BOOK REVIEW

COPYRIGHT'S HIGHWAY: THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX

by PAUL GOLDSTEIN
HILL & WANG, NEW YORK, NY; 253 PAGES; $21.00

REVIEWED BY ROBERT CHOW †

In the not too distant future, people will no longer drive to the video store and stand in line to rent the latest movies. Nor will they visit music stores to buy a copy of the latest hit single. Instead, people will have access to vast libraries of films, sound recordings, and printed material from the convenience and comfort of their homes. They will simply send electronic commands from their personal computers or consoles mounted on their television sets and whatever they desire will appear on the screen. This cache of movies, music and writings may take the form of either a satellite orbiting above the earth or an earthbound network of fiber optic cables and telephone wires. This technology is what Stanford Law Professor Paul Goldstein has coined the "Celestial Jukebox."[1] Others know it by the less elegant term, "Interactive Television."

But here's the rub. Copyright laws as they exist today may not protect copyrighted works distributed via the celestial jukebox. Presently, people are free to make copies of copyrightable works as long as such copies are made for non-commercial use in the privacy of their homes.[2] Even though private copying undercuts a copyright owner's ability to recoup the work's value, Congress and the courts have deemed such non-commercial copying noninfringing because it would be economically impracticable to collect licensing fees from each individual private user.

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1. PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX 28 (1994).

2. This doctrine has been explicitly applied to both audio recordings, *see* 17 U.S.C. § 1008 (1992), and video recordings, *see* Sony v. Universal City Studios, 464 U.S. 417 (1984).

Goldstein, however, argues that the assumptions exempting home recordings from copyright infringement are no longer true. The same technology that will give people access to entertainment on demand will also make it possible to charge subscribers electronically for each use of a pre-recorded work.[3] Goldstein predicts the price of access to such works could drop to the point where people, knowing they can access the work on the celestial jukebox anytime, would simply not bother making copies.[4] Producers of copyrightable works would receive the full value from their creative endeavors and there would be little need for home recording devices.[5] But to make it so, Congress must rewrite copyright laws so that they extend to private copying. Goldstein believes that "[i]f Congress and the courts continue to hesitate to extend copyright into the home, and copyright's public-private distinction persists and is not adjusted to the technologies of the celestial jukebox, the integrity of copyright will be threatened."[6]

Whether you believe that copyright laws need to be rewritten to accommodate the celestial jukebox, or whether you agree that copyright ought to reach as far as Goldstein urges, *Copyright's Highway: The Law and Lore of Copyright from Gutenberg to the Celestial Jukebox* is worth reading. Goldstein takes the reader on a splendid journey through the colorful history of copyright and offers a bold vision of the future. The author's lucid articulation and elegant presentation of the intriguing concepts underlying copyright law offer something for all readers, whether they be laypersons or lawyers, copyright scholars or the merely curious.

The author explains the dynamic force shaping copyright as the tug-of-war between two groups who argue whether copyright is a glass half full or half empty.[7] He describes "optimists" as those who see the glass half full, believing copyright is a natural right, entitling authors to every last penny that other people will pay to obtain copies of their works. On the other side, "pessimists," those who see copyright as a glass half-empty, believe copyright owners should only get as much control over copies as is necessary to provide an incentive to produce creative works.

The author claims to have one foot in each camp. He is a pessimist when it comes to bringing new subject matter under the protection of copyright. "As new forms of technological subject matter claim copyright protection, lawmakers should carefully measure them against copyright's historic standards and resist the temptation to extend protection simply

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3. GOLDSTEIN, *supra* note 1, at 28.
4. *Id.* at 30.
5. *Id.*
6. *Id.*
7. *Id.* at 15.

because copyright represents the most capacious and catholic intellectual property doctrine."[8] He is dubious about the inclusion of computer software as copyrightable subject matter and describes the United States Copyright Office's registration of computer programs as "panglossian."[9] He objects to copyright protection for software because he believes the duration of such protection is much too long for such fast-moving technology. Furthermore, copyright protection for software risks creating monopolies over things that belong within the public domain.[10]

But once Congress has properly determined that something deserves copyright protection, Goldstein becomes a zealous optimist. He believes that copyright protection should then reach as far as practically possible so that authors and other creators of copyrightable works receive the necessary incentive to create new work and develop new markets.[11] "As new technological uses of copyrighted works emerge, lawmakers should be quick to extend copyright to encompass them, even if the uses are construed as private."[12]

Although numerous commentators see the digital revolution leading to the extinction of copyright,[13] Goldstein finds a ray of hope. The author sees the digitization of data as simultaneously posing the greatest opportunity and the greatest challenge for copyright. The opportunity lies in the potential for using the celestial jukebox in a manner that will allow producers of creative works to recapture the economic value lost to private copying. Presently, producers of movies, television programs, music and other publicly performed works recover the value of their works through the imprecise method of blanket licensing fees from broadcasters. Broadcast audiences are for the most part free to listen to performances of copyrighted works without charge. Private copying further diminishes the compensation copyright holders receive for producing their works, as such copies displace retail sales and rentals of authorized originals from which publishers, movie studios and record companies earn their revenues. The law, however, permits such copying to continue because of the belief that it cannot be practically regulated.

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8. *Id.* at 202.
9. *Id.* at 203.
10. *Id.*
11. *Id.* at 216-17.
12. *Id.* at 202.
13. NICHOLAS NEGROPONTE, BEING DIGITAL 58 (1995) ("Copyright law is totally out of date. It is a Gutenberg artifact. Since it is a reactive process, it will probably have to break down completely before it is corrected."); *see also* John Perry Barlow, *The Economy of Ideas: A Framework for Rethinking Patents and Copyright in the Digital Age*, WIRED, March 1994, at 85 ("Intellectual property law cannot be patched, retrofitted, or expanded to contain digitized expression any more than real estate law might be revised to cover the allocation of broadcasting spectrum.").

Goldstein suggests that the celestial jukebox can correct these market and regulatory failures:

> For copyright optimists, at least, one virtue of the celestial jukebox is that it can reverse the losses they see copyright owners suffering today when people make copies of films and sound recordings: by charging subscribers electronically for each use of the prerecorded works it offers—motion pictures, sound recordings, books, magazines or newspaper articles—the celestial jukebox will be able to compensate copyright owners each time their works are chosen.[14]

In fact, if Goldstein's vision is carried to its logical conclusion, there may be little need in the future for inexact devices like American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Musicians Inc. (BMI). For that matter, there may not be much need for television and radio stations, video rental shops, advertisers and a host of other media middlemen. Goldstein, however, does not believe the celestial jukebox will ever completely displace traditional copyright markets.[15]

The challenge, the author suggests, lies in convincing Congress to amend the copyright laws so that they prohibit private recording of works delivered over the celestial jukebox before it is too late:

> By and large, copyright owners suffer and consumer electronic companies benefit any time Congress postpones a decision on home copying. As time passes, more and more consumers acquire new copying equipment and, with it, the expectation of free copying. As habits of free use proliferate, the prospects for dislodging them diminish. Ideal, balanced laws that might have been possible within a year or two of a new technology's arrival in the marketplace can, five years later, be politically impossible.[16]

Of course, getting Congress to act promptly is no easy task. Historically, Congress has waited 20 years before re-writing copyright laws to accommodate new technology—much too slow for present cycles of innovation. "As the pace of technological change quickens, Congress seems less and less able to adjust copyright laws to the changes,"[17] Goldstein writes. The author describes two examples in which Congress' failure to respond to new technology led to the erosion of copyright: the invention of photocopiers, and home video cassette recorders.

In the absence of Congressional action, the courts have been reluctant to extend the reach of copyright. The author focuses in

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14. GOLDSTEIN, *supra* note 1, at 30.
15. *Id.* at 224.
16. *Id.* at 134.
17. *Id.* at 32.

particular on the Court's decisions in *Williams & Wilkins Co. v. The United States*[18] and *Sony v. Universal City Studios.*[19]

Goldstein's detailed account of *Williams & Wilkins* captures the drama behind publisher William Passano's copyright infringement suit against the National Library of Medicine and the National Institute of Health for the systematic photocopying of articles from journals published by Williams & Wilkins. The author draws from interviews with many of the principals in the case as well as from court opinions and transcripts to lead the reader step-by-step through the landmark case. In a 4-3 decision, the U.S. Court of Claims ruled against Passano because of concerns that finding copyright infringement would harm medical research, leaving the matter for Congress to resolve. An evenly divided panel of Justices let stand the U.S. Court of Claims decision. When Congress finally did act, it adopted 28 U.S.C. § 108 of the 1976 Act, which provided a statutory exemption from copyright for library photocopying.

In the chapter discussing *Sony v. Universal,* the author gleans new insight from the late Justice Thurgood Marshall's court papers, only recently made public by the Library of Congress. Following oral arguments, the Supreme Court was poised to affirm the Ninth Circuit's holding that Sony's sale of Betamax recorders amounted to contributory copyright infringement. Justice Stevens, who had been originally assigned to write the dissent, persuaded four other justices to endorse his view, turning Justice Blackmun's opinion into a four-Justice dissent. Part of the Court's reluctance to hold Sony liable as a contributory infringer stemmed from distate for the idea of characterizing the millions of home users of video recorders as lawbreakers.[20] But Goldstein believes the Court's concern was unfounded. Goldstein writes, "The Supreme Court should have realized that, even if it had ruled for Universal and Disney rather than for Sony in the Betamax case, the film companies would not have sought injunctions against home copiers. More likely, working together with VCR manufacturers, the studios would have negotiated a VCR and videotape royalty that reflected the value of VCRs and videocassettes in making home recordings of copyrighted films."[21]

Given the lessons of *Williams & Wilkins* and *Sony,* Goldstein fears that the celestial jukebox's potential for revitalizing copyright will be lost if producers of creative works fail to convince Congress to rewrite copyright laws to prohibit private copying.

Yet, Goldstein does not explain how Congress should go about prohibiting private copying. Video and audio recording devices are

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18. 420 U.S. 376 (1975).
19. 464 U.S. 417 (1984).
20. GOLDSTEIN, *supra* note 1, at 150.
21. *Id.* at 218-19.

found in most homes today. Even though the celestial jukebox makes it possible to bill subscribers for the movies and music they select, what is to prevent them from recording as they view their selections? The author himself admits that Congress is loathe to adopt laws that cannot be effectively enforced.[22]

The fact that the celestial jukebox provides copyright holders the ability to reap the full economic value of their works, however, begs the question of whether they ought to be entitled to reach that potential. As Stephen Breyer noted in his 1970 Harvard Law Review article, "The Uneasy Case for Copyright,"[23] few workers receive salaries that amount to the full value of their labor. Why should a producer of creative works be paid more than the cost of persuading him to create the work? Perhaps Goldstein's metaphor of the half-filled glass is backwards. The author and others who advocate extending the reach of copyright to recover the entire economic value are those who view copyright's glass as half empty and will not be satisfied until they see the other half filled.

The author's interest in seeing copyright "extend into every corner of economic value" may be more than academic. The author served as a consultant to the plaintiffs in the infringement suit against Sony, and he continues to consult for the movie and recording industry. Goldstein's perspective is certainly one that furthers the interests of producers of movies and musical recordings.

Goldstein suggests that extending copyright's reach as far as practically possible is justified even if one views copyright from a utilitarian perspective. He offers the economic theories of Chicago School economist Harold Demsetz, who reasoned that the more an author is compensated for economic value, the more accurately price functions as a signal of consumer preference. This encourages the most efficient channeling of private investment in the production of creative works.[24]

Goldstein neglects to discuss other justifications for excluding private copying from copyright besides market failure. In *Twentieth Century Music Corp. v. Aiken*,[25] Justice Stewart noted the need for balancing the copyright holder's interest against the public's interest:

> The limited scope of the copyright holder's statutory monopoly, like the limited duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.[26]

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22. *Id.* at 131.
23. Stephan Breyer, *The Uneasy Case for Copyright*, 84 HARV. L. REV. 281 (1970).
24. GOLDSTEIN, *supra* note 1, at 178-179.
25. 422 U.S. 151 (1975).
26. *Id.* at 156.

Indeed, the digitization of copyrighted works provides for the recovery of the full economic value from such works precisely because of unprecedented control over access. Law Professor Pamela Samuelson notes that the ease with which works in digitized form may be replicated and transmitted to multiple users creates a strong incentive for copyright industries to move away from sales of copies, and toward greater control over the use of their works.[27] Such control over access, however, has the potential for allowing copyright holders to extend ownership of their works beyond the duration of the copyright term.[28] Goldstein himself recognizes the concerns over the public's access to copyrighted work by stating, "With the celestial jukebox, while the quantity of entertainment and information will doubtless increase for those who are able and willing to pay for it, it will probably shrink for those who are not."[29] The author, however, fails to address those concerns.

Regardless of one's point of view on copyright, *Copyright's Highway* raises an intriguing vision of the future for copyright. Whether the future develops as Goldstein envisions will depend on a multiplicity of factors: whether the technology will be implemented as Goldstein suggests;[30] whether consumers adopt the technology;[31] and how Congress and courts shape and interpret the copyright laws to meet the challenge of the digital age.

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27. Pamela Samuelson & Robert J. Glushko, *Intellectual Property Rights for Digital Library and Hypertext Publishing Systems*, 6 HARV. J.L. & TECH. 237 (1993).

28. *Id.* at 253.

29. GOLDSTEIN, *supra* note 1, at 32.

30. *See generally* NICHOLAS NEGROPONTE, BEING DIGITAL (1995). Negroponte suggests that even with entertainment-on-demand, consumers will prefer to download copies of digitized works and store them for future viewing, rather than viewing the works as they are delivered. This approach will invariably require copying of the work. Furthermore, consumers will have competing demands on use of the fiber optic conduit into their homes from video telephoning and other services. Thus consumers will not want to tie up their fiber optic connections by watching digitized works in real time as they are being delivered. *Id.* at 46-48, 174-176.

31. EVERETT M. ROGERS, DIFFUSION OF INNOVATION, 120-22 (1995).

BOOK REVIEW

CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES

by JOHN A. ROBERTSON
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REVIEWED BY DUANE R. VALZ †

INTRODUCTION

The past fifty years have witnessed considerable progress in the field of reproductive technology.[1] However, the successful development of *in vitro* fertilization (IVF) in the 1980s ushered in a new era of heightened ethical concerns.[2] IVF at once entails the disembodiment of conception, embryo manipulation and experimentation, and often the creation of multiple embryos, not all of which can be implanted. Moreover, IVF has made possible a host of related and more controversial reproductive technologies and practices, including embryo cryopreservation,[3] gestational surrogacy,[4] and most recently pre-embryo

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1. For an overview by decade of the major technical developments in the treatment of infertility see Serena H. Chen, M.D. & Edward E. Wallach, M.D., *Five Decades of Progress in Management of the Infertile Couple*, 62 FERTILITY & STERILITY 665 (1994).

2. See *id.* at 676-79 for a review of the various technical procedures which may comprise an *in vitro* fertilization cycle.

3. Also known as "embryo freezing." For the leading case addressing the custody/disposition conflicts that may arise from the use of cryopreservation, see Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992). *Cf.* Kass v. Kass, 1995 WL 110368 (N.Y. Sup. Ct. 1995).

4. Johnson v. Calvert, 5 Cal. 4th 84 (1993) (articulating an "intentional parenthood" standard in determining that a husband and wife who contributed the gametes for producing their son retained full parental rights respecting the child, though the surrogate they hired to gestate the child actually gave birth to it). *Cf.* McDonald v. McDonald, 608 N.Y.S.2d 477 (1994). *McDonald* applied the intentional parenthood standard to a situation where, consequent to their divorce, a husband attempted to deprive his wife of parental rights respecting their daughter because the child was the product of his and an ovum-donor's gametes. The court found that even though the wife was, biologically, only a gestational mother to the child, her intention to be its mother before the child was ever conceived or implanted was enough to confer upon her legal maternal status.

splitting.[5] On the horizon lies the prospect of germ-line gene therapy,[6] and perhaps artificial wombs.[7] The very idea of such technologies has elicited strong responses—some herald them for expanding the range of procreative opportunities available to the infertile while others denounce them for defiling the sanctity of nature, human life, and the procreative process.

There is no doubt that New Reproductive Technologies (NRTs) have allowed many parents to bear children where they would have been unable to otherwise. Although having infertility treatment is not medically necessary, the desire to become a parent is a strong, compelling one for most adults. Adoption has long been an option for the infertile, but it is often an expensive, time consuming, and legally arduous process. Additionally, many prospective parents find NRTs particularly valuable because they allow parents to have children with whom they share a biological bond. To the extent that NRTs do enable prospective parents to enhance their reproductive capacities and avoid the complications of adoption, they have been a very positive development.

However, sex and reproduction remain contentious and politically charged topics in contemporary American society. New reproductive practices are proliferating in a context where social views about such issues as abortion, teen pregnancy, sexually transmitted disease, homosexuality, interracial relationships, and single motherhood continue to diverge. Further, our notions of parenthood and family are also being challenged by the increasing number of divorces, out-of-wedlock births, and incidences of single parenthood. While these issues do not always relate to NRTs directly, they often impinge on discussions of the social and cultural impact of NRTs and their related practices. For instance, members of the gay and lesbian community are more frequently turning

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5. Also commonly referred to as "cloning," though this is technically a misnomer. *See* Philip Elmer-Dewitt, *Cloning: Where Do We Draw the Line*, TIME, Nov. 8, 1993, at 65; Gina Kolata, *Scientist Clones Human Embryos, And Creates an Ethical Challenge*, N.Y. TIMES, Oct. 24, 1993, at 1:1.

6. *See* Gina Kolata, *Gene Technique Can Shape Future Generations*, N.Y. TIMES, Nov. 22, 1994, at A1, B9 (outlining a procedure whereby scientists can isolate, transplant and/or alter sperm stem cells, early-stage sperm cells which are the genetic source of all sperm cells in a given organism. Genes inserted into stem cells will appear in all sperm derived therefrom and consequently in every cell of an organism's progeny. Such treatment will be feasible for practice in human beings within five years). *See also Transgenic non-human mammals*, U.S. Patent No. 4,736,866 (1988). This patent is for the notorious Harvard oncomouse. An oncomouse is basically one which, while an embryo, has had a deleterious gene added to its genome that makes it highly susceptible to cancerous polyploid growths. This type of alteration is a form of germ-line therapy.

7. *See, e.g.*, Nobuya Unno et al., *Development of an Artificial Placenta: Survival of Isolated Goat Fetuses for Three Weeks With Umbilical Arteriovenous Extracorporeal Membrane Oxygenation*, 17(12) ARTIFICIAL ORGANS 996 (1993); Yoshinori Kuwabara, *Approach to the Management of Fetuses and Immature Babies—Development of the Extrauterine Fetal Incubator*, 32(8) ASIAN MED. J. 419 (1989).

to artificial insemination and surrogate motherhood in order to have biologically related children without having to contend with someone of the opposite sex who can assert parental rights.[8] Further, whether prospective parents are homo- or heterosexual, the employment of surrogate mothers raises the issues of whether parents should be allowed to hire the reproductive capacities of others in order to further their own procreative objectives, and who should achieve parental status if a dispute arises.[9] Many argue that reproductive methods like surrogate motherhood treat both hired third parties and resultant children too much like commodities.

Because they entail procedures and enable reproductive outcomes previously unassociated with parenthood, NRTs in many ways defy traditional political boundaries and legal classification. Consequently, state legislation and caselaw from around the country reflect vast differences in the way that various NRTs are regulated, and how conflicts stemming from their use are resolved. For example, some states prohibit commercial surrogate motherhood entirely, while those that allow it employ different standards for determining parental status when surrogates come at odds with those who hire them.

It is against this backdrop that one can place John Robertson's latest work, *Children of Choice: Freedom and the New Reproductive Technologies*, and the range of issues that he addresses therein. Robertson is a prolific and highly regarded thinker in the field of reproductive law and ethics.[10] In *Children of Choice* he consolidates his normative views on a variety of new reproductive practices into a comprehensive theory of reproductive freedom. Robertson's background as a Constitutional scholar greatly influences his formulation of the moral and legal principles underlying procreative liberty, the fulcrum of his theoretical position. The concept of

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8. Such practices raise the questions of gay parenthood, and— since gays and lesbians cannot legally marry— raising children out of wedlock.

9. *See generally* Johnson v. Calvert, 5 Cal. 4th 84 (1993).

10. Robertson is the Thomas Watt Gregory Professor of Law at the University of Texas at Austin. Robertson's work in the field of law and reproduction includes: John A. Robertson, *The Question of Human Cloning*, 24(2) HASTINGS CENTER REP. 6 (1994); Robertson, *Ethical and Legal Issues in Preimplantation Genetic Screening*, 57 FERTILITY & STERILITY 1 (1992); Robertson, *Procreative Liberty and Human Genetics*, 39 EMORY L.J. 697 (1990); Robertson, *In the Beginning: The Legal Status Of Early Embryos*, 76 VA. L. REV. 437 (1990); Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407 (1990); Robertson, *Ethical and Legal Issues in Human Egg Donation*, 52 FERTILITY & STERILITY 353 (1989); Robertson, *Technology and Motherhood: Legal and Ethical Issues in Human Egg Donations*, 39 CASE W. RES. L. REV. 1 (1988-89); Robertson, *Procreative Liberty and the State's Burden of Proof in Regulating Noncoital Reproduction*, 16 L. MED. & HEALTH CARE 27 (1988); Robertson, *Fetal Tissue Transplants*, 66 WASH. U. L.Q. 443 (1988); Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939 (1986), Robertson, *Embryo Research*, 24 W. ONTARIO L. REV. 15 (1986); Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405 (1983).

procreative liberty encompasses the notion that individuals have a presumptive right to make basic reproductive decisions. In Robertson's view, our reproductive experiences are central to our personal conceptions of meaning and identity.[11] To prevent procreative choice is to "deny or impose a crucial self-defining experience, thus denying persons respect and dignity at the most basic level."[12] As such, the precept of procreative liberty deserves respect in all reproductive activities, whether *au naturel* or requiring technological assistance.[13] Further, state attempts to restrict persons' reproductive choices should face the weighty burden of overcoming the presumptive primacy of procreative liberty.

Commentators on NRTs have contributed critical perspectives through a variety of theoretical and doctrinal lenses.[14] Of these, Robertson's approach is among the most compelling. Robertson's utilization of Constitutional doctrine allows him to ground his perspectives on some of the more vague and troubling issues surrounding NRTs in familiar and authoritative terms. If one agrees that procreative liberty interests should always be given favor, *Children of Choice* offers a thorough and well-articulated justification for such a position. If one is more skeptical about procreative liberty interests being given primacy in inquiries concerning NRTs, the book offers a series of principled arguments which would have to be addressed in order to effectively advance an alternative normative position.

SYNOPSIS

The first chapter of *Children of Choice* reviews the contemporary scope of reproductive practices and the basic controversies which they elicit. Chapter 2 presents Robertson's framework for procreative liberty, its legal foundation, moral basis, and normative scope. The other chapters of the book apply this theoretical framework to different areas of reproductive practice, assessing which procreative liberty interests are invoked in each case, and to what extent such interests should be allowed to prevail.

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11. JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 4 (1994) [hereinafter ROBERTSON, CHILDREN OF CHOICE].

12. *Id.*

13. *Id.*

14. *See, e.g.*, Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297 (1990) (contract law); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (property law); William J. Wagner, *The New Reproductive Technologies and the Law: A Roman Catholic Perspective*, 4 J. CONTEMP. HEALTH L. & POL'Y 37 (1988) (theology); GENA COREA, THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS (1985) (feminism).

Procreative liberty, as a matter of Constitutional doctrine, "is a negative right against state interference with choices to procreate or to avoid procreation."[15] Accordingly, Robertson posits, while neither the state nor particular persons have any positive duty to provide reproductive resources or services, they do have a duty not to impede someone from seeking such means. Robertson is concerned not only with advocating ethics of personal autonomy, family, and community, but also with guarding against excessive governmental control of reproduction, which "may extend beyond exhortation and penalties to Gestapo and police state tactics."[16] In fact, such concerns are not entirely fanciful. As Robertson shows, NRTs are sought not only by prospective parents, but also by various governmental institutions to further public policy goals such as preventing irresponsible parenthood. Consequently, as a matter of methodology, Robertson consistently scrutinizes which parties are seeking to employ a given technology, as well as their reproductive objectives in doing so.

Robertson cites two Supreme Court cases as providing the contemporary underpinnings for the fundamental legal right to avoid reproduction: *Griswold v. Connecticut*[17] and *Planned Parenthood v. Casey*.[18] In *Griswold*, the Court found that a law which criminalized using or distributing contraceptives violated a fundamental liberty right of married couples. The High Court later extended this holding to unmarried persons, as a matter of personal liberty and privacy.[19] In *Casey*, the Court reaffirmed *Roe v. Wade*,[20] holding that all women have a right to terminate pregnancy up to the point of viability. While these cases establish that anyone has the right to avoid reproduction both before and after conception, they do not provide that once a child is born, men or women may irresponsibly avoid their parenting obligations.[21]

Regarding the pursuit of reproduction, Robertson posits the existence of such a fundamental right based on dicta from a series of Supreme Court cases. In *Skinner v. Oklahoma*,[22] the Court struck down a law which allowed for the nonconsensual sterilization of thieves but not embezzlers. Though the Court employed equal protection doctrine in deciding the case, it noted that marriage and procreation are among the basic civil rights of man, fundamental to the existence and survival of the

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15. ROBERTSON, CHILDREN OF CHOICE, *supra* note 11, at 23.
16. *Id.* at 25.
17. 381 U.S. 479 (1965).
18. 112 S. Ct. 2791 (1992).
19. Eisenstadt v. Baird, 405 U.S. 438 (1972); Carey v. Population Services Int'l., 431 U.S 678 (1977).
20. 410 U.S. 113 (1973).
21. ROBERTSON, CHILDREN OF CHOICE, *supra* note 11, at 29.
22. 316 U.S. 535, 541 (1942).

human race. These principles have most recently been reiterated by the High Court in *Eisenstadt v. Baird*[23] and *Casey*.[24] In *Eisenstadt*, the Court stated that the right of privacy extends to both married and unmarried persons. Such a right includes freedom from unwarranted governmental intrusion into fundamental matters such as the decision whether to bear or beget a child. In *Casey*, a more conservative Court also noted that marriage, procreation, contraception, family relationships, childrearing and education all involve the most intimate and personal choices a person may make in a lifetime and are central to the liberty protected by the Fourteenth Amendment. Only a compelling interest in averting some considerable harm would justify state intrusion into this protected sphere.

Robertson devotes most of a chapter to discussing why *Casey* is a resuscitation of *Roe v. Wade*. Acknowledging that abortion is an intractable issue of moral absolutes, he frames *Casey* as an intermediate position on the continuum between the total pro-choice and absolute right-to-life positions. Under *Casey*, state laws that pursue legitimate concerns regarding how abortions are provided, but which do not substantially limit access to them or otherwise create an "undue burden," are acceptable.[25] Robertson states that this modified pro-choice position, because it "recognizes a moral and legal right to early abortion but seeks to discourage or prevent abortion[,] has much greater appeal."[26] This given, Robertson also discusses contragestive drugs such as RU486, which prevent or interrupt the implantation of newly conceived pre-embryos. He is a proponent of these drugs since they could help dampen the controversy surrounding abortion. Because they operate before pregnancy itself has begun, contragestives are cheaper and safer than surgical procedures and could also make the choice to avoid reproduction morally and symbolically more palatable.[27]

Having presented the constitutional basis for procreative liberty and its pertinence to personal choice in the area of avoiding reproduction, Robertson then proceeds to address the role of NRTs in positive procreation. With respect to IVF, Robertson identifies two central issues implicating procreative liberty: (i) whether out-of-the-womb conception should occur at all, and (ii) what, if any, legal and moral status attaches to disembodied embryos. As to the first issue, Robertson concludes that IVF clearly falls within the scope of procreative liberty and that any laws banning it would likely be found unconstitutional.[28] Further, the moral

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23. 405 U.S. 438 (1972).
24. 112 S. Ct. 2791 (1992).
25. ROBERTSON, CHILDREN OF CHOICE, *supra* note 11, at 61.
26. *Id.* at 48.
27. *Id.* at 45, 64.
28. *Id.* at 100.

objections to IVF voiced by the Catholic Church, feminists, and others "do not constitute the compelling evidence of tangible harm necessary to justify interference with procreative liberty."[29] As to the second issue, Robertson posits that embryos generally have legal cognizance only when the legal interests of an actual person are involved.[30] He contends that *Roe v. Wade* and other doctrines on abortion pertain only to termination of pregnancies and not to the disposition of embryos before pregnancy actually occurs. Accordingly, practices such as freezing embryos for later implantation or the decision not to implant them after freezing should not be prohibited. Although embryos may arguably deserve some level of respect, Robertson concludes, procreative liberty would dictate that conflicts concerning their disposition should be resolved in favor of the couples who provided gametes for the embryos.

The IVF process often extends beyond the parties wishing to be parents to other parties such as donors, who provide the gametes, and surrogates, who provide the gestation necessary for reproduction. Robertson terms procreation involving such third parties "collaborative reproduction." While he maintains that procreative liberty should presumptively protect engaging the services of a willing donor or surrogate, he acknowledges that collaborative reproduction "involves a novel set of practices and relationships in which social and psychological meanings and legal rights and duties have not yet been clearly defined."[31] In theory, for example, a child could end up with three biological parents (a genetic mother, genetic father, and a gestational mother) and two additional rearing parents, with various permutations of relationship and agreement among them.[32] Not only does such collaboration risk confusing children about who their "real" parents are, but it also subverts our conventional notions of parenthood and family and leaves ample room for conflict over parental status among the various collaborators.[33] Further, many critics argue that donating gametes or providing surrogate services in exchange for money is exploitative and akin to prostitution. This given, Robertson cautions that "the use of the technology to alter fundamental or traditional family relationships seems risky, and should occur only under conditions that protect [equitably] the welfare of offspring, couples, and collaborators."[34] Thus, rather than discouraging collaborative reproduction, policy makers should focus on ensuring that

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29. *Id.*
30. *Id.* at 104.
31. *Id.* at 120.
32. *Id.*
33. *See, e.g.*, Johnson v. Calvert, 5 Cal. 4th 84 (1993), and Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (1994).
34. ROBERTSON, CHILDREN OF CHOICE, *supra* note 11, at 120.

proper counseling, informed consent, record keeping, and legal rules for allocating rearing rights and duties exist.[35]

Another emerging issue in the field of reproductive therapy is the selection of offspring characteristics. Prenatal screening techniques, such as amniocentesis and chorion villus sampling, are becoming increasingly sophisticated. In addition to its gender, many of a fetus' genetic characteristics are ascertainable after only three months of pregnancy. Combined with preemptive abortion or corrective intervention, prenatal diagnostic techniques amount to negative selection. For Robertson, negative selection is protected by procreative liberty, whether employed for "therapeutic" reasons or not.[36] Admittedly, the idea of deliberately selecting, altering, or terminating children on the basis of their anticipated qualities has a disturbing edge. Nevertheless, it is legitimate for parents to want healthy children, and thus for them to use available selection techniques to achieve that end.

Robertson also argues that positive selection, or genetic characteristic shaping, falls within the scope of procreative liberty. He does, though, offer several qualifications. Robertson posits that even if genetic enhancement clearly benefited offspring, it would not necessarily follow that it was protected by procreative liberty. That is, it is not clear whether the general parental desire to produce, healthy, normal children for rearing—which is a presumed objective when other NRTs are employed—is the same with enhancement, cloning, or diminishment interventions.[37] If prospective parents establish, however, that their ability to use characteristic-altering techniques will be determinative of whether they reproduce at all, then their efforts to employ such techniques should nevertheless be protected. Robertson also emphasizes that *in vitro* and *in utero* genetic interventions for humans are not yet feasible. Thus, slippery slope concerns about their potential impact should not be allowed to impede using current screening and negative selection techniques to produce healthy offspring.[38]

It is true that, as a matter of constitutional doctrine, personal decisions concerning marriage, childrearing, and family relationships are protected under the tenets of procreative liberty. However, NRTs call into question what the boundaries of such liberty interests are or should be. To what extent do people have a right to new technologies and the novel alternatives they make possible? That is, to what extent should technological advances be allowed to expand the scope of personal rights

35. *Id.* at 145.

36. *Id.* at 172.

37. *Id.* at 166-67. Robertson suggests that it is the interest in producing and raising healthy, normal children that gives reproductive freedom its value. This interest also provides an outer limit to procreative liberty.

38. *Id.* at 172.

regarded as basic or fundamental? Do the concerns raised by NRTs such as IVF and genetic manipulation have to manifest as "tangible harm" before more vigorous oversight and regulation can be justified? These are some of the underlying questions which Robertson only addresses indirectly. His answers to these are satisfying if one accepts that NRTs and the reproductive practices they make possible fall unproblematically within the traditional domain of parental decision-making and family planning. NRTs, however, in many ways confound conventional notions of what family relationships, childbearing and childrearing, and personhood are in the first place. Certainly, the state has a place in helping to define what the rights and limits attaching to procreation are and how these should be enforced. Robertson is not always consistent about defining the line between personal conceptions of parenting and family and the role the state should play in helping to facilitate the effective integration of NRTs in society.

Robertson also addresses issues related to the contraceptive Norplant and public policy initiatives to prevent irresponsible reproduction. Norplant systems of contraception entail the insertion of matchstick-sized capsules under the skin of women's upper arms which slowly release a synthetic substance that suppresses ovulation. Their effect is temporary sterilization for up to five years, unless the implants are removed. As a voluntary method of contraception, Robertson regards the use of Norplant as fully protected by procreative liberty. Since it has met regulatory standards for safety and efficiency, Norplant presents no major ethical or legal issues beyond informed consent as to its possible side effects and making it available to all women who want it.[39] Norplant is, however, a very effective anti-fertility treatment and is beyond the patient's control once it has been inserted. When legislatures offer incentives for women on welfare to use Norplant, and judges impose the contraceptive as a condition of probation, its use becomes more problematic. After carefully considering the various interests involved, Robertson concludes that only in the most extreme cases should Norplant be employed as a state tool to address allegedly irresponsible reproduction.[40] The public's interest in the welfare of offspring as yet unconceived and in the conservation of public funds does not justify intruding on the basic right to reproduce.

Robertson's views are somewhat more moderate regarding public policy and the prevention of prenatal harm. The issues in this area of concern are whether governmental institutions may impose legal sanctions, forced medical treatment, or other coercive tactics to discipline

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39. *Id.* at 71.

40. *Id.* at 93. Robertson offers the case of severely retarded females who are at substantial risk of sexual exploitation or rape as an example of such an extreme case.

pregnant mothers who are arguably harming children that they intend to bring to term. For Robertson, such issues move beyond the basic question of procreative liberty—the decision to reproduce or not—to second-order questions of liberty in the course of procreation.[41] Consequently, moral duties to take or accept measures to avoid prenatal harm may attach once a woman has determined to proceed with reproduction. Robertson concludes, however, that sanctions and seizures are justified only in the most extreme cases and that the focus of public policy should be on freely chosen measures, education, and the provision of services.[42]

In the final portion of the book, Robertson turns his attention to the use of embryonic or fetal tissues to serve non-reproductive ends, such as research or tissue transplants. He posits that such uses are not matters of procreative liberty, but matters of liberty in the use of one's reproductive capacity.[43] Robert reasons that the symbolic harms arising from the use of post-conception tissues for research or medical application do not outweigh the benefits that such activities produce. Further, not much distinction should be made between post-conception tissues which were the incidental result of abortion, the excess by-products of an IVF cycle, or deliberately created for research or medical purposes.[44] Robertson also notes earlier in the book that "*Roe-Casey* does prohibit any inquiry into motives or reasons for abortion, and thus probably protects conceptions and abortions designed to produce embryos or fetal tissue for research or transplant, and even abortion on gender grounds."[45] His last chapter is dedicated to responding to what he designates as Class, Feminist, and Communitarian critiques of procreative liberty. Ultimately, Robertson urges that in confronting the ethical, legal, and social conflicts over the value-laden arena of NRTs, "we must not deny the importance of procreative liberty just to escape the discomfort that its use often engenders."[46]

CONCLUSIONS

Children of Choice is a comprehensive, well-considered addition to the contemporary inquiry into new reproductive technologies and

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41. *Id.* at 194. Compare this position with Robertson's views on the use of Norplant to further public policy goals, *supra.* Because forced or coerced use of Norplant preempts a woman's decision to reproduce entirely—as opposed to overseeing her treatment of a prenascent child she has determined to bear— Robertson is more strongly opposed to its use by the state.

42. *Id.*

43. *Id.* at 200.

44. *Id.* at 201.

45. *Id.* at 63.

46. *Id.* at 235.

practices. It is clearly articulated and Robertson makes some of the more vague and complex aspects of NRTs easily accessible. To his credit, however, Robertson also candidly acknowledges that his emphasis on procreative liberty

> provides a useful but by no means complete or final perspective on the technologies in question. Theological, social, psychological, economic, and feminist perspectives would emphasize different aspects of reproductive technology, and might also offer better guidance in how to use these technologies to protect offspring, respect women, and maintain other important values.[47]

Robertson's basic formulation of procreative liberty—its precepts, legal foundations, and moral appeal—is quite persuasive. Nevertheless, one may disagree with how he chooses to apply this framework to a given reproductive technology or practice. Depending on one's disciplinary and moral inclinations, for instance, one may choose to construe differently the harms implicated by a given NRT, and to give such harms more or less weight vis-a-vis any parental rights and interests suggested by procreative liberty. Additionally, Robertson is somewhat reticent about asserting normative judgment and extending his procreative liberty analysis to a number of issues which are, admittedly, politically sensitive. For instance, he does not specifically address whether procreative liberty should apply equally to single persons, gay men and lesbians, and other "unconventional" prospective parents. Overall, however, the book is one of the most thorough and informative works on NRTs offered in recent years. Whether one agrees with Robertson or not, his method of treating the many ethical issues involved is both practically and intellectually useful.

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47. *Id.* at 42.