Chapter 3
Conceiving a New Right to Procreate

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Introduction

The chapters of Holm and Revel in this book demand the establishment of a clear and uncontroversial form for right to procreate. Their chapters imply the need of a framework for regulation, and indicate the need for a basis to judge the developments of reproductive techniques, especially as a result of the changing positions of men and women in the reproductive process. Holm’s chapter sets out that having a liberty to choose does not yet amount to an effective freedom, and he questions the effects of medicalisation. His chapter leads to questions about how to we can reconcile liberty and freedom, and, in the light of the medicalisation, which framework we would best place them in. Whereas Holm avoids talking about rights, his considerations and conclusions demand for a basic starting point, a minimum guarantee. Revel elaborates on the state of the art of new reproductive techniques, and his conclusion touches upon the boundaries of law and ethics. Revel’s chapter requires us to think about the availability of these techniques; what the shifting position of men and women would mean for this assessment, and whether there is a right to these techniques. This chapter seeks to create the basic starting point that these chapters need: A notion that could harmonise law and ethics better than the current conception, which is vague and we try to avoid referring to as a result of its complexity. This new notion tries to do that by dissecting the process of reproduction until reaching the most basic and bare standard that could provide protection: the capacity-based standard. In a minimalistic conception, my notion is aimed at preventing randomized availability of reproductive techniques, addresses the ambiguities in regulation as a result of their development, as apprehended by Holm and Revel, and offers a framework for the many issues that the field entails.

In both academic literature and popular debate, the concept of a right to procreate is much discussed and disputed. I argue in this paper that some of the controversy

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surrounding claims of a right to procreate derives from the obscurity of the term itself. There is no consensus on just what is meant by those deceptively simple three words "right to procreate". Other kinds of alleged rights such as the right to respect for family life, the right to rear a child or found a family are too often taken to be the same as a right to procreate. Different writers claim different things when using the same words. Yet, when trying to define the common core in these claims, many writers have traditionally found that the right to procreate is about having a child to rear. I argue, in this paper, that this approach is paradoxically too narrow and too broad.

As an alternative, I offer a simple and basic definition of the right to procreate. It is this. Everyone has the right to realize and control his or her capacity to procreate, that is the capacity to engage in the process of procreation, or the process in order to conceiving or begetting offspring. Exercising this right means both a prima facie claim not to have his/her capacity to procreate removed against his/her will and that where a person is affected by some remediable problem in his/her capacity to procreate, the right provides that he/she should not be prevented from having access to treatment to overcome that problem. The emphasis within this notion lies on the capacity, and the possibility to control and realize this capacity, which is required to engage in the process, not to be confused with the realization of the conception or fertilization itself [1]. By focusing on the individual’s capacity, the notion dissociates itself from the traditional fixation on realizing the fertilization, and the conception of a child, but is indifferent to the outcome of the process. The right that I seek to establish is separate from, and different to, such rights as the right to privacy or bodily integrity, or the right to rear a child. It is a lowest common denominator. The claim for a right based so firmly on the capacity to procreate does not mean that those other rights may not also be advocated.

I argue that the semantic difficulty in the traditional approach is not simply pedantic, but it means that it is harder to reach any consensus on the substance of the right being claimed. I will even go further than that and argue that it prevents us from defining the right to procreate as a fully fledged moral or legal human right. My revised definition seeks to meet the problems arising under the traditional approach and forms a better basis for legislation; it can deal with the interests of the child, has a well delineated scope, and has a gender neutral starting point.

In order to show why a new conception of the right to procreate is desirable, I will, in section “The Traditional View and its Shortcomings”, analyze the traditional notion, then set out the new notion and its justification, in section “The Capacity to Procreate”, and, finally, in section “Problems of Implementation and how These can be Solved by the New Approach”, I will address some of the problems of the traditional notion and demonstrate how the new conception can deal with these.

The Traditional View and its Shortcomings

The reasons why I believe that the current usages of the term ‘the right to procreate’ tend to obscure, and undermine the usefulness of this notion’s content, will be the subject of this first section. Here I delineate the foundation for my claim that a new definition of this purported right is a desideratum.