Normative analysis of the legal structure of the new reproduction begins with a discussion of procreative liberty. IVF is now widely accepted, though a few years ago there were strong objections to it. Today, however, many people would support a ban on certain IVF activities, such as gamete and embryo donation and surrogacy. Since legal restrictions on use of noncoital reproductive techniques might preclude persons from the only reproduction possible for them, their procreative liberty would be limited significantly. Yet all liberty can be limited when its exercise substantially burdens others. Accordingly, we [offer] a discussion of the scope of procreative liberty and the extent of constitutional protection for noncoital conception and its collaborative variations.

The Nature and Scope of Procreative Liberty

"Procreative liberty" denotes freedom in activities and choices related to procreation, but the term does not tell us which activities fall within its scope. A crucial distinction is between actions designed to avoid procreation and those designed to cause procreation. In many societies cultural duties to procreate exist. In the United States, however, individuals and couples have no legal duty to procreate. The burdens of unwanted pregnancy and childbearing are deemed so substantial that any competent person—married, single, adult, minor—may choose to abort up to the fetus’ viability and use contraceptives to avoid pregnancy.

The right to procreate—to do those things that will lead to biological descendents—is equally or even more significant to persons, yet has not received the explicit legal recognition that the avoidance of procreation has. The absence of explicit law is significant, for it shows how widespread and
deep is the social understanding of the right to reproduce through sexual intercourse. While sterilization, fornication, and marriage laws have prevented some persons from reproducing, no law has prohibited or penalized married couples from having children as often as they like and can.

Extracorporeal conception and manipulation of the fertilized egg forces us to consider several new questions about the scope of the right to reproduce when that right, lodged as it is in the community's background assumptions, has itself received little critical scrutiny. Do persons with the right to reproduce coitally also have a right to do so noncoitally, if coital reproduction is not possible? May they enlist gamete donors and surrogate gestators to overcome their infertility? May they choose to limit their participation to discrete, unconnected reproductive roles, such as gamete or embryo donor or surrogate? Questions of posthumous procreation, embryo storage, and selection of offspring characteristics also arise.

Determining the scope of the right to procreate—and hence of reproductive liberty involving extracorporeal human embryos—depends on exploration of two issues that have never been isolated in this way. The first is the extent to which the basis for valuing reproduction applies when conception occurs noncoitally or collaboratively. The second concerns the meaning and scope of responsibility in reproduction, and thus the circumstances in which reproduction can justifiably be limited.

The first question requires us to examine the moral or value basis for according reproduction such high value. Reproduction is the creation of biological descendants through gametic fusion with a partner, gestation by the female, and usually rearing by one or both of the procreators. Creating and rearing biological descendants is immensely meaningful for individuals and for society. The case for according persons a large degree of liberty in creating and rearing biological descendants is plausible and appealing, and, at least within marriage, has been widely accepted.

It would seem, then, that freedom to procreate noncoitally should also be recognized, since it may be the only way for the person to reproduce. By the same token, the use of sperm, egg, embryo, or uterus donors may also be necessary for the person to have or rear biological descendants. While the possibility of harms unique to IVF procreation should be explored, a plausible argument to extend procreative liberty to transactions involving the extracorporeal embryo can be made.

This understanding of procreative liberty, however, can be distinguished from reproductive roles played by persons who are not themselves attempting to acquire offspring of their own. For the donor or surrogate, participation in partial reproductive roles, such as gamete or embryo donor, or gestator, may have less of the meaning that gives reproduction its significance, and therefore need not be as fully protected. Similarly, the liberty to have one's heirs conceived or transferred to a uterus posthumously, which gamete and embryo storage makes possible, seems less compelling than the liberty to have heirs during one's life. Extension of the scope of procreative liberty thus raises questions about life, death, and one's continuity with the natural order. Analo-
gies and similarities to current practices abound, but none is identical. Whether the dissimilarities are morally significant must await further experience and the evolution of shared understandings about the personal and social importance of the procreative interests at stake.

There is also normative uncertainty about the scope of reproductive responsibility—a second issue in need of clarification. May a person’s freedom to acquire children for rearing or to engage in other activities with reproductive significance be limited to protect offspring and others? Reproductive decisions affect offspring and may lead directly to burdens for others. Yet there have been few efforts to assure reproductive responsibility, and the idea of reproductive responsibility is seldom addressed in countries without a population problem. In developed countries most people are free, if they have a partner, to reproduce when and as often as they like.

IVF will force elucidation of the concept of reproductive responsibility, for actions done to create or manipulate fertilized eggs may directly hurt offspring or others. In assessing reproductive responsibility in use of noncoital technologies, concerns about overpopulation, producing handicapped children, imposing rearing costs on others, maternal behavior during pregnancy, and the ability to parent competently must be distinguished. The limits of acceptable behavior will depend on the burdens and benefits of particular techniques and on the emerging meaning of reproduction as these techniques filter into common use.

Constitutional Recognition of a Right to Procreate

The legal structure of noncoital reproduction will reflect these questions concerning the meaning and scope of procreative liberty. The current legal situation is marked by an absence of direct regulation and uncertainty about the extent to which fetal research, adoption, and artificial insemination by donor (AID) laws apply to embryo manipulation and to donor and surrogate transactions. Further regulation limiting IVF and noncoital options is certainly a possibility. Discussion of the constitutional right to procreate will illuminate the underlying normative problems, indicate the scope of possible state intrusion, and thus define the freedom to make noncoital and collaborative reproductive decisions.²

The Right to Noncoital and Donor-Assisted Reproduction

The starting point of analysis is the recognition that married persons (and possibly unmarried persons as well) have a right to reproduce by sexual intercourse. Although laws regulating fornication, cohabitation, and adultery have limited the freedom of unmarried persons to reproduce, laws limiting coital reproduction by a married couple have been notably absent. As a result, there are no cases that directly involve a married couple’s right to coital reproduction.
In dicta, however, the Supreme Court on numerous occasions has recognized a married couple's right to procreate in language broad enough to encompass coital, and most noncoital, forms of reproduction. In Meyer v. Nebraska, for example, the Court stated that constitutional liberty included the right of an individual "to marry, establish a home and bring up children."\textsuperscript{3} In striking down a mandatory sterilization law for habitual criminals in Skinner v. Oklahoma, the Court noted that the law interfered with marriage and procreation, which were among "the basic civil rights of man."\textsuperscript{4} In Stanley v. Illinois the Court observed that "[t]he rights to conceive and raise one's children have been deemed ‘essential,’ ‘basic civil rights of man,’ and ‘[r]ights far more precious . . . than property rights.’"\textsuperscript{5} The Court has noted that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."\textsuperscript{6} An especially explicit statement of the right to procreate appeared in Justice Brennan's opinion in Eisenstadt v. Baird: "If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."\textsuperscript{7}

The Court's statements have not distinguished carefully between conceiving and rearing a child, analyzed the interests behind this protection, or taken account of new reproductive technologies. Moreover, these statements arise in a context where government control over entrance to, and exit from, marriage is not in question, and where public policy may mandate government interference with the reproduction of mentally incompetent persons.\textsuperscript{8} Yet it seems indisputable that even a conservative Supreme Court would find that married couples have a fundamental constitutional right to reproduce by coitus.\textsuperscript{9}

One need only imagine the result if a state passed a law that limited a married couple's freedom to reproduce by sexual intercourse. Involuntary sterilization, mandatory contraception and abortion laws, laws limiting the number of children, or other laws restricting coital reproduction doubtlessly would be subjected to the same strict scrutiny that laws restricting abortion and contraception now receive. Such laws would be struck down unless some compelling ground for such a drastic restriction of marital freedom could be shown.\textsuperscript{10}

If the Supreme Court would recognize a married couple's right to coital reproduction, it should recognize a couple's right to reproduce noncoitally as well. The couple's interest in reproducing is the same, no matter how conception occurs, for the values and interests underlying coital reproduction are equally present. Both coital and noncoital conception enable the couple to unite egg and sperm and thus acquire a child of their genes and gestation for rearing. Aside from religious views that see coitus and reproduction as inextricably linked, the particular technique used to bring egg and sperm together is less important than the resulting offspring. The use of noncoital techniques such as IVF or artificial insemination to unite egg and husband's sperm, made necessary by the couple's infertility, should then also be protected.
The need for a third party donor or surrogate to provide the sperm, egg, or uterus necessary for the couple to beget, bear, or otherwise acquire a child should, under these principles of procreative liberty, also fall within the married couple’s procreative rights. Although not as directly entailed as noncoital conception, the assistance of a third party collaborator should be treated similarly. The donor assists the couple in reproducing by contributing a factor of conception or gestation that the couple lacks. The donor is essential if the couple is to rear a child that has a gametic or gestational connection with the couple. Since they are otherwise qualified to be parents, and would be free, if fertile, to reproduce as often as they wished, they should be free to procreate with the help of gametic or womb donors.

Unpacking the meaning of procreation by sexual intercourse, as IVF and noncoital conception require us to do, we see that the reasons and values that support a right to reproduce coitally apply equally to noncoital activities involving external conception and collaborators. While the case is strongest for a couple’s right to noncoital and external conception, a strong argument for their right to enlist the aid of gamete and womb donors can also be made. Both enable a couple to rear a child that is the biological descendant of, or has been gestated by, one of them.

If the couple’s right to reproduce were fully recognized, married persons would have the right to engage in a wide range of noncoital activities involving embryos, donors, and surrogates in their attempt to reproduce. They would have the right to determine the use of their gametes and the disposition of embryos created with those gametes. They would also have the right to contract with others for the provision of gametes or embryos, or gestation, with the contract settling the parties rearing rights and duties in resulting offspring. While the state could regulate the circumstances under which parties enter into reproductive contracts, it could not ban or refuse to enforce such transactions altogether without compelling reason. In short, the interests and values supporting the right to reproduce by sexual intercourse extend to external conception and the need to contract with donors, surrogates, and physicians for the creation, gestation, and rearing of children. While the state is not obligated to facilitate or provide the means to reproduce, it would need a compelling justification to interfere with noncoital reproductive choices made by freely consenting persons in the private sector.

Unmarried Persons

Although no law prohibits reproduction by unmarried persons, fornication, cohabitation, and paternity laws that penalize nonmarital coitus still exist in many states. Of more immediate concern is the reluctance of physicians and hospitals to make donor insemination and other reproductive options available to single persons. Access for unmarried persons takes on greater significance as single women and same sex couples seek to beget and rear children.

The argument for the right to reproduce coitally is clearest in the case of married persons but can also be made for unmarried persons. If their right to
reproduce by sexual intercourse were recognized, then they too would have a right to noncoital and donor-assisted reproduction.

A strong argument that unmarried persons should have a right to reproduce coitally can be made. Unmarried persons also have needs or desires to have and rear biological descendants, and may be as competent parents as married couples. They may not be able or willing to marry to satisfy this desire. Given the personal significance of reproduction, it would seem to deserve protection for unmarried as well as married persons. Indeed, banning coital or noncoital conception by single persons seems absurd when unmarried sexual relations are common and when single women cannot be forced to use contraception or to abort after pregnancy has occurred. Surely capable rearers should not be denied the opportunity just because they are unmarried.

While the argument for the right of single persons to reproduce coitally persuades many persons, it is not clear that it would be accepted by the Supreme Court. The single person's right to use contraception and to continue a pregnancy once begun does not necessarily entail a right to conceive in the first place. Preventing conception and pregnancy by requiring contraception and abortion interferes with bodily integrity in a way that preventing conception in the first place—by preventing access to the needed means—does not. Like the distinction between reading pornography in the home and purchasing it to bring home, these distinctions might be appealing to a Supreme Court not disposed to extend the list of fundamental rights. While traditions of family and of reproduction within marriage make it difficult for the Court to deny the procreative liberty of married persons, it may be less willing to recognize the right of single persons to reproduce. For example, the Supreme Court has not yet held that fornication and marriage laws violate an unmarried person's right of privacy. In any event, if the right of single persons to reproduce coitally is recognized, then they too should have the right to reproduce through IVF and other forms of noncoital reproduction.

**Limits on the Right to Noncoital Reproduction**

If the foregoing analysis seems startling, it may be because we are unpacking the implications of a right that never, because of technology, had to be unpacked. If procreative liberty protects a wider swath of reproductive activities than one might have thought, limits on reproductive choice may nevertheless exist, either because the values behind reproduction are not significantly implicated or because valid state interests justify limiting the right.

Recognition of a right to reproduce noncoitally and to contract with donors and surrogates to that end leaves unanswered many questions raised by noncoital conception. Even if there is a right to use IVF to have and rear biological descendants, it may be that IVF activities not aimed at acquiring a child for rearing are not protected. For example, a married or single person's desire to play a partial reproductive role, such as providing gametes or
gestation *tout court*, may not involve the underlying values that support a right to reproduce to such an extent as to deserve protection in its own right. Similarly, the values underlying a right to reproduce may be too attenuated to deserve protection when posthumous disposition of stored gametes or embryos is at issue. Nor may reproductive values be strongly implicated in a person’s wish to manipulate the genes of extracorporeal embryos in order to select or control offspring characteristics. Whether such reproductive choices deserve constitutional protection will depend upon the evolving social and individual meanings attached to reproduction and its disaggregated components.

A second important limit on IVF and noncoital activities would be prevention of harm to other persons or to important state interests. The main concerns with IVF have centered around harm to extracorporeal embryos, offspring, family, and the human dignity of reproduction. While some of the debate concerns the meaning of harm in a reproductive context, this article concludes that most noncoital maneuvers pose a low risk of the kinds of harm that might justify prohibition of their use. Thus, regulation to assure free, informed entry into donor and surrogate transactions might be justified to protect the autonomy of the parties, but a complete ban on collaborative arrangements would ordinarily not be justified.

Noncoital reproduction, however, does raise the possibility of symbolic harm. Its main impact may be on moral or religious notions about sexuality, reproduction, family, female roles, and similar value-laden concerns. Such concerns are of immense importance to individuals and society. In choosing values, persons and societies understand themselves as beings and groups with particular ethical or moral beliefs. Because these choices are so fundamental, individuals may vary widely in their choice of and commitment to such values. It is no surprise that activities that carry such symbolic weight are controversial and lead to efforts to enlist legal institutions to enforce one’s views of the matter.

Constitutional protection for noncoital reproduction thus has enormous importance, for symbolic concerns without direct, tangible harm to others are usually insufficient to justify infringing the fundamental rights of persons with different views. Views of the rightness or wrongness of particular means of conception might properly animate individual choices to avoid, seek, or provide such services. They also permit the state to refrain from funding or subsidizing the activity. But they generally do not justify public action that interferes with the exercise of the right.

In short, IVF and noncoital reproduction illustrate the recurring dilemma of rights in a society of limited governmental powers. Recognition of fundamental rights is essential in the constitutional scheme, yet it permits activities that may run counter to the values that a majority holds and may even lead to changes in those values. Yet the community through law may not stop the exercise of those rights, even though an impact on its value structure may occur. Noncoital reproduction is thus left to the moral discretion of patients, physicians, and other actors in the private sector.
Notes

1. The recipient of the donation, however, may have the full procreative interest, even if the donor does not. Thus, persons desiring to reproduce may have a right to receive gametes and gestation from others, even if the others have no independent right to provide those services. See infra text accompanying notes 11-13.

2. Whatever the constitutional posture of procreative liberty, persons in the private sector will remain free to make decisions concerning IVF and their participation in it. See infra text accompanying note 21.

3. 262 U.S. 390, 399 (1923).


5. 405 U.S. 645, 651 (1972) (citations omitted) (brackets in original).


7. 405 U.S. 438, 453 (1972) (emphasis omitted). Only four members of the Court concurred in Justice Brennan’s opinion. See also Bowers v. Hardwick, 106 S. Ct. 2841, 2851 (1986) (Blackmun, J., dissenting) (“We protect the decision whether to have a child because parenthood alters so dramatically an individual’s self-definition, not because of demographic considerations or the Bible’s command to be fruitful and multiply.”)

8. See Buck v. Bell, 274 U.S. 200, 207 (1927); see also In re Grady, 85 N.J. 235, 251–52, 426 A.2d 467, 475 (1981) (courts can order sterilization under parens patriae jurisdiction). Recognition of the state’s right to sterilize mentally incompetent persons implicitly supports the notion of the married couple’s right to reproduce. These cases assume that persons have a procreative right not to be sterilized, and they examine whether mental retardation allows the right to be overridden. Although the grounds or source of the person’s right is never examined, it could be justified as necessary to protect against unwanted physical intrusion and to protect the ability to reproduce if one later marries.

9. The claim of a married couple’s right to reproduce coitally is a claim of substantive due process—a claim that unwritten rights exist and are appropriately identified by the Supreme Court within the confines of the fourteenth amendment.

10. The point is that state restriction of coital reproduction would be tested by a standard more rigorous than a rational basis test. Extraordinary situations like the need to reduce population because of severe over-population or food shortages might meet such a standard, ... but a moral dislike of the way people are choosing to reproduce would not. Another conceivable ground for limitation might be when a person knowingly and avoidably conceives and brings to term a severely handicapped child and passes the costs and burdens of rearing that child to others.

11. Thus, existing fetal research, adoption, and AID laws that limit noncoital reproductive options are of doubtful constitutionality, and may be struck down if challenged. Similarly, legal presumptions about who is the rearing father and mother in situations involving donor gametes and surrogates may also fall, once the full implications of procreative liberty are recognized. ... 

12. Refusal to enforce reproductive contracts and prohibitions on money payments would amount to an interference with procreative liberty, since it would prevent
couples from obtaining the donor assistance that they need to acquire a child genetically or gestationally related to them.

The right to contract for reproductive assistance asserted here may be compared with the right of persons contemplating marriage to regulate by contract the relation between them and a future divorce settlement. Both reproductive and prenuptial contracts illustrate the social movement from status to contract in family and reproductive relations. Recognition of such a contract right also raises the question of why contracts to adopt children made before or after conception but before birth would not be valid, or why parties should not be free after birth to make private contracts for adoption directly with women who want to relinquish their children. The logic of my argument is that persons, at least if married, have a right to acquire a child for rearing purposes, and may resort to the medical or social means necessary to do so. Although IVF and its variations preserve a genetic or gestational link with one of the rearing parents, the right at issue may not be so easily confined. It may be that the law of adoption needs to be rethought in light of the right to contract for noncoital reproductive assistance.

13. The argument for a single person's right to procreate sexually must be distinguished from the argument for the right of a single person to have sex with consenting others and the right to avoid reproduction. Recognition of the unmarried person's right to avoid procreation through access to birth control and abortion does not necessarily imply either a right to procreate or a right to have sex with consenting others. Sexual liberty would not necessarily entail reproduction (merely sex with contraception), and a right to reproduce would not necessarily entail sexual freedom beyond the sexual or other acts required for reproduction.

14. While poor, young, single mothers who are unemployed or lack skills arguably may not be well situated to raise families, unmarried persons with means clearly could be. Indeed, many poor, single women are capable mothers, and more single parents than ever now raise children. Since unmarried status or single parenthood is not in itself grounds for termination of parental rights, unmarried status is, arguably, a poor reason to prevent conception or the means to achieve it.

15. A single person may have a right to go to term once she has conceived, i.e., a woman cannot be forced to have an abortion even if she is single. But this right may be based on a right of bodily integrity, rather than on a right to reproduce. Similarly, a single woman who has given birth cannot be forced to relinquish a child just because she is single. But in this case it would be a heavy intrusion to separate mother and child on the basis of unmarried status when her parenting capacity is clear. Also, a single person is constitutionally guaranteed the right to access to contraceptives in order to avoid the burdens of reproduction. But these cases do not demonstrate that a single person cannot be penalized for fornication. If so, the state could deny IVF and other noncoital reproductive services to single persons.

16. The distinction is admittedly strained. In the one case, the state is forcing one type of burden on the woman, and in the second, another type of burden altogether. But difference in type of burden seems less important than the significance or magnitude of the burden. On this score there appears to be no morally cognizable difference between the two.

17. This example focuses attention on the interests that make reproduction so highly valued and on whether they are present when gestation and rearing without a gene link occur. Indeed, it is not clear that we would say that such persons have reproduced. In the reverse case, a gene link without gestation and rearing, we might...
accurately say that reproduction has occurred. For example, an anonymous sperm donor has reproduced himself when a child is born from his donation even if there is never any contact between them. It would not follow, however, that the choice to give or withhold the sperm is part of protected liberty, for some additional interest could be required before a reproductive incident is constitutionally protected. The case of rearing or gestating without the hereditary link may have those other incidents and thus merit constitutional protection even though the avoidance or creation of an hereditary link alone does not.

18. This issue involves an assessment of the importance to people of the knowledge that a biological descendant will come into being and live after one has died. . . . The right to transmit property to embryos and children born posthumously of stored gametes is a separate matter.

19. However, prohibition in particular instances might be justified. For example, the offspring's interest in knowing her genetic roots may justify a ban on collaborative reproduction that does not maintain records concerning the gamete source.

20. There is no way to understand cases such as Roe v. Wade, . . . Eisenstadt v. Baird, . . . Griswold v. Connecticut, . . . and a host of others other than as standing for the proposition that symbolic or moral evaluation of protected conduct without more does not justify state interference with the conduct. The community's power to enforce or impose morality stops at the threshold of another person's fundamental rights.

21. Since procreative liberty is (like most constitutional rights) a negative—not a positive—right, it obligates the state to refrain from interference with reproductive arrangements among consenting adults and physicians. It does not obligate the state to fund these activities or allow the activities in state institutions, any more than the state is obligated to fund abortions or contraception. . . . Nor is the private sector obligated to offer IVF services. Hospitals may refuse to allow IVF or may restrict the reproductive transactions that it allows. Doctors and institutions conducting IVF may set their own limits on what they will permit. The power of the private sector suggests that patient-physician relations may be as important as constitutional limitations in determining the development and impact of the new reproduction. . . .