

RECONSTRUCTING RATIONALITY: TOWARDS A CRITICAL ECONOMIC THEORY OF REPRODUCTION

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As the Center for Reproductive Rights prepared to argue the next big reproductive rights case to come before the Supreme Court,¹ it paused to consult with its constituents and supporters—experts, activists, and scholars all interested and invested in the state of the reproductive rights project. I commend their decision to give members from various sectors of the movement an opportunity to help develop strategies and approaches as well as to prepare for the wide range of possible outcomes. Such opportunities are rare but necessary as we brace for and embrace the monumental task of achieving reproductive freedom.

In this rapidly changing sociopolitical environment, even the term “reproductive freedom” has a new connotation. Rather than representing new terrain, the mainstream’s code for abortion, or a rallying cry and critique from the margins, reproductive freedom has evolved into a more authentic, meaningful, and complex theory. Although abortion remains the central organizing issue of the reproductive rights project in many ways, a new wave of advocates opting for a broader more fluid rendition of the movement seems to have the spotlight these days.² So, in the spirit of this evolution (or

* Professor of Law, American University Washington College of Law. The organizers of the Equality and Reproductive Rights Symposium, the Center for Reproductive Rights, especially Kim Buchanan and Lorena Fernandez, worked tirelessly to make this forum possible to discuss the important issues of reproductive justice and freedom. Thank you to the editors and staff of the *Emory Law Journal*, especially Kiran Raj and Shirley Brener, for their hard work and commitment to this publication. This Article benefited from the scholarship of Professors Dorothy Roberts, Martha Fineman, Margaret Radin, Reva Siegel, Linda Gordon, Martha Ertman, Lama Abu Odeh, Carol Graham, Michele Goodwin, Jose Gabilando, and April Cherry. In ways too numerous to list, Kweku Toure, Dennis Williams, JoAn Wypijewski, Margaret Cerullo, and Frankie Winchester help make me and my work more thoughtful. Special thanks to my friend and colleague, Ms. Monica Phillips at the Washington College of Law, without whose assistance I would not have made it to the Symposium.

¹ See *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007) (upholding the constitutionality of the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (Supp. III 2003)).

² See, e.g., National Abortion Federation, <http://www.prochoice.org/blog/2007/01/celebrating-reproductive-freedom.html> (last visited Feb. 5, 2007) (announcing their “Celebrating Reproductive Freedom” Campaign to commemorate *Roe v. Wade*’s 34th Anniversary). Many others “in” the movement have been outwardly pursuing freedom well before this point. See TRANSFORMING A MOVEMENT: FROM ABORTION TO

revolution), this Article provides some preliminary ideas on a project interested in reproduction, history, and the material conditions of the lives of women, their families, and their communities.³

This Article concerns the opportunities and expectations of an economic market for reproductive services and products. When considered through an economics lens, certain reproductive activities might actually be useful in bettering the material conditions of the lives of women. But questions remain: Does this economic logic apply to women of limited means? What does “better” really mean in the lives of these disadvantaged women?

Previous work has noted that one of the tangible outcomes of a regulated market for reproductive services is that it would provide reproductive and general health care to a woman who would otherwise be unable to access such care. This work assumed that access to health care was a normative and economic good.⁴ Additionally, for those whose desire for children drives the reproductive market, the assumption is that affordable health care would not be a problem. This Article specifically questions whether these normative assumptions represent a “better” condition for the women who provide

REPRODUCTIVE FREEDOM (Marlene Gerber Fried ed., 1992) (collecting essays from the margins of the mainstream reproductive rights and abortion movements).

³ This is not a particularly novel approach. In an effort to resist becoming uncritical and stagnant, feminist legal theorists have consistently critiqued their own challenges to theories, frameworks, and paradigms. See, e.g., AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY 47 (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991) (describing the debates and discussions that are critical to assessing the gains and losses of feminist legal theory); CRITICAL RACE FEMINISM: A READER (Arien K. Wing ed., 2003); FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW & SOCIETY (Martha Albertson Fineman & Terence Dougherty eds., 2005); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 873–74 (1990) (chiding MacKinnon and West, among others, for their totalizing views); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 261 (Francisco Valdes et al. eds., 2002). But cf. JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006) (arguing that feminism has not been critical of itself).

⁴ This is not intended to ignore the issues related to too much access to health care. I have written about sterilization and contraceptive abuse in communities of color. See Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE R.E.A.L. J. 11 (2001); Pamela D. Bridgewater, *Ain't I a Slave: Slavery, Reproductive Abuse, and Reparations*, 14 U.C.L.A. WOMEN'S L.J. 89 (2005). Many others have also addressed the suspicion people of color and poor women have of health care generally, and reproductive health care in particular. See, e.g., DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997) (providing a comprehensive view of reproductive abuse of blacks in the United States); Vernellia R. Randall, *Racial Discrimination in Health Care in the United States as a Violation of the International Convention on the Elimination of All Forms of Discrimination*, 14 U.F. J. PUB. POL'Y 45 (2002); Deleso Alford Washington, “Every Shut Eye, Ain't Sleep”: *Exploring Crack Cocaine Sentencing and the Illusion of Reproductive Rights for Black Women from a Critical Race Feminist Perspective*, 13 AM. U. J. GENDER SOC. POL'Y & L. 123 (2005) (describing the torture of enslaved women by Dr. Sims, known as the father of gynecology).

reproductive services and products, resisting the impulse to assume that reproducing and child rearing are normatively and economically “good.”

In many ways, *Freakonomics*, and specifically the essay, “Where Have All the Criminals Gone?,” was the starting point of this interrogation of normative assumptions in reproductive rights theory.⁵ The essay advances a number of theories on the economic relationship between abortion and declining crime rates.⁶ That essay’s economic theory inspired this Article’s economic approach to the market in reproductive services and products. As it turns out, economic theory proved well-suited to assess the viability, contours, and consequences of such a market.⁷

This Article’s central objectives are threefold. First, it develops the notion that history offers a great deal of information establishing the connection between economics and reproduction. It looks specifically to the role reproduction played in establishing and maintaining perhaps two of the most important institutions in U.S. history—marriage and slavery. Particular attention is paid to the way economic realities greatly impacted the reproductive realities of players in the master-slave system, especially women. The second objective is to show how key concepts in economic theory, namely utility, efficiency, and rationality might be constructed or reconstructed to inform our understanding of the motivations, interests, and relative power dynamics of the parties in the modern market for reproductive services and materials. Lastly, this Article seeks to contribute to the conversation on the opportunities and challenges of a regulated market and consider whether such a market could provide greater access to “better” and “positive” tangible outcomes to more participants than what is possible under the current market.

In order to meet these objectives, Part I begins with a survey of the economic incidents of marriage.⁸ Marriage is widely considered the only appropriate context for reproduction, which makes it a fruitful site for inquiry

⁵ STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* 117 (2005).

⁶ *Id.* at 117–47.

⁷ The important work examining issues of commoditization in the context of reproduction on which this Article builds was started by my companeras in the fight for reproductive freedom. Many of them are participating in this Symposium; their thoughtfulness on these hard and urgent questions created space for our discussion.

⁸ Similar to feudal incidents (the rights and liabilities that attached to a particular status resulting from a relationship to the king and possession of land), marriage has a number of status-based rights and responsibilities related to but not limited to property and economic wealth. For a brief description of feudal incidents and their historical context, see JESSE DUKEMINIER ET AL., *PROPERTY* 175–81 (6th ed. 2006).

into the role reproduction plays in the acquisition, accumulation, allocation, and protection of private property interests and wealth. Part I also discusses the role reproduction played in creating and maintaining the economic profits of slavery during the nineteenth century in the United States. The discussion in Part I is not intended to posit a transhistorical analogy⁹ but to shed light on how there might be dignity in dire circumstances, agency in angst. Examining the reproductive implications of an economy based on slavery with emphasis on the micro-economies of the Southern plantations can inform our understanding of the desires and vulnerabilities of participants in the modern market for reproductive services and products.

Part II jumps from the nineteenth century to the modern day market for reproductive services and products. It applies some historical lessons to the modern market, comparing the motivations, expectations, and exploitations that attract or discourage its participants. Finally, Part III defines this Article's critical economic theory of reproduction. Given the variation of terms within the economic lexicon, Part III also offers definitions that are essential to the theory.

I. THE INSTITUTIONS THAT REPRODUCTION BUILT

A. *Marriage*

Since the days of feudalism, reproduction has played a critical role in maintaining and transferring property interests within bloodlines. Historically, only men were able to own property and could only leave their property to the eldest male child at death.¹⁰ Parentage was a crucial element in deciding who among many potential takers was the rightful heir to his father's estate.¹¹ For the majority of the history of the question of parentage, the answers were easy to determine. The children of wives were the children of husbands unless there was overwhelming evidence to the contrary (e.g., the color of the child's skin,

⁹ Those involving slavery are often fraught with problems. For examples of literature critiquing comparisons to slavery or civil rights movement made by women and gay people, see Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms)*, 1991 DUKE L.J. 397, 404; Sharon Elizabeth Rush, *Equal Protection Analogies—Identity and “Passing”*: *Race and Sexual Orientation*, 13 HARV. BLACKLETTER L.J. 65, 97 (1997); and Deborah Threedy, *Slavery Rhetoric and the Abortion Debate*, 2 MICH. J. GENDER & L. 3 (1994).

¹⁰ DUKEMINIER ET AL., *supra* note 9, at 200.

¹¹ JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 89–100 (8th ed. 2005).

texture of the child's hair, or a mysterious birth date).¹² The objective of this male-favoring property regime was keeping wealth in the bloodline. Because spouses were not considered in the bloodline, they could not own property outright. The presence of male heirs did not solve all problems. The patriarch could have a strand of the bloodline that was not created by his wife. This situation has become less problematic over the years, but it still offers important insight into the interrelationship between reproduction, marriage, and economics. The treatment of sons of property owners makes this point well: "bastards"—illegitimately conceived male heirs—could not inherit from their fathers, while sons of property owners conceived in wedlock were free to inherit wealth.¹³

The influence of the relationship between marriage, reproductive decisions, and the material conditions of one's life is as important today in the United States as it was during feudalism in England.¹⁴ One has but to look at the interrelationship of the issues as they played out in the lives and legacies of three very different men: Thomas Jefferson,¹⁵ Junior Davis,¹⁶ and James Brown.¹⁷ Each had marriage and reproductive issues that impacted and were impacted by economic considerations, namely the acquisition, allocation, and distribution of property and wealth. Specifically, the location of reproduction—in marriage versus outside of marriage—played a significant role in shaping the property rights of these men's heirs.

When two people marry, each spouse is earning an interest in property acquired by either party (with exceptions based on whether the jurisdiction the spouses live in is a community or common law jurisdiction). For purposes of this discussion, modern inheritance law provides the best view of reproductive

¹² *Id.*

¹³ *Id.* at 99 (discussing the historical use of the term bastard to refer to children born out of wedlock and therefore excluded from inheritance); see also Ralph C. Brashier, *Consanguinity, Sibling Relationships, and the Default Rules of Inheritance Law: Reshaping Half-blood Statutes to Reflect the Evolving Family*, 58 SMU L. REV. 137 (2005) (discussing the modern day implications of whether a child's parents are married or not).

¹⁴ See, e.g., Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001).

¹⁵ See, e.g., JEFFERSON: AN INTIMATE HISTORY (1975) (detailing the social and economic context and implications of the children Jefferson fathered with his slave, Sally Hemings).

¹⁶ See *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992) (deciding whether frozen embryos were marital property subject to equitable distribution at divorce and holding that despite not being "property," joint custody of the embryos would be awarded to the litigants).

¹⁷ *Wrangling over Brown's Estate Continues*, CNN, May 3, 2007, <http://www.cnn.com/2007/SHOWBIZ/Music/04/30/brown.ruling.ap/index.html> (discussing the fact that Brown drafted his will prior to the birth of his son and questioning whether his partner will be deemed his widow).

and economic implications of marriage. Even in community property states, it can be difficult (but not impossible) to completely divest one's spouse of their interest in property acquired during marriage. Upon death, the surviving spouse has priority in distribution of the estate.¹⁸ This is the case even when one spouse dies intestate; the intestacy statute in the jurisdiction purports to prefer the surviving spouse. With few exceptions, the spousal preference is only affected by the existence and identity of the children of either spouse. If the decedent had children with someone other than the surviving spouse, then the surviving spouse receives a smaller portion of the estate.¹⁹ Finally, if the surviving spouse has children with someone other than the decedent, the surviving spouse gets even less.²⁰ In short, the nature of the marital and reproductive arrangements between spouses dictates to a large extent the economic effects of death on the surviving spouse.²¹

The modern plight of lesbian and gay members of society also provides a fertile site of inquiry of the incidents of marriage.²² Health care coverage, wrongful death actions, life insurance benefits, inheritance, automatic power of attorney, and equitable distribution of marital property are all listed among the economic benefits associated with marriage. Neither the proponents nor opponents of same-sex marriage argue that those incidents are not real and meaningful. Despite the fact that economic considerations are important in the heterosexual marriage calculus, they are rarely discussed publicly or listed as motivations for marriage.

This is not the case with regard to the reproductive "incidents" of same-sex state-recognized unions. Same-sex couples are among the primary participants in the reproductive and adoption markets.²³ This is the case although many insurers do not cover assisted reproductive technology (ART) for women who, because they are lesbian or single, are not in a sexual relationship with a man.²⁴ In the context of same-sex adoption, it is rare to hear economics as a

¹⁸ Upon divorce, most states use some form of equitable distribution to distribute property interests to each former spouse.

¹⁹ Brashier, *supra* note 13.

²⁰ *Id.*

²¹ Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1 (1998).

²² Suzanne B. Goldberg, *A Historical Guide to the Future of Marriage for Same-Sex Couples*, 15 COLUM. J. GENDER & L. 249, 258 (2006).

²³ *Id.*

²⁴ Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573, 590 (2005).

motivation. Yet, same-sex couples' interest in adoption or assisted reproduction fall squarely within the historical efforts to create legally and economically relevant units in order to concentrate and protect wealth.

Rather than be relegated to the annals of history, bloodlines (biological, legal, or equitable) remain essential concerns in marriage today. Why is this so? What are the particular benefits that require a connection via reproduction? This question is beyond the scope of this Article, but it is clear that the boom in cutting edge advancements in reproductive technologies exists to satisfy the desire for this biological connection.

B. Slavery and Reproduction

Thomas Jefferson is arguably the most influential person to publicly express his appreciation of the economic implications of the reproductive capacities of enslaved women. In an 1805 letter to a colleague about matters on his plantation, Jefferson noted, "I consider the labor of a breeding woman as no object, and that a child raised every 2 years is of more profit than the crop of the best laboring man."²⁵

Female slaves did not have social or legal protection from rape; there was no way for a female slave to stop her owner or his agent from abusing her body nor was there any redress after the abuse occurred.²⁶ The pregnancies that resulted from this unfettered sexual access were addressed early in Virginia when it enacted "status-of-the-mother laws."²⁷ This set of laws mandated that if a mother of a child was enslaved, the child would be a slave regardless of the status of the father or how the child was conceived. These laws also had distinct economic implications because the rape of a female slaves became a

²⁵ Letter from Thomas Jefferson to John Jordan (Dec. 21, 1805), in RONALD T. TAKAKI, *IRON CAGES, RACE AND CULTURE IN 19TH-CENTURY AMERICA* 44 (1990); see also Letter from Thomas Jefferson to Joel Yancy (Jan. 17, 1819), *reprinted in THOMAS JEFFERSON'S FARM BOOK* 43, 46 (Edwin Morris Betts ed., 1953) (comparing the value of a breeder slave to a horse).

²⁶ DEBORAH GRAY WHITE, *AR'N'T I A WOMAN?: FEMALE SLAVES IN THE PLANTATION SOUTH* 6–7 (1990) (providing the most comprehensive historian's account of the life of female slaves during American slavery); see also BARBARA MAYER WERTHEIMER, *WE WERE THERE: THE STORY OF WORKING WOMEN IN AMERICA* 109 (1977) (citing case holding that female slaves had no legal claim to their children).

²⁷ Act XII, 2 LAWS OF VA. 170, 170 (Hening 1823) (enacted 1662) (cited in A. Leon Higginbotham, Jr. & Barbara Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1976 (1989) (discussing implications that these laws had on sexuality, reproduction and racial subordination during slavery and beyond)); see also WERTHEIMER, *supra* note 26, at 109.

wise investment strategy rather than solely an act of domination.²⁸ Thus, the mother had no legal right to her child, and the child had no legal right to any of his father's property, which was ordinarily granted via paternity. Some owners included female slaves and their potential children in their gifts upon the marriage of their children as well as in their wills.²⁹ The children born by a bequeathed female slave would also be subject to such gratuitous transfers.³⁰

The end of the international slave trade in 1808 gave rise to the macroeconomic implications of these laws.³¹ The slave economy—indeed the institution itself—would have to depend almost exclusively on the “natural” increase of slaves.³² Reproduction and the laws that regulated it proved essential to keeping the economy supplied with slaves. Several plantation owners took full advantage of the profitability of the rape and impregnation of slaves.³³ For example, in order to meet the demands of the agriculture and textile industries in which slaves were employed, many mid-Atlantic slave states, already suffering from the market disadvantage of a short growing season, stopped producing traditional plantation commodities and focused solely on breeding slaves for the domestic market. Reproduction became a successful subindustry during slavery.³⁴

This increased focus on reproduction led to specific acts of resistance by enslaved women.³⁵ Interestingly, one form of resistance was the creation of a

²⁸ For a detailed discussion of the various motivations for raping slaves (including economic), see, e.g., Neal Kumar Katyal, Note, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 *YALE L.J.* 791, 801 (1993).

²⁹ Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 *STAN. L. REV.* 221, 246–47 (1999).

³⁰ *Id.*

³¹ Leading historian Herbert Gutman noted, “Enslavement required more than that human chattel produce commodities, it also required, especially after the abolition of the international slave trade, that the slave labor force reproduce itself Few recognized this better than the slave owners themselves.” HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750–1925*, at 225 (1977).

³² “[Since] their natural increases become a source of a great profit to their owner. Whatever, therefore, tends to promote their health and render them prolific, is worthy of attention.” *American Cotton Planter*, No. 295, in Gerald Norde, *From Genesis to Phoenix: The Breeding of Slaves During the Domestic Slave Era 1807–1863 and Its Consequences* 93–94 (1985) (unpublished Ph.D. dissertation, University of Delaware) (on file with author).

³³ WHITE, *supra* note 26, at 99.

³⁴ The reproduction rates after the enactment of the legislation substantiate claims of reproductive abuse. The number of slaves in America “increased 500 percent in a period of sixty years following the prohibition.” Norde, *supra* note 32, at 39.

³⁵ Historians such as Catherine Clinton and Darlene Clark Hine have added much needed insight to the issue of female resistance. See, e.g., CATHERINE CLINTON, *THE PLANTATION MISTRESS* (1982); Darlene Hine

microeconomic approach to reproductive costs and benefits. For example, if a female slave submitted to the demands of her owner and reproduced often, she might be rewarded with extra food, better clothing, or less field labor.³⁶ Their ability to have these rewards transferred to others increased standing in the slave community.³⁷ Those who did not submit might be punished with beatings, food rationing,³⁸ or sale.³⁹ Some owners promised a slave her freedom if she delivered a certain number of healthy babies—a few owners even kept their promise.⁴⁰

These “transactions,” although without real agency or bargaining power as modern economics would define it, reflect the female slaves’ appreciation of the economic benefit or harm they could bring to their owners.⁴¹ Like male slaves who successfully escaped or committed suicide⁴² undermined their owner’s control and economic well-being, female slaves understood that their efforts to resist sexual and reproductive exploitation would result in fewer slaves and have adverse economic consequences for their owners.⁴³ Abolitionists also recognized the importance of reproduction to individual owners as well as to the industry as a whole, and they mentioned the phenomenon often in their speeches opposing slavery.⁴⁴

This history should not be taken to suggest that such a reproductive market should exist, but rather that it *did* exist and that we can learn many things from its operation and impact upon its participants. First, the slavery reproduction market should continue to serve as the worst case scenario against which we

& Kate Wittenstein, *Female Slave Resistance: The Economics of Sex*, in *THE BLACK WOMAN CROSS-CULTURALLY* 289, 296 (Filomina Chioma Steady ed., 1981).

³⁶ WHITE, *supra* note 26, at 99–100.

³⁷ Patricia Hill Collins, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 50 (1990).

³⁸ WHITE, *supra* note 26, at 100–20.

³⁹ “[Master] tried to get rid of a woman who didn’t have [children].” *BULLWHIP DAYS: THE SLAVES REMEMBER* 296 (James Mellon ed., 1988).

⁴⁰ One slave owner promised to free his slave upon the birth of the woman’s twelfth child; she died a month before the twelfth baby’s due date. *THE AMERICAN SLAVE: A COMPOSITE AUTOBIOGRAPHY* (George P. Rawick ed., 1972).

⁴¹ Elizabeth Fox-Genovese, *Strategies and Forms of Resistance: Focus on Slave Women in the United States*, in *BLACK WOMEN IN AMERICAN HISTORY: FROM COLONIAL TIMES THROUGH THE NINETEENTH CENTURY* 409, 424 (Darlene Clark Hine ed., 1990) (“Resistance to sexual exploitation . . . had major political and economic implications.”).

⁴² See *LAY MY BURDEN DOWN: A FOLK HISTORY OF SLAVERY* 144, 174 (B.A. Botkin ed., 1945).

⁴³ Fox-Genovese, *supra* note 41, at 424.

⁴⁴ See, e.g., JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 101 (1988) (addressing the frequency with which incidents of rape and beatings of enslaved women appeared in nineteenth century abolitionist literature).

gauge the functioning of a modern market for reproductive services and material. Second, the history of the exploitation of enslaved women's reproductive capacities provides us with a particular historical context from which to begin our forward-looking inquiry.

II. THE MODERN REPRODUCTIVE MARKET

Deborah Spar of the Harvard Business School, author of *The Baby Business*, accurately notes in her new book that the reproductive market is correctly identified as such because (1) there is demand and supply, (2) prices that link supply and demand, and (3) businesses that "sell their wares."⁴⁵ The only thing that differentiates it from other markets for goods and services (and from reproduction via sexual relations) is the mode of acquisition.⁴⁶

Beyond the issue of insurance coverage for ART procedures, the reproduction market in the United States is largely unregulated. As such, clinics, doctors, and brokers have the power to decide many of the important details of the transaction. Whether it is surrogacy, gamete donation, or gestational surrogacy, if the parties do not already know each other, their experience in the market will be shaped in large part by these middle men.

Generally, the donation of semen is fairly straightforward and painless.⁴⁷ Egg donation, on the other hand, is much more invasive and presents health challenges and risks.⁴⁸ Danger lurks at every stage, starting with side effects including nausea, stomach cramps, mood swings, hot flashes, and headaches.⁴⁹ The more serious risks associated with egg donation arise once the hormone treatment cycle leads to ovarian stimulation, hyper-ovulation, and harvesting under local anesthesia.⁵⁰ During these critical stages the egg donor risks hemorrhaging, infection, and even death.⁵¹ Although short-term complications

⁴⁵ DEBORAH L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* (2006).

⁴⁶ *Id.* at 23.

⁴⁷ P. Baetens et al., *Counselling Couples and Donors for Oocyte Donation: The Decision to Use Either Known or Anonymous Oocytes*, 15 *HUM. REPROD.* 476, 476 (2000), available at <http://humrep.oupjournals.org/cgi/content/full/15/2/476>.

⁴⁸ See, e.g., Bernadine Healy, *The High Cost of Eggs: Donors at Risk*, *U.S. NEWS & WORLD REP.*, Jan. 13, 2003, at 44.

⁴⁹ Sheridan McCoid, *Donation: The Medical Facts*, *OBSERVER*, July 3, 2006, <http://www.guardian.co.uk/medicine/story/0,992158,00.html>.

⁵⁰ Baetens et al., *supra* note 47.

⁵¹ Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 *BYU L. REV.* 107, 118.

are generally rare, there is little data on the long-term impact of egg donation process beyond the preliminary reports that have shown increased risks of ovarian cancer.⁵²

For their trouble, women who donate eggs receive varying sums ranging from \$5,000 to \$50,000.⁵³ If the donor has particular traits and characteristics, the market pays a “premium,” as did one couple who offered to pay \$50,000 to an egg donor who was a tall, Ivy League student with an SAT score greater than 1400.⁵⁴ These women provide eggs that help to produce thousands of children every year in the United States.

As for those who are willing and able to pay for these services, the average person in need of ART is straight, older, married, white, educated, and financially well off.⁵⁵ Many statistics show that African-American and Latinas are underrepresented in the population of ART consumers, as are poor people and people with less than a high school education.⁵⁶ Even in states that mandate insurance coverage for ART, insurers exclude same-sex couples by requiring women to first attempt conception using their husband’s sperm; this requirement is a prerequisite to coverage of ART procedures.⁵⁷

Requirements such as these effectively make ART unavailable to the middle and lower classes.⁵⁸ Yet, even for the well off, the costs are astronomical and largely out of pocket. The costs range from \$7,000 to \$20,000 per cycle, depending on the ART procedure and desired premiums.⁵⁹ In addition to being priced out of the market, a number of buyers explore other markets for the most favorable legislative framework governing the reproductive markets and their participants.⁶⁰ ART regulation in the United

⁵² Jo Revill, *IVF Egg Donors ‘Risking Their Health’—Experts Call for a Ban on Donations from Strangers*, OBSERVER, Feb. 9, 2003, at 6.

⁵³ See, e.g., Gina Kolata, *\$50,000 Offered to Tall, Smart Egg Donor*, N.Y. TIMES, Mar. 3, 1999, at A10.

⁵⁴ *Id.*

⁵⁵ See generally VICTORIA CLAY WRIGHT ET AL., NAT’L CTR. FOR CHRONIC DISEASE PREV. & HEALTH PROMOTION, ASSISTED REPRODUCTIVE TECHNOLOGY SURVEILLANCE—UNITED STATES, 2002 (2005), <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5402a1.htm>.

⁵⁶ Tarun Jain & Mark D. Hornstein, *Disparities in Access to Infertility Services in a State with Mandated Insurance Coverage*, 84 FERTILITY & STERILITY 221, 221 (2005).

⁵⁷ American Society for Reproductive Medicine, *State Infertility Insurance Laws*, <http://www.asrm.org/Patients/insur.html> (last visited Mar. 26, 2007).

⁵⁸ Jain & Hornstein, *supra* note 56.

⁵⁹ Felicia R. Lee, *Driven by Costs, Fertility Clients Head Overseas*, N.Y. TIMES, Jan. 25, 2005, at A1.

⁶⁰ *Id.*; see also Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295 (2005) (discussing the relationship between the global market for ART restrictions placed upon assisted reproductive technology).

States is confused and confusing; it is very hard for any of the market participants to develop expectations that they can be sure the law will enforce.⁶¹

Under the current environment, the market for reproductive services operates in ways that are disproportionately favorable to the brokers and those who are seeking to satisfy their reproductive desires—i.e., those who can afford to pay women for their reproductive services or materials. The market seems to proceed on the default notion that so long as the woman providing the service or material is not paid, then the arrangement is acceptable and free from coercion. The slippery slope of reproductive slavery has, in other words, been averted by denying an essential party remuneration for her services; as long as the buyers do not place a price on the value of the sellers' reproductive capacities, as slave owners once did, the arrangement is acceptable. Even in those jurisdictions that allow some payment to surrogates, egg donors, gestational surrogates, and other providers of reproductive material and services, the amount those women receive is often de minimus when compared to what the brokers receive and the vast resources that the would-be parents are investing in the enterprise.⁶² The true beneficiaries of the privacy and choice protected by *Roe v. Wade* are those who are able to enter an unregulated market for reproductive services and pay exorbitant amounts of money to a broker who will help them satisfy their reproductive desires.

The unfairness in the reproduction market cannot be remedied in the courts because ART falls under the umbrella of privacy and fundamental rights. Interestingly, this same umbrella proves leaky in the abortion context, and it seems as though states are allowed to regulate at will.⁶³ This distinction is implicit in nearly every aspect of the current reproductive rights environment. Consider again the point made in *Freakonomics*⁶⁴ that legalized abortion is related to a decrease in crime.⁶⁵ In proving this contention, the authors ask the reader to consider the primary beneficiary of the decriminalization of abortion.

⁶¹ David Adamson, *Regulation of Assisted Reproductive Technologies in the United States*, 39 FAM. L.Q. 727 (2005).

⁶² Consider the semen donor who may be paid \$25–50 for his “donation”. The facility collecting his specimen can get perhaps three samples that can be sold for no less than \$300. Jennifer Wolff, *Sperm Donor Ruling Could Open Door for Offspring*, USA TODAY, June 15, 2004, at 13A.

⁶³ See, e.g., Cheryl Erwin, *Utopian Dreams and Harsh Realities: Who Is in Control of Assisted Reproductive Technologies in a High Tech World*, 9 J. GENDER RACE & JUST. 621 (2006) (comparing the demographic and doctrinal differences between abortion and ART).

⁶⁴ LEVITT & DUBNER, *supra* note 5.

⁶⁵ *Id.* at 139–40.

According to the essay in *Freakonomics*, this person is a poor, young, and single woman.⁶⁶

This characterization of the reproductive rights beneficiary is the result of years of disinformation regarding the protection and power granted under the reproductive rights doctrine enunciated in *Roe*.⁶⁷ If one counts decriminalization of abortion as the sole benefit of the current reproductive rights doctrine, then Levitt and Dubner are right—poor, young, and single women did receive something they were denied prior to *Roe*—at least in theory. If, on the other hand, one looks to the limitations on access, funding, sexual education, religious and cultural prohibitions, age restrictions, lack of protection against sexual assault, and limited alternatives to pregnancy and abortion as a consequence of sexual activity, it is unlikely that young, poor, and single women could be described as the primary beneficiaries of *Roe*.⁶⁸ Under different measures, *Roe*'s primary beneficiaries are those who are able to enjoy the broad range of reproductive options now available without being limited by funding issues, access issues, or governmental regulation.⁶⁹ Those beneficiaries are realizing the promise of *Roe*—reproductive freedom that includes the freedom to make economically irrational and inefficient reproductive decisions.⁷⁰

III. CRITICAL ECONOMIC THEORY AND THE MODERN MARKET FOR REPRODUCTIVE SERVICES AND MATERIALS

A. *A Primer on Economics from a Non-Economist*

As economics is the study of how people choose to allocate scarce resources (such as money and time) and how the factors that influence people's allocation decisions interrelate, it is an appropriate discipline through which reproductive markets and its participants can be explored. The parameters of economic theory at play in this Article are admittedly narrow. Specifically, this analysis will focus on three primary economic theories or constructs: (1)

⁶⁶ *Id.* Although not expressed, the reader is to assume that the person is a woman, although it is arguable that *Roe* was at least as beneficial for young poor men as it was for young poor women.

⁶⁷ 410 U.S. 113 (1973) (decriminalizing abortion).

⁶⁸ See, e.g., Erwin, *supra* note 63, at 621.

⁶⁹ See *id.*

⁷⁰ Mary Ann Chase, *Pets or Meat: Must We Choose Between Rationality and Irrationality?*, 80 CHI.-KENT L. REV. 1129 (2005); Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, 26 B.C. THIRD WORLD L.J. 61 (2006).

utility, (2) efficiency, and (3) the rational economic actor. These concepts allow for the development of important theories and ideas about how a market for reproductive services and products might look. Most importantly, using economics to think about reproductive rights creates an opportunity to identify and evaluate the challenges and realities created by such a market.

1. Satisfaction: Utility, Subjective Well-Being, and Efficiency

a. Utility

The construction of the rational economic subject also involves the concept of utility—the extent to which the good or service at issue in the transaction will bring satisfaction to the consumer.⁷¹ Satisfaction is a difficult concept to quantify and can refer to purely financial benefit, personal satisfaction, or both. Like most concepts taken from one context (philosophy) and imported to others (economics and law),⁷² utilitarianism has been refashioned to fit a variety of theoretical needs. For example, in property law, utilitarianism is especially useful when courts are asked to assess competing claims to property when different uses are proposed. The test most often used in such cases asks some version of the following two questions: (1) who is willing and able to pay for the disputed property; and (2) among those willing and able to pay, who proposes the most efficient use.⁷³ This test incorporates Locke’s labor and deservedness theories⁷⁴ and also appeals to the roles personality and personhood theories play in reaching efficient results.⁷⁵ Applying the theory of utilitarianism to an economic analysis of supply and demand results in consumers seeking to maximize their satisfaction, producers seeking to maximize profits, and government actors seeking to regulate the relationship between consumers and producers to achieve maximum public welfare or social utility.⁷⁶

⁷¹ Jeanne Shroeder, *Rationality in Law and Economics Scholarship*, 79 OR. L. REV. 147, 154 n.10 (2000).

⁷² Elements of the utilitarian school of philosophy are often borrowed by economic theorists. *See id.*

⁷³ This is a classic application of law and economics borrowed from Jeremy Bentham and often used in the property law context. *Id.*

⁷⁴ JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 14–27 (J.W. Gough ed., 1966) (1690).

⁷⁵ *Id.*

⁷⁶ Jeremy Bentham, the father of utilitarianism, stated that the role of the legislator was to do “what is essential to the happiness of society; when he disturbs it, he always produces a proportionate sum of evil.” JEREMY BENTHAM, THE THEORY OF LEGISLATION 113 (C.K. Ogden ed., 1987) (1802).

b. *Subjective Well-Being*⁷⁷

Law and economic theorists have, in recent years, addressed whether, and to what extent, happiness and well-being underlie the philosophical notion of utilitarianism.⁷⁸ The notion of subjective well-being is related to utility and satisfaction in that it takes into account factors other than the pursuit of financial success; when subjective well-being is considered in relation to decision making, it may indicate moving forward with actions that are contrary to economic or financial well-being.⁷⁹ In early law and economics scholarship, the formulation of utilitarianism as applied to economic analysis was simple: Happiness equals wealth in the form of liquid assets or real property.⁸⁰ Under this formulation, the particular preferences and facts influencing the subjective, emotional happiness of particular individuals were difficult to quantify, and thus ignored.⁸¹

c. *Efficiency*

The traditional definition of efficiency requires that transactions leave at least one party better off than she was before the transaction, and no parties worse off than they were before the transaction.⁸² In other words, the worst case scenario that still produces an efficient result is where only one party is made better off while the status quo is preserved for the other party or parties. Conversely, the best case scenario is that all parties are better off after the transaction. Neoclassical economic theory closely relates efficiency with the

⁷⁷ See, e.g., Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669 (2003).

⁷⁸ BRUNO S. FREY & ALOIS STUTZER, HAPPINESS AND ECONOMICS: HOW THE ECONOMY AND INSTITUTIONS AFFECT WELL-BEING 19–24 (2002).

⁷⁹ Carol Graham, *Insights on Development from the Economics of Happiness*, 20 WORLD BANK RES. OBSERVER 201, 202 (2005) (identifying factors such as social insurance, health, and perceived status of others as affecting happiness or well-being).

⁸⁰ For examples of how early pioneers of law and economics articulated the role of wealth in the happiness of society, see, e.g., R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

⁸¹ FREY & STUTZER, *supra* note 78, at 30–34.

⁸² Economists differ on how to define efficiency. The definition above refers to Pareto efficiency; Vilfredo Pareto defined economic efficiency as a movement from one allocation to another that can make at least one individual better off without making any other individual worse off. See generally VILFREDO PARETO, *MANUAL OF POLITICAL ECONOMY* (1971).

operation of a free market; therefore, conditions that impair the operation of a free market, such as government regulation, may lead to inefficiency.⁸³

The role of law, then, was to intervene, by facilitating—not impeding—the pursuit of happiness. The extent to which law functioned properly was determined by whether resources were used efficiently in the pursuit of wealth maximization.⁸⁴ The perceived impact of government regulation—i.e., increasing the propensity for inefficiency—is the chief complaint of law and economic scholars against increased regulation.⁸⁵ Specifically, they charge that prices in a regulated market generally exceed the cost of compliance with the regulation, thereby creating what economists term “dead weight loss.”⁸⁶

B. Reconstructing the Rational Economic Actor

The theoretical framework for economics is founded upon the presumptions that attach to its protagonist, the rational economic actor.⁸⁷ This figure is a part of popular culture as well as economic and legal theory. Consider a recent radio broadcast that started with a definition of the rational actor: According to the broadcaster, “[R]ational economic actors are actors that will make decisions in their interests.”⁸⁸

Traditionally, this rational actor was constructed as a man who enters the market to engage in transactions with other rational actors—also men.⁸⁹ The proper functioning of a market depends upon the assumption that all rational actors seek to maximize utility and are motivated by the desire to achieve

⁸³ Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 MINN. L. REV. 1620, 1624–25 (2006); see, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992).

⁸⁴ Martha McCluskey, Presentation at the Feminism and Legal Theory Workshop at Columbia University: Telling Stories About the State and the Market: The Rhetorical Construction of Efficiency (Feb. 1995) (conference materials on file with the author and available via Feminism and Legal Theory Project at Emory University School of Law) (discussing the theory that the market and the government, i.e., regulation, are inextricably bound).

⁸⁵ POSNER, *supra* note 83, at 628–29.

⁸⁶ Jeanne Shroeder, *supra* note 71, at 184–85; see also RICHARD A. POSNER, *OVERCOMING LAW* 172–73 (1995).

⁸⁷ *Introduction to FEMINISM CONFRONTS HOMO ECONOMICUS*, *supra* note 3, at ix, xiii.

⁸⁸ *Kojo Nnamdi Show: Measuring Happiness*, 1/9/07 (Podcast Jan. 9, 2007), available at <http://www.wamu.org/programs/kn/07/01/09.php#12718>.

⁸⁹ See, e.g., Jeanne Shroeder, *Virgin Territory: Margaret Radin's Imagery of Personal Property as the Inviolate Feminine Body*, 79 MINN. L. REV. 55 (1994) (discussing the masculine underpinnings of economic theory).

efficient outcomes.⁹⁰ Efficiency and utility have variable definitions, which shift over time. Today, however, there seems to be enough room in the economic theory to reconstruct the rational actor as a woman, or at least as a gender-neutral figure.⁹¹ Whether male or female, the neoclassical rational actor “enters into transactions with the sole objective of maximizing wealth and economic well-being.”⁹²

An example of the implications of the mischaracterization of rationality in the reproductive context appears in *Johnson v. Calvert*,⁹³ a gestational surrogacy case where the surrogacy contract was enforced against the birth mother who desired to rescind.⁹⁴ Ms. Anna Johnson was a single mother of a four-year-old daughter and a sometimes-welfare-recipient.⁹⁵ She entered into a gestational surrogacy contract in 1992 with the Calverts, a co-worker and her husband.⁹⁶ The couple agreed to pay Ms. Johnson \$10,000 to be implanted with an embryo created from Mr. Calvert’s sperm and Mrs. Calvert’s egg.⁹⁷ During the pregnancy, discord among the parties led Ms. Johnson to file a claim to establish full parental rights in her fetus.⁹⁸ Upon the birth of the child, the court granted full parental rights to Mr. and Mrs. Calvert, finding that Ms. Johnson was more of a “foster mother” or human incubator caring for the child because the “natural mother” was unable to conceive, thus making Ms. Johnson the first woman since slavery to a give birth to a baby to whom she was a legal, and therefore “natural,” stranger.⁹⁹

The Calverts benefited from the reproductive rights doctrine in ways that Ms. Johnson did not. They also benefited from the presumptive rationality of their market participation—as rational actors, they signed a contract that was enforceable—but under economic theory, this was a mischaracterization. The couple invested exorbitant amounts of money in order to satisfy their

⁹⁰ Shroeder, *supra* note 71, at 202.

⁹¹ Shroeder, *supra* note 89, at 60.

⁹² Jeanne Schroeder, *The Midas Touch: The Lethal Effect of Wealth Maximization*, 1999 WIS. L. REV. 687, 691.

⁹³ 851 P.2d 776 (1993).

⁹⁴ *Id.* at 778.

⁹⁵ Deborah Grayson, *Mediating Intimacy: Black Surrogate Mothers and the Law*, in BIOTECHNOLOGY AND CULTURE: BODIES, ANXIETIES, ETHICS 99, 99 (Paul E. Brodwin ed., 2000); Thomas W. Laqueur, “From Generation to Generation”: *Imagining Connectedness in the Age of Reproductive Technologies*, in BIOTECHNOLOGY AND CULTURE, *supra*, at 75, 88.

⁹⁶ *Johnson*, 851 P.2d at 778.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 786 n.13, 787.

reproductive desires.¹⁰⁰ If utility equals happiness and happiness equals wealth (under a very primitive economic theory), the fact that the investment of resources by the couple was made with no expectation of wealth accumulation may be illogical.¹⁰¹ In fact, the only thing they could expect is a decrease in wealth as they meet the financial demands of having children in this day and age.¹⁰² In other words, purchasers of reproductive services and products pursue a happiness that does not necessarily coincide with the type of happiness recognized under the most basic view of utilitarianism, which traditionally equates happiness with wealth. In fact, for them, reproductive utilitarianism is quite the opposite: that child will not add to their happiness (i.e., wealth).¹⁰³ Yet, the privacy, choice, and freedom components of the reproductive rights doctrine are all applied favorably to the Calverts by the courts.

Ms. Johnson, on the other hand, entered into the surrogacy transaction as an economically rational actor in pursuit of happiness (wealth), and yet, her economic motivations were downplayed and devalued.¹⁰⁴ The fact that she received money appeared to work against her in her claim for parental rights.¹⁰⁵ The two interests—economic and parental—are incongruent in the context of Ms. Johnson’s claim, but completely recognized and normalized in the Calvert’s willingness to pay to satisfy their reproductive desires.

The court’s treatment of Ms. Johnson as a human incubator or gestational foster parent lends itself to a comparison between the plight of breeder slaves during slavery and Ms. Johnson. The similarities, at least at first glance, do not go far beyond their racial similarities, which historically have meant increased vulnerability to reproductive exploitation. An enslaved woman forced to breed by her owner and Ms. Johnson, a woman who voluntarily entered into a surrogacy contract, have little else in common. The court’s comment did not

¹⁰⁰ The deal was for \$10,000 plus a \$200,000 life insurance policy with Ms. Johnson’s daughter as the beneficiary. *Id.* at 778. The court’s opinion does not address the expenses that brought each party to the point of implantation. Mrs. Calvert underwent the same procedure as would an egg donor.

¹⁰¹ Professor Carol Graham, a Senior Fellow in Economics Studies at the Brookings Institute, conducted a recent subjective well-being study, *supra* note 79, and the results show that “children have no measurable effect on happiness.” *See Kojo Nnamdi Show, supra* note 88.

¹⁰² *Id.* (noting the stress of children may counterbalance or outweigh the increase in happiness levels).

¹⁰³ *Id.*

¹⁰⁴ *Johnson*, 851 P.2d at 778, 782–83.

¹⁰⁵ The court included Anna’s demand letter, which was arguably irrelevant to the issues before the court. *Id.* at 783 n.11.

enslave Ms. Johnson or make her more similar to the enslaved women of the eighteenth and nineteenth century American landscape.

Yet, there are other similarities that occur on the other end of the spectrum. The plight of the enslaved breeder can offer insight into the motivations, experiences, and pursuit of freedom attendant to Ms. Johnson's wealth maximization expectations. Consider the resistance strategies employed by female slaves specifically designed to exert control over their reproductive capacities. The use of these strategies can be interpreted as assertions of freedom in that if successful, enslaved women were able, like their white counterparts, to internalize the economic benefits that resulted from satisfying their owner's desire for a particular reproductive outcome. Thus, a plausible alternative to viewing Ms. Johnson and others who commodify their reproductive capacities as slaves is that they are exercising the reproductive freedom learned from their foremothers, paralleling that which is exercised by the purchasers of the products and services they provide.

In addition to the hybrid historical-economic analysis, a pure economic analysis also sheds light on the parties and the transaction and arguably may have led to a different result. First, had there been a recognition of gestational surrogates' power to rescind the contract, such a recognition would have redistributed the power in the transaction from the beginning: The Calverts would have had to pay more in order to protect against economically motivated breach.¹⁰⁶ Equally distributed power would give all parties the ability to satisfy their investment-backed expectations. Of course, the opposite could result. Many people who are willing and able to pay to have their reproductive desires satisfied might stay away from a market that recognizes the ability to rescind on the part of the provider of reproductive services or materials. In my view, both situations yield positive results in that they empower previously exploited women: either money can be more wisely invested in carefully worded surrogacy contracts or infertile couples could look to the adoption market which has a surplus of children waiting to satisfy parenting desires. Both results can be described as efficient and utilitarian in that each satisfies preferences and contributes to the accumulation—not the destruction—of wealth.

¹⁰⁶ Ms. Johnson, who is not a lawyer, used the word breach in her letter to the Calverts. She was in her seventh month of pregnancy and on disability from work. *Johnson v. Calvert*, 851 P.2d 776, 780 (1973).

CONCLUSION

Despite the misidentification of the participants in the reproductive market, the fact remains that for a certain segment of market participants, the power to make unfettered decisions in the pursuit of happiness exists. If we recognize and protect their interests in buying, we must also protect and recognize the other participants in the transaction, namely women who provide the desired reproductive materials or services. The buyers have the power of constitutional protections as well as the ability to access the freedom the Constitution affords. Currently, these actors are allowed to invest unlimited resources in their happiness without any regard for the externalities the rest of society will have to incur in support of their decision. Reconstructing rationality is useful in that it can help us to favorably interpret the reproductive decisions of disfavored reproducers. The impact of disparate power, education, and access to health care—all of the things that economic theory often assumes away—is significant in the lives of many women. Further, the constancy that does exist—namely the identity of those who are historically vulnerable to oppressive policies despite the protections articulated in the connection between power, wealth, race, gender, and historical reproductive oppression—is much too deeply ingrained in the social fabric that overlays the public discourse on reproductive practices and rights.