is “automatic,” but if Professor Tribe is lumping contractual enforcement into the category of “affirmative assistance,” the point is vulnerable for the reasons suggested in the text.

Professor Robertson has referred to the “the limitations of procreative liberty as a negative right that does not entitle people to government resources to fulfill their reproductive goals.” ROBERTSON, *CHILDREN OF CHOICE*, *supra* note 3, at 117. But it seems clear, given his general position on enforceability of many collaborative reproductive agreements, that he does not view ordinary legal/judicial enforcement processes as falling outside procreative liberty. That would seem to be inconsistent with his views. I agree with his ultimate conclusion that, in general, payment for collaborative services should not

But, as we saw, this is not a fully apt comparison. Judicial resources are used to implement rights through the general laws of contracts, property, and torts. These bodies of law are *laws of general application*, though the legal relations they implement are defeasible. Professor Rao must *distinguish the NRTC contracts from the general run of contracts* that are routinely upheld and enforced. The default position of the legal system is that contracts may be enforceable without regard to their exact subject matter—whether widgets, health care, or transferring custody of a child. It mischaracterizes the question to describe it simply as concerning assistance in procreation. The issue is no more about affirmatively assisting procreation than enforcing an agreement that happens to involve acquisition of consumer goods is about affirmatively assisting people to own consumer goods specifically. The background political decision to help people pursue their interests—whatever they are—by creating and enforcing legal relations has already been made and its “affirmativeness” has been submerged into the baseline of reasonable expectations.

The argument in question thus improperly lumps affirmative assistance of some particular interest, on the one hand, with the general enforceability of contracts dealing with any interest, on the other. If some special reasons of social policy dictate that some agreements should not be respected, that is, as indicated, a separate matter. The question of enforcement does not in general rest on the distinction between affirmative assistance and noninterference, but on independent grounds of public policy or constitutional constraints having nothing to do with “affirmativeness.” Some remedies may seem to be too severe given the interest at stake. The “affirmative assistance,” in any event, is to be provided by private parties, by agreement.

Although judicial enforcement of private agreements for affirmative assistance is not *itself*—in general—what we mean by “affirmative assistance,” there are arguably contrary examples, such as *Shelley*.²⁸⁵

be discouraged or banned because of “symbolic concerns alone.” *Id.* at 141. *But see* the account of arguments from symbolism in Part IX, text accompanying notes 307-325.

285. One of the endearing features of this case is that it messes up reasonably neat discussions about links between private and governmental action. But the special case of state “participation” that ratifies private racist conduct does not carry over to all forms of judicial “participation” in private decisions: *Shelley*’s threat to prove too much has never been carried out. There is no need here to inquire into the idea of government neutrality and its connection with state action problems. *See generally* GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1701-57 (3d ed. 1996). It is worth emphasizing, however, that it is the existence of certain differences in use of the “background” tort, contract, or property law that often requires attention. For example, in LAURENCE TRIBE, *CONSTITUTIONAL CHOICES* 260 (1985), the author states:

(If you were injured as a result of negligence and sued the culprit, would you expect the judge to say, “The state does not have to affirmatively assist you in your private grievances”?) If “judicial resources” are to be supplied for some agreements but not others, the withholding of resources generally available to others must be explained. One cannot *start* by saying the government is not obliged to assist by enforcing a contract when your contract, to all appearances, is like other contracts. It is something *to be established*, not assumed, by showing how your contract (or claim sounding in tort or property rights) differs from others.

A gardener hired to care generally for *all* the flowers is responsible for the death of the single rose he intentionally ignored, and he cannot ascribe its demise to the malevolent forces of wind, sun, and inanition. He, like the state, cannot decline the assistance he provides to all other plants by asserting that he is not obliged to provide affirmative assistance for some specific flower. All he can do is explain why a variation from the “norm” is justified (the mutant rose is out to get the other roses?). The issue is whether selective failure by government to enforce the baseline provisions of the laws of torts, contracts,

Missouri treats most restraints on alienability of real estate as judicially unenforceable: to enforce any such restraint, a state court must first find that the *substance* of the restraining covenant is reasonable and consistent with public policy. . . . The real ‘state action’ in *Shelley* was Missouri’s facially discriminatory body of common and statutory law—the quintessence of a racist state policy.

Whether this is a sound explanation of *Shelley I* I leave aside; the point is that in many cases of discriminatory structure and enforcement of the background law, it is easy to discern constitutional or public policy violations. And in some cases, the irregularity marks an “affirmative variation” that requires justification; such variations are in effect a sort of subsidy or penalty, depending on who is affected and how. It is only then that one could urge that some parties are affirmatively being benefitted or harmed—as if collaborative reproductive contracts were routinely enforced, but contracts to acquire a new business franchise were not. There seems to be no persuasive argument that reproductive agreements are being singled out for favorable treatment.

But in *Hickman v. Group Health Plan*, 396 N.W.2d 10 (Minn. 1986), the court upheld Missouri statutes banning certain forms of wrongful life and wrongful birth actions, ruling that there was no state action to support due process and equal protection claims under the Fourteenth Amendment. One could, among other things, argue that Missouri “departed from the norm of enforcement,” thereby interfering with the physician-patient relationship, and that this constituted state action, but that issue need not be resolved here. *Cf. Note, Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 HARV. L. REV. 2017, 2026 (1987). Missouri’s argument was not about “affirmative assistance” in allowing the banned actions. It apparently believed that recognizing such actions would be inconsistent with public policy because the allegations necessary for a plaintiff’s case include claims that “but for the negligent conduct of another, a child would have been aborted.” If it had counted judicial enforcement as affirmative assistance, its argument presumably would have been that some forms of affirmative assistance are appropriate and some are not, depending on the circumstances.

property, and so on, is a *culpable omission*—not a privileged refusal of affirmative assistance. Some particular remedies might be disallowed as contrary to public policy. Specific performance, for example, might be viewed as too intrusive (too “affirmative”?) in relation to the claim, but this is consistent with vindicating the threshold interest. If one insists on using the language of affirmative assistance, then the issue concerns deciding which forms of affirmative assistance are to be provided and when.

I note that in trying to explain why contracts for certain reproductive transactions should not be routinely enforced, one cannot simply assert that such enforcement may violate someone’s constitutional rights—e.g., that of a surrogate not wishing to transfer the child and claiming the right of companionship. This simply begs the questions concerning the scope of the right and whether it is alienable or waivable, and how the father’s competing companionship claim should be resolved.²⁸⁶ It is possible that failure to enforce the provisions of certain contracts would itself impair constitutional rights. “[T]he Coasian world of contract” and “the realm of constitutional rights” are not disjoint.²⁸⁷ Holding persons to the promises they make at a given time is one way of furthering procreational autonomy and its linked companionship rights.²⁸⁸ Complaining that such assistance in enforcement favors Mr. Stern’s interests over Ms. Whitehead’s constitutional rights generates the response that failure to enforce does the reverse. En-

286. *But see* Rao, *supra* note 256, at 1493: “Such a contract [for surrogacy] involves conflicting constitutional rights. A holding that the infertile couple’s right to procreate requires enforcement of such a contract would deny the surrogate her constitutionally protected rights to be free from physical invasions into her body and to raise her biological child.” But later, Rao states that “[a] clash of constitutional rights can be averted only by determining that the surrogate’s constitutional right to procreate includes the power to alienate her constitutionally protected personal and parental privacy rights. For this reason, issues of waiver and alienability of constitutional privacy rights lie at the core of the constitutional law model.” *Id.* at 1494. If so, she cannot at the threshold identify whose constitutional rights have been denied.

287. “Robertson’s constitutional framework defines the right to procreate as the right to create genetically or gestationally connected progeny. In so doing, it specifies that the initial entitlement belongs to those who are biologically reproducing. But by assuming without justifying why it is that this entitlement can be bargained away, Robertson seems to be operating in the Coasian world of contract and not in the realm of constitutional rights.” Rao, *supra* note 256, at 1494-95. As stated in the text, however, the two realms intersect. (Recall the constitutional ban on state impairment of the obligation of contracts. U.S. CONST. art. I, § 10, cl. 1.)

288. See the main articles on “parenthood by intention”: John Lawrence Hill, *What Does it Mean to Be a “Parent”? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991); Marjorie Schulz, *Reproductive Technologies and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297.

forcing failed agreements benefits one side, and not enforcing them benefits the other. That's the way it is with contracts and lawsuits. In this limited sense, there are no "neutral" paths. One must squarely confront the problem of determining whose constitutional interests outweigh whose.

B. Going Too Far

Failing to distinguish among different forms of affirmative assistance may lead both to mistaken rejection of certain projects as uncalled for "positive" help and to inappropriate endorsement of such support. Brock, for example, questions Robertson's distinction between negative and positive procreative liberties, and calls for understanding procreative liberty as "both a negative and a positive right."²⁸⁹

Again, one needs to distinguish among ways of assisting—ways that may track the admittedly hazy distinction between noninterference and affirmative assistance. "[T]he often powerful desire to reproduce, or not to reproduce, together with the deep and far-reaching impact on a person's life of whether he or she does so, undergirds an argument for both a negative and a positive right to procreative liberty."²⁹⁰ Brock then refers to the costs of IVF, suggesting that they are comparable to the treatments for disabilities and loss of function often covered by health plans.

It may well be desirable to fund remedies for infertility, but it is one thing to insist that the state not interfere with a private decision to secure and pay for IVF, and quite another to call for private or public insurance to pay for it. The external impact of many affirmative assistance rights—that is, the effect on persons who are strangers to the reproductive effort—may involve substantial costs. Insurance premiums may go up. Positive rights *may* risk greater effects of this sort—adverse or beneficial—than negative rights, and this, to recall Brock's own point, is something for (classical) liberals to worry over because it may diminish liberty overall. Although the needs of infertile persons may be as effectively blocked from (say) IVF by lack of economic resources as they would be if IVF were illegal, the remedies for the two sorts of blockades do not have the same consequences. Although one may urge the injustice of failing to secure affirmative assistance for important needs, one cannot generally do so without

289. Dan W. Brock, *Procreative Liberty*, 74 TEX. L. REV. 187, 189 (1995) (reviewing ROBERTSON, *CHILDREN OF CHOICE*, *supra* note 3).

290. *Id.* at 193-94.

taking resources from others.²⁹¹ Perhaps those others ought to be willing to provide such help—but they may not be, and their preferences count too.

VII. The Claim that Some NRTC's Are Not Enforceable Because Constitutional Rights to Companionship and Procreative Choice Are Not Linked.

The clearest articulation of this strange proposition is in *Matter of Baby M*: "There is nothing in our culture or society that even begins to suggest a fundamental right on the part of the father to the custody of the child as part of his right to procreate when opposed by the claim of the mother to the same child."²⁹² The court went on to say: "Mrs. Whitehead, on the other hand, asserts a claim that falls within the scope of a recognized fundamental interest protected by the Constitution. As a mother, she claims the right to the companionship of her child."²⁹³ And finally:

The right to procreate very simply is the right to have natural children . . . It is no more than that. Mr. Stern has not been deprived of that right. Through artificial insemination of Mrs. Whitehead, Baby M is his child. The custody, care, companionship, and nurturing that follow birth are not parts of the right of procreation.²⁹⁴

The oddity here is not simply that procreation is split off from the companionship of one's children, a severance wholly unwarranted *in our tradition of procreation*, but it is that it is split off for males only. Apparently the phrase "in our culture or society" refers to the assumption that the mother is the true parent and the father some sort of epiphenomenon of minor consequence. But it is not so easy to dismiss the supernumerary progenitor.

What *is* the proper characterization of the link between procreative and companionship rights? They are conceptually distinct, of course, just as genetics and gestation are. And they are sometimes empirically disconnected. Some procreators abandon or kill their offspring; others give them up for adoption; others sell them; and others keep them but dissociate themselves from them. Some procreators merely deposit their gametes and remain anonymous and apart. It

291. This is true of judicial enforcement of contract, tort and property law also. But *in the main*, these are nonelective government expenditures—fixed costs—design to maintain the legal order, in part by vindicating basic noninterference rights as well as whatever affirmative assistance rights exist.

292. *In re Baby M*, 537 A.2d at 1254.

293. *Id.* at 1255.

294. *Id.* at 1227.

makes perfectly good sense to distinguish, say, between a man's right to engage in a procreative act, whether through consensual intercourse or through sperm donation, and his right to custody. If he agreed to remain anonymous and noninvolved, or absented himself for years, or consciously avoided bonding with the child, his ultimate claim to companionship is weak. Parallel remarks apply to women. And any parent can forfeit preexisting companionship and custody rights through abuse or neglect. The right to continued companionship with one's children is presumed, but it is nonetheless contingent on avoiding certain forms of injurious conduct.

This elementary point is made in several Supreme Court decisions recognizing different classes of rights that reflect the distinction between reproducing and nurturing: rights to procreate, and rights to the companionship of one's children. But nowhere does the Court erect a wall between the two: it is quite the opposite.²⁹⁵ The biological link is intimately tied to the assumption that, in the normal course of events, biological parents will be custodial parents. Procreation, in short, entails a strong presumption of the right to the companionship of one's offspring, for both parents.²⁹⁶

In most existing cultures, it could hardly be otherwise. Imagine, as before, residing in a modern version of Plato's Republic. Children are taken by the state at birth and raised communally by a parent class. It is of course possible that in such a culture procreation would be valued for reasons other than the prospect of family companionship. Citizens might be taught that procreation *simpliciter*, whether

295. See generally *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (recognizing that "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' [citation omitted]"); and holding that under the Fourteenth Amendment's due process and equal protection clauses, an unwed father is entitled to a hearing on fitness before losing his children). I do not try to characterize precisely the forms of heightened scrutiny that might apply to various impairments of companionship rights. The term "fundamental right" generally signals the use of a version of strict scrutiny. In *Lehr v. Robertson*, the Court stated that an unwed father committed to the rearing of his child "acquires substantial protection under the Due Process Clause," although the biological link standing alone does not do so. 463 U.S. 248, 261 (1982). In *Santosky v. Kramer*, the Court said that due process requires a state to establish its case by clear and convincing evidence before terminating the rights of parents in their natural child. 455 U.S. 745, 747-48 (1982).

296. See Uniform Parentage Act, CAL. FAM. CODE §§ 7600-7954 (West 1995). But see Rao, *supra* note 256, at 1487: "Robertson's reading of this [procreational] right conflates procreation and parenting, but the two are distinct. . . ."

coital or noncoital, was one of the paramount duties of citizens, and that fulfilling this duty would assure one a place in heaven. But for most of this planet's residents, the point of recognizing procreational rights would be largely annulled by summary child removal.²⁹⁷

This contextual understanding of procreation and companionship is thus directly responsive to claims such as Professor Rao's:

Even if *Skinner* supports a constitutional right to procreate, therefore, parental prerogatives need not follow. The right to reproduce does not necessarily entail the right to rear one's biological child. Should one right accompany the other, moreover, how do we determine which procreator, the gamete contributors, the gestator, or the intending parents, possesses these related rights?²⁹⁸

First, in traditional forms of reproduction, companionship indeed "follows" in the form of a presumptive custodial right. A defensible right to companionship is indeed "entailed" by procreation, at least within the understanding of procreation in our collection of cultures. Procreation and companionship are not simply ships passing in the night: they are presumptively linked. One cannot accurately use the phrase "[s]hould one right accompany the other" as if such accompaniment were a mere contingency.

Second, the fact that there are procreative situations in which it is hard to identify rightful holders of companionship rights does not defeat this presumptive linkage as a general matter. It is a problem parallel to that of identifying at the threshold who the procreators are—the gestator? the ovum source? Some cases are conceptually easier than others, and the more difficult ones should not be thought to engulf the less difficult ones. To take an extreme futuristic example, suppose gametes could be reconstructed by inserting genes from several different sources, whether human or nonhuman, creating a mosaic. The resulting entity is brought to term in an artificial womb. Who reproduced? Every DNA source, including Lassie? Who has the presumptive right to companionship? Without further factual and theoretical specification, such as the account based on the intentions of the parties in *Johnson v. Calvert*, there is no way to answer.

Yet this "gap" in our concepts doesn't impair our intuition that, in the usual anonymous AID case for example, the pregnant woman is not only procreating—as is the donor—but is the presumptive holder

297. See Brock, *supra* note 289, at 189 n.2 ("[I]t is typically reproducing and rearing, not just reproducing, that has such fundamental effects on a person's identity, dignity, and life's meaning.").

298. Rao, *supra* note 256, at 1487. Rao points out that Robertson recognizes such questions. *Id.*

of companionship rights. There is nothing incoherent about this and it conflates no rights. The particular circumstances of the reproductive process may suggest how and why procreation and companionship may be severed or preserved by both parents.

Professor Rao also complains that linking procreational and companionship rights—which she views as an “expansive version of the right to procreate”—“may diminish other constitutional rights and disregard the constitutional rights of others.”²⁹⁹ But this is hard to follow. *What* constitutional rights of others? The clash is serious only if *their* rights are similarly expansive. If their rights are thin, so is the clash.

In any event, I am not endorsing absolute rights for some persons that automatically trump those of others. Indeed, *that is precisely the infirmity in the Baby M case that I complained about earlier*. The court seemed to think—without much supporting argument—that Ms. Whitehead’s rights to companionship trumped Mr. Stern’s. But why was companionship part of her “expansive” procreational rights and not Mr. Stern’s? It is seriously incomplete to complain that enforcing a contract impairs Ms. Whitehead’s constitutional rights without also noting that nonenforcement may violate Mr. Stern’s.

In general, then, insisting on a close connection between procreational and companionship rights is not impaired by problems arising with surrogacy or any other NRTC. But a last word is in order about the termination and creation of companionship rights. One can, within sharp limits defined by notions of abandonment, abuse, and neglect, sever the right to companionship with one’s child. In the context of surrogacy, however, *the whole point of severance is not severance itself*;³⁰⁰ *it is to assist in the creation of the companionship relation between a parent (the father, and usually his spouse) and his child*. It is, once again, a major mischaracterization to view disassociation simply as a goal, and not a mechanism for association in a new family. That point, that image, that idea, often goes unmentioned in the fray,³⁰¹ and this leads to conclusions inevitably distorted by the failure to perceive it.

299. Rao, *supra* note 256, at 1487.

300. This is contrary to the assertions of various commentators who incompletely characterize (and thus mischaracterize) surrogacy as procreation for the purpose of disconnection. See Krimmel, *supra* note 206, at 97-98 (arguing that a child is created because it will be useful—it “is conceived in order to be given away”). See also O’DONOVAN, quoted *supra* note 206 (making a similar point).

301. Even when it is mentioned, it may be overshadowed by vivid descriptions of the other end of the transfer. “By requiring a court to enforce a preconception agreement that

VIII. Is the Moral and Legal Burden of Proof in Evaluating NRTCs on Those Proposing Their Use?

Suppose we assign presumptive moral priority to "autonomy" claims, without further specification. By simple inference, the burden is on those who object to its exercise in various forms to show why the liberty claim should be disallowed.³⁰²

But even in an assertedly individualist society such as our own, "autonomy" and "liberty" do not globally describe interests that automatically generate such a presumption. Liberty is fragmented into a variety of domains—a point suggested by the rough hierarchy of liberties identified by the Supreme Court in interpreting the Fourteenth and Fifth Amendment's liberty clauses. The fragmentation of liberty parallels the fragmentation of life processes when we deal with NRTCs: what presumptions of immunity from regulation or prohibition do we assign these exercises of procreative liberty?

It is difficult to say who has the moral "burden of proof" on NRTCs, if the question is put that generally. Such burdens are assigned in contested cases partly on the basis of their similarity to prior cases. But specifying who has the burden in the case of posthumous reproduction or surrogacy or other NRTC cannot be answered by simply invoking notions of liberty or autonomy as implemented in standard cases to which we are accustomed. To do so would entail a nearly absolutist position applied to very expansive understandings of "liberty" and "autonomy." The fact that in standard cases the burden is on others to show why prospective parents should not reproduce does not necessarily settle which way the burden falls in *other* forms of reproduction.³⁰³ Nor can the novelty of a transaction or unfocused ideas of its risks necessarily place the burden on its opponents. The assessment of NRTCs thus can't be finessed by the simple device of

would wrest a child from the arms of one biological parent and transfer her to the home of another, Robertson's right to procreate has become so broad as to impinge upon parental rights." Rao, *supra* note 256, at 1488. But once again, the father is one of the parents, and few cases merit the description "wrest[ing] a child from the arms."

302. *E.g.*, Nelson, *supra* note 2, at 129 (characterizing this position, which she criticizes).

303. In some cases, the burden is sustained on the basis of a finding of incompetence, perhaps combined with a showing of risks to the party's best interests. *Cf.* Conservatorship of the Person of Valerie N. v. Valerie N., 707 P.2d 760 (Cal. 1985) (holding statutory ban on sterilizing retarded persons unconstitutional, but noting that a proper showing is required to justify the procedure).

specifying burdens. At the very least, one would have to specify varying burdens for different NRTCs.³⁰⁴

The matter is not resolved by focusing on the “assisted” or “collaborative” nature of NRTCs. Nelson suggests a “higher standard of accountability” if someone seeks assistance from other moral agents when embarking on reproduction.³⁰⁵ But accountability for what, and in what form? We are of course bound not to abuse our collaborators by force, fraud, threats, or other maneuvers. If collaborative reproduction represents “a more broadly shared cooperative activity”³⁰⁶ than usually prevails, perhaps reciprocal duties are stronger. But how would recognition of such duties, standing alone, shift the burden of proof as to whether such reproduction ought to occur? Indeed, if we believe new collaborations carry new fiduciary duties, the case for burden shifting may be *weaker*, because the parties will have enforceable obligations of disclosure and fair dealing that address the exceptional circumstances.

There may be a plausible case for legal regulation of some NRTCs through common law actions or even statutory intervention, if the risk of interpersonal abuse is shown to be sufficiently high. But even if regulation is called for, this does not entail that one must establish the propriety of the regulated activity in the first instance. One must specify context: even if one can justify a presumption against unregulated *Xing*, there may be no plausible presumption against regulated *Xing*.

If the risks of activity even under rational regulation seem to be very serious—think of trying to regulate private use of nuclear weapons—this may justify assigning a heavy burden against it. A particular NRTC, we might think, ought to be discouraged or disallowed.

304. Germ line alteration might be one example. *Cf.* Ryan, *supra* note 48, at 8, whose assessment of risks seems to call for assignment of the burden to proponents of germ line intervention. (“[T]he claim that a parental right to a satisfying reproductive experience justifies the manipulation of genetic material is flawed, for the sort of guarantee sought cannot be provided by control of conception.”). Still further distinctions might be made—as between prevention of disorders versus augmentation of favorable traits.

305. Nelson, *supra* note 2, at 131. *See also* Cohen, *supra* note 49, at 20 (referring to the claim that “[t]hose who resort to these techniques . . . bear the burden of their safety. They have an obligation to establish whether these ever-increasing methods of assisted reproduction do, in fact, harm a small but significant proportion of children before they are used.”). She refers to this as the “Harm to Children Argument.” *Id.* at 20. One might also generally argue that anyone proposing a technological or social innovation bears the burden of establishing its safety and worth—but that way of proceeding would itself seem to be an innovation.

306. Nelson, *supra* note 2, at 131. Despite these observations, Nelson does not seem to rely on any burden of proof assignments. *Id.* at 134.

Still, the “publicness” and “colloborativeness” of an NRTC does not itself establish a global assignment of burden of proof—it simply informs a framework for assessing risks. Speaking to others may also be a “public act,” but who has the burden of showing the communication is so risky that it ought to be suppressed or punished?

IX. The Argument from Symbolism Against NRTCs Must Be Taken Seriously

A. The Nature of Arguments from Symbolism

Arguments from symbolism are often dismissed, or at least undervalued, and are probably viewed as evidence of weak analytic arguments—the last resort of the whipped.³⁰⁷ Nevertheless, though few such arguments may be winners, their importance shouldn't be underestimated: the dismissal or undervaluing of “mere symbolism” masks the fact that we are addressing a fundamental aspect of human behavior—learning.³⁰⁸ As Ryan puts it, “[W]e interpret and shape experience through our symbols and therefore how we think about persons, events, and biological processes has a great deal to do with how we behave toward them.”³⁰⁹

The fact that we cannot precisely describe the causal process in such learning does not mean it doesn't exist, and elementary learning theory strongly suggests it does. It does mean, however, that we have to be quite circumspect in acting on the belief that a *particular* form of learning is taking place: otherwise, it would be far too easy to “justify” serious intrusions on basic rights and interests.

307. Few persons dismiss symbolic arguments altogether. Robertson states that in certain situations, his “analysis will identify both core procreative interests that deserve protection and competing concerns that are too speculative or symbolic to justify intrusion on procreative choice.” ROBERTSON, CHILDREN OF CHOICE, *supra* note 3, at 17. (See also his remarks on symbolism in various places, especially *id.* at 41, 54-57, 64, 88, 108, 112, 141-42, 158, 199, 201-02, 205-06, 212-14, 222, 216.) It may well be that most arguments from symbolism are unimpressive in the reproductive arena and should be (at least weakly) presumed unsound. The question, however, is how far we are reasonably entitled to discount them, given the fact that “symbolism” implicates methods of learning that may in turn heavily affect behavior, even though we often cannot discern precise causal pathways.

308. Cf. Ryan, *supra* note 48, at 11 (“Because reproduction has a social dimension, and reproductive practices have profound real and symbolic impacts on the community, the promotion of individual procreative liberty can never be an abstract end.”). Symbolic impacts are not mere epiphenomena.

309. Ryan, *supra* note 48, at 12. See also Brock, *supra* note 289, at 194 (criticizing Robertson for “too quickly dismissing what he usually calls ‘symbolic’ considerations and ‘deontological harms’”).

The typical argument from symbolism takes roughly the following form:³¹⁰ certain actions or practices viewed narrowly may be morally unexceptionable. By “narrowly,” I mean viewed apart from learning effects on attitudes, values, beliefs and behaviors. However, when one considers the impact of observing certain individual or institutional actions and practices, then the overall moral assessment may change. In this sense, “symbolic effects” refers to the possible learning effects of observation of, or beliefs about, actions and practices.³¹¹ The insertion of “mere” in “mere symbolism” or “mere ritual” is generally not warranted in the NRTC realm and begs the essential question about the full impact of actions and practices.³¹²

310. This brief account is designed to unpack the idea that certain “practices may impinge on and affect important values, even if they do not satisfy liberal harm prevention criteria for interference or prohibition.” Brock, *supra* note 289, at 197. In characterizing arguments from symbolism, I reject the claim that they (or some of them) should be dismissed because they are ultimately grounded on “religious” views. See, e.g. Justice Stevens’ dissent in *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 350 (1990) (“[I]t would be possible to hypothesize such an interest [on the part of Nancy Cruzan] in the perpetuation of what the State has decided is her life[.] on the basis of theological or philosophical conjecture. But even to posit such a basis for the State’s action is to condemn it. It is not within the province of secular government to circumscribe the liberties of the people by regulations designed wholly for the purpose of establishing a sectarian definition of life.”). See also RONALD DWORKIN, *LIFE’S DOMINION* (1993) (“We may describe most people’s beliefs about the inherent value of human life—beliefs deployed in their opinions about abortion—as *essentially* religious beliefs.”). Perhaps Justice Stevens believes “theological” and “philosophical” designates all judgments based on nonconsequentialist moral theories. Cf. *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 565-66, 567, 569, 571 (1989) (suggesting that various aspects of Missouri’s statutory scheme protecting early fetal life were “theological” in foundation).

311. The idea of “ritual,” including stylized forms of conduct, use of artifacts and icons, may be part of symbol-mediated learning. Cf. Sally Falk Moore, *Epilogue*, in *SYMBOL AND POLITICS IN COMMUNAL IDEOLOGY* 221-22 (Barbara Myerhoff & Sally Falk Moore eds., 1975) (arguing that rituals, laws, customs, and the like are used “to fix social life, to keep it from slipping into a sea of indeterminacy”). I do not claim, however, that all effects of ritual are best viewed as “learning.”

312. I said in an earlier work: “‘Symbolic’ effects’ are not simply dissipated into the air. We often teach ourselves through symbols. Whatever mechanisms are at work in more revolutionary social changes, when these change are captured in law, the causal effects can continue and be amplified; causality does not run *exclusively* in one direction.” Shapiro, *Regulation as Language: Communicating Values by Altering the Contingencies of Choice*, *supra* note 14, at 690. See also *id.* at 685: “[I]nvestigation solely into the distribution of goods and services and the related background rules of contract, property, and so on, aren’t enough fully to evaluate regulation. One must also ask whether the distribution system affects preferences that may influence behavior that in turn alters distribution patterns and/or even redefines the community itself. Only a comprehensive view that considers endogenous change of preferences arising from the distribution system’s communicative impacts and learning effects can adequately assess a regulatory scheme—either by way of explaining it, or by normatively evaluating it.”

There is no shortage of examples of possible arguments from symbolism in bioethics generally and addressing reproductive matters in particular. Anna Johnson, the gestating mother in *Johnson v. Calvert*,³¹³ is a “symbol” of something, depending on what a given observer perceives and infers: the oppression of poor women of color; the expansion of opportunities for poor women of color or under-educated, under-skilled women; the improvement in fertility technology allowing strangers to help each other attain some of the most valued ends in their lives; the transmogrification of reproduction from life-affirming to machine-affirming; and so on. Perhaps the most demoralizing “symbol” is the apparent assault on the ideal of motherhood and its attendant noncontingent bonds.³¹⁴

Surrogate motherhood has probably evoked more attention, so far, than any other reproductive innovation. As I said elsewhere:

Those transactions, on some views, present the image of parental bonds of love and duty being contingent because they can be annulled by an offer of money, or by a child’s condition or personal characteristics. Bans on surrogacy may thus reinforce the idea of noncontingent parental bonds. This reinforcement comes, however, at the high price of making it difficult for some persons to create new nuclear families bearing the traditional noncontingent bonds, a matter often ignored in the surrogacy debate.³¹⁵

B. Evaluating Arguments from Symbolism; Mechanisms of Public Debate

It seems hard to question the general proposition that we learn from what we see. Are there any latter-day rationalists who believe that everything we know and all of our predispositions are wired in? Not even the most avid partisans of nature over nurture would make such extravagant claims. It thus seems very odd to dismiss arguments from symbolism across the board—yet this is routinely done in every

313. 851 P.2d 776 (Cal. 1993).

314. As Carol Sanger puts it, “because surrogacy represents maternal separation decisions in their most unrelenting form, opposition to the practice derives as much from the symbolic threat that surrogacy hurls at the institution of mother as from concerns, however sincere and however speculative, about the welfare of children.” Sanger, *supra* note 30, at 451. And later, she observes, “as a culture, we have come to accept maternal absence as a maternal wrong and a mother’s *deliberate* absence as particularly searing.” *Id.* at 453. She also refers to and criticizes the claim that in surrogacy, the mother acts “disloyally” toward her own offspring, quoting GEORGE P. FLETCHER, *LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS* 86 (1993).

315. Shapiro, *Regulation as Language: Communicating Values by Altering the Contingencies of Choice*, *supra* note 14, at 685.

area of bioethics, not just reproductive control.³¹⁶ The fact that learning effects are diffuse and hard to confirm, however, doesn't mean they aren't there.

Although peremptory dismissals of arguments from symbolism are unwarranted, the arguments are obviously not always well-taken. Indeed, the hostility to them is not hard to understand: while they may rest on soundly-based general principles of learning,³¹⁷ they can be taken to prove too much. Everything can be viewed in adverse ways, and these (mis)perceptions can have undesirable effects on preferences and behavior. And what is learned depends in part on individual frameworks for perception and inference—in short, on who the observing audience is and what its members are seeing.³¹⁸ Plainly, no one can show that such effects never occur. More, it is easy to slip into a mode of deference to community fears of attitudinal impacts—with dangerous consequences for both basic liberties and the ideal of progress. Still more, arguments from symbolism are sometimes fused with appeals to the risk of offending or demoralizing persons whose moral views are challenged.³¹⁹ And “offense” is not hard to establish.

Proper evaluation of arguments from symbolism recognizes them as addressing possible shifts in important value perspectives that may mark significant changes in our normative systems. One may of course question the moral status of any given norm or normative system: some shifts are obviously desirable as well as morally obligatory.

316. This is sometimes done by simply dismissing “slippery slope” arguments, which in some forms rest on mechanisms of attitude change that involve symbolic effects mediated through communicative impacts generally. See, e.g., *Compassion in Dying v. State of Wash.*, 79 F.3d 790, 830-31 (9th Cir. 1996).

317. See also *supra* note 36 (“slippery slope” references). “[S]ocial learning theory regards moral actions as having the same earthy dependence on reinforcement schedules as all the other kinds of human behavior have.” Thomas E. Wren, *Social Learning Theory, Self-Regulation, and Morality*, 92 *ETHICS* 409, 409-11 (1982). See also J. Phillippe-Rushton, *Altruism and Society: A Social Learning Perspective*, 92 *ETHICS* 425, 435 (1982): “From a social learning perspective, the overwhelming majority of human social behavior is learned from observing others.”

318. Cf. ROBERTSON, *CHILDREN OF CHOICE*, *supra* note 3, at 141, discussing payment in collaborative reproduction (“With such splits in perception, such symbolic concerns alone should not override the couple’s interest in having and rearing biologic offspring with the help of a freely consenting, paid collaborator.”).

319. See generally Brock, *supra* note 289, at 189: “Such harms [‘substantial harms to the interests of others’ (quoting Robertson)] are to be distinguished from ‘harms to personal conceptions of morality, right order, or offense,’ which Robertson often characterizes as merely symbolic harms, not sufficient to justify restrictions on procreative liberty (citing ROBERTSON, *CHILDREN OF CHOICE*, *supra* note 3, at 41). This is the heart of Robertson’s ethical argument, and it is a position with which I have much sympathy, as should other liberals.”

Consider, for example, the shifts in views about equality and justice as reflected in cases such as *Brown v. Board of Education*.³²⁰ But such foundational questions are not dealt with here.

So, what must be examined is the exact mechanism of learning supposedly involved in any given argument from symbolism. But such precision is hard to come by, partly because of the variability of perception and inference just mentioned. Faced with such uncertainties, one must identify and seek to "enter into" as many perspectives, both competing and cooperating, as possible. Forms of public debate and argument not conducive to this are of limited value. It would thus be a serious matter if it were generally true that "[w]hen the framework rests heavily on personal choice, we cannot even see what is missing, let alone whether it is worth having."³²¹

But as I have already argued, this view that the framework of choice excludes other frameworks is simply wrong, when stated as an across-the-board proposition. Concern about objectification and community does not turn up missing because autonomy is strongly valued. If anything serves to obfuscate, it is the put-down of autonomy by invoking the supposedly blinding light of the ideal of personal choice. Allusions to women as flowerpots and, more generally, as persons evacuated of value and "reduced" to storage bins seem designed to downgrade personal choice as a value. Recall, for example, how the prospective father's preferences were ignored, overwhelmed by the perceived creepiness of maintaining dead pregnant women on life support.³²² To make a modest change in the preceding paragraph: "When the framework rests heavily on objectification, we cannot even see what is missing let alone whether it is worth having."³²³

Careful public debate can thus both clarify *and alter* the mechanisms of learning. If we learn from what we see, we also see from what we learn.

320. 347 U.S. 483 (1954).

321. Nelson, *supra* note 2, at 134.

322. See generally Nelson, *supra* note 102, who barely mentions the father.

323. Nelson soundly concludes, however, that "[i]n the absence of sustained and thoughtful public debate . . . , there is reason to argue that we are not justified in passing laws that forbid the use of any reproductive technology—at least, not unless the technology can clearly be shown to cause personal harm. Nor . . . are we justified in leaving these matters to the market and to other social and disciplinary forces that wield a power over us which we neither fully understand nor fully control." *Id.* at 134. One doesn't have to accept the notion of a hard technological imperative to concur that we indeed do not fully understand how our institutions and practices affect us. As for "leaving it to the market": the phrase is ambiguous. One can leave matters to markets and still impose some degree of regulation upon them—consistently with their remaining markets.

C. Concluding Examples

Consider now how symbolism arguments apply to surrogacy and to using brain-dead pregnant women to incubate their fetuses. To do this, recall the earlier discussion about modes of perception, and variations in lumping and splitting tendencies.

To “see” the transaction, it is irrational to exclude any portion of the sequence of images that embody it, such as fathers and their wives taking in a genetically related child who would not otherwise exist. Yet such images are persistently excluded, and the skewed emphasis may lead to skewed perceptions and thus skewed learning. Temporary fragmentation of the picture, for purposes of close scrutiny, are obviously useful. But *all* the fragments require attention. With portions of a transaction systematically excluded, it is not surprising that what is left over is seen in a certain way: fetal containers rather than autonomous women, for example.

So, the problem with the argument from symbolism as applied to NRTCs is not the basic foundation of the argument, but its application. Actions or practices may be systematically misdescribed in the sense that selected portions of the events are excluded, and value-laden “descriptions” may be imported into observational claims.

Nevertheless, few of the NRTCs currently under discussion seem poised to cause a major shift in our attitudes on the status of women and children, or on matters of autonomy and personhood generally—even if their use expands. Two possible exceptions, discussed briefly above, are the abortion of non-affected fetuses in favor of affected ones; and germ-line engineering for purposes of “augmentation” rather than “prevention of disorder/defect.”

Two additional points concerning the argument from symbolism: First, the fact that many observers in fact perceive certain actions or practices in certain ways, even if they wouldn't if they were more fully attentive, is not a morally neutral fact. One who relies on arguments about learning effects may have to take the bitter with the sweet and acknowledge that certain practices which she morally approves pose risks precisely because they are seen in certain ways. Without effective means to revise perceptions, we cannot avoid the risks, such as they are. Of course, there are many examples of practices viewed one way at one time and another way at another time. Public debate and

change of circumstances often work revisions in preexisting frameworks.³²⁴

Second, general calls for public debate rather than immediate heavy-handed regulatory action do not offer an easy way out. There may be no consensus on how the debate should proceed, what the dominant values should be, what perspectives to absorb, or *how to rank them*. This should be no surprise since the very terms in which debate is pursued rests partly on the dominant values thought to be at stake. Calls for conversation are ordinarily better than calls for bullets, but framing public debates itself requires debate and may presuppose the very judgments and perceptions that some of us want revised. Selecting the modalities of debate is not morally neutral either, and we are quickly trapped in a kind of substance-procedure cycling. Without overarching canons that help us resolve serious issues, one calls for debate. And when the debaters get together, what exactly is it that they talk about, and how? If we knew, we might not be as quick to call for debate, for we would already have a handle on some answers. In fact, in the debates as we know them, perspectives are offered as truths and rival frameworks blasted as, at best, obfuscatory, irrelevant or unimportant.

William Ruddick states at the beginning of an essay that “[w]e do not think clearly about parents and children.”³²⁵ True enough. But it isn’t obvious how one goes about doing this when our very systems of thought are under siege. And even if we do find ourselves thinking clearly, it may not bring us much beyond some clues about how to avoid major errors.

Conclusion

I have not tried to apply the evaluative tools described here—Kant’s Formula, the idea of objectification, notions of selfishness and irresponsibility—to every NRTC, or even any given NRTC exhaustively. I have simply argued that assessments of NRTCs that rely on such analytic and evaluative tools require a degree of rigor and completeness often lacking in scholarly discourse. I have not supplied that required degree here, but have tried to point the analyses in the right direction. With some possible exceptions, I have concluded that using

324. See generally Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POLS., POL’Y & LAW 57, 76 (1989) (who also notes the difficulty in shifting our forms of perception); Tversky & Gati, *supra* note 9, at 98 (“[S]imilarities are constantly updated by experience to reflect our ever-changing picture of the world.”).

325. Ruddick, *supra* note 45, at 124.

these evaluative tools cannot lead us to across-the-board condemnations of any of the innovative reproductive techniques mentioned. The prevailing denunciations seem to be based in part on problems in the ways in which many observers try to fit these novel mechanisms into preexisting conceptual structures: differences are ignored or stressed; similarities are stressed or ignored. One's conclusions may remain the same after improved analysis, but the conclusions, in that event, are far more rationally based.

