

BDF BIOETHICS BRIEFING

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Contact: info@bdfund.org

VERMONT PROPOSAL 5 (2019)

A FEW BIOETHICS IMPLICATIONS BEYOND ABORTION OF THE PROPOSED “RIGHT TO PERSONAL REPRODUCTIVE LIBERTY”

INTRODUCTION

The following is a brief policy analysis setting forth a few initial observations regarding Vermont Proposal 5 (2019). The policy considerations listed are intended to raise a few possible bioethics issues that go beyond the abortion issue. This analysis does not constitute an exclusive list of the possibly unintended bioethics consequences that could be implicated by the broad and undefined language of the proposed amendment.

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TEXT OF VERMONT PROPOSAL 5

Proposal 5 would add Article 22 to the Vermont Constitution, providing: “That the people are guaranteed the liberty and dignity to determine their own life’s course. The right to personal reproductive autonomy is central to the liberty protected by this Constitution and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means.”¹

A FEW INITIAL POLICY CONSIDERATIONS

1. The operative phrase “**personal reproductive autonomy**” in the proposed new Article 22 of the Vermont Constitution **is not defined**. Proposal 5, Sec. 2
 - Any ambiguity surrounding the phrase will be resolved ultimately not by the people through their elected representatives, but by the Vermont Supreme Court through litigation, thereby possibly undercutting the very point of putting this amendment to *a vote* of the *people*.

¹ Full Text of 2019 Proposition 5, including a Section 1 “Purpose” can be found at <https://legislature.vermont.gov/Documents/2020/Docs/BILLS/PR0005/PR0005%20As%20Introduced.pdf>

2. Does Proposal 5 invite constitutionally protected “reproductive tourism” that exploits vulnerable women of reproductive age in Vermont?

- “Reproductive tourism” is the phenomenon of people crossing state borders to access more lax regulation of assisted reproductive technologies. One of the fastest-growing categories is a form human trafficking called “gestational surrogacy.” This involves the act of infertile clients using a brokerage to engage the paid services of economically disadvantaged young women to carry their babies to term. The risks to the life and health of egg donors and surrogate mothers are significant.

3. Are unethical human experimentation practices protected by the proposed amendment? The term “reproductive” is *not* expressly limited to abortion. Current and future proposed biotechnologies that arguably relate directly or indirectly to “reproduction” include, among others, the following practices that could have constitutional protection:

- **human cloning** (e.g., “somatic cell nuclear transfer”) for reproductive purposes;
- **3-parent embryo creation** (“mitochondrial substitution”);
- **gestational surrogacy trafficking** (achieved by in vitro fertilization and then followed by human embryo transfer, and after birth the handing over of a born human child in exchange for payment);
- **trafficking in human embryo creation** (creation of a human embryo by IVF and the subsequent sale or trade of such human embryos for implantation in another’s womb for the purposes of reproduction);
- **designer babies** (creation of designer embryos using gene editing techniques such as **CRISPR-CAS 9** and the implantation and birthing of such genetically modified human beings);
- **womb transplants** for those who are over the age of 50, 60, 70, or even 80.

4. Statutory rape consequences? The term “autonomy” used in Section 2 of Proposal (“personal reproductive *autonomy*”) is not defined. What expressions of autonomy would be enshrined in the Constitution?

- Would this “autonomy” right undercut criminal prohibitions related to age of consent or sexual assault if a minor girl sought to become pregnant with the assistance of a man over the age of 18?
- Would a minor girls’ rights to “personal reproductive liberty,” see Section 1 of Proposal 5, be “infringed” if such a man were prosecuted for sexual contact with the minor?
- Would a man have an “autonomy” right to have sex with minor males or females? The lack of any defined terms and express limits opens up a wide spectrum of potential problems limited only by the resourcefulness of clever criminal defense lawyers.

5. Does Proposition 5 require taxpayer funding of assisted reproductive technologies?

- The overbroad language of Proposition 5 might be used to argue that economically disadvantaged people have a constitutional right to IVF, human cloning, gestational surrogacy, 3-parent embryos or any other reproductive technology, and that the state or their insurance owes them a duty to subsidize or fund these practices.
- What would be the impact on tax costs and insurance rates?

6. The term “personal” is *not* expressly limited to any one gender.

- In fact, Section 1 “Purpose” language of Proposal 5 states “[t]his proposal would amend the Constitution of the State of Vermont to ensure that *every* Vermonter is afforded personal reproductive liberty.” (emphasis added).
- Arguably, if Supreme Court abortion jurisprudence were reversed, this amendment might allow a man to object to an abortion of his own genetically related child since such an abortion would “den[y] or infring[e]” *his* right to *reproduce*. See, e.g., Section 2, Proposal 5.
- Moreover, the term is not even expressly limited to those who have a first generational connection to any potential child. Thus, under this amendment parents, whose only son becomes brain damaged, might claim a Constitutional right to retrieve sperm to have a grandchild by IVF who is a male heir, for the purpose of carrying on the family name. (See, e.g., the [real life case of Peter Zhu](#), a brain-damaged West Point cadet who suffered a broken spine in a skiing accident on February 23, 2019. His parents are seeking a court order, after a doctor declared their son brain dead, to retrieve his sperm to preserve his reproductive genetic material for use in IVF).