

# Coverage From the Storm: A.R.T. Insurance as Reparations for Biological Weathering

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## ABSTRACT

*Though the violence of racism in the United States has never been unknown to Black Americans, the recent cases of police brutality and the resulting uprising have made it abundantly clear that racial subordination is the thread of most—if not all—American institutions. The racism perpetuated by these institutions has caused stress-induced wear that is most visible in the reproductive context. This Note calls for reparations in the form of expanded insurance coverage for infertility treatments. American racism is irreversibly diminishing the reproductive capacities of Black people, for which they deserve an equitable chance at parenthood through reparations.*

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## INTRODUCTION

Typically, people<sup>1</sup> are most fertile in their twenties—the number of quality eggs is the highest and pregnancy risks are the lowest. That is—unless you are a Black person. By their twenties, Black people already have a reduced reproductive capacity—a lesser ability and access to procreate due to a number of sociological and environmental factors, the least surprising of them being racism. “Reproductive capacity” is generally used to describe the number of offspring an organism or population can

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1. In an effort to ensure the discourse on reproductive justice does not continue to center cisgender women, this Note will use the gender-neutral term, “people,” when not citing to sources that refer only to cisgender women. This is an acknowledgement that transgender men and gender nonconforming individuals have a place in the fight for reproductive justice.

theoretically produce.<sup>2</sup> This Note refers to “reduced reproductive capacity” to describe reproductive damage as the biological manifestation of the socio-political subordination of Black people in the United States.

Weathering, a term used to capture the “stress of racism,”<sup>3</sup> is one condition that can cause a decline in fecundity. Uncorrected, weathering prevents Black people from becoming parents at disproportionately high rates compared to the general population. Although insurance coverage for assisted reproductive technologies (ARTs) is currently limited, insurance could offer a reparative solution to remedy the effect systemic oppression has had on the reproductive capacity of Black bodies.

Part I of this Note discusses weathering and how it negatively affects reproductive capacity. Part II briefly reviews the available ARTs and the current state of insurance coverage for fertility treatments and in vitro fertilization. Part III argues that because of the advanced biological age of Black people—and thus their reduced reproductive capacity—Black people should be eligible for infertility diagnoses prior to the usual one-year minimum,<sup>4</sup> and provided insurance coverage for fertility treatments, including IVF as a form of reparations.

## I. WEATHERING & ASSOCIATED PREGNANCY OUTCOMES

Weathering is a physiological effect of the chronic stress associated with racism.<sup>5</sup> Dr. Arline Geronimus, public health researcher and professor at the University of Michigan, was the first to discuss the concept in 1992 while examining teenage mothers.<sup>6</sup> She theorized that Black women were prematurely aging due to social inequalities.<sup>7</sup> She was correct—Black teen mothers had better birth outcomes than Black women in their twenties, but the same was not true for white women.<sup>8</sup>

When a person experiences stress, the hypothalamus sends signals to the adrenal glands to release adrenaline and cortisol.<sup>9</sup> This process happens infrequently under

2. Didem P. Sarikaya et al., *Reproductive Capacity Evolves in Response to Ecology Through Common Developmental Mechanisms in Hawai'ian Drosophila*, BIORXIV 1, 3 (Nov. 16, 2018), <https://www.biorxiv.org/content/10.1101/470898v1.full.pdf>.

3. Patia Braithwaite, *Biological Weathering and Its Deadly Effect on Black Mothers*, SELF (Sept. 30, 2019), <https://www.self.com/story/weathering-and-its-deadly-effect-on-black-mothers>.

4. Many state laws requiring insurance coverage for fertility treatments require at least one year of unsuccessfully trying to conceive before receiving coverage for the treatments. See discussion *infra* Part II, note 40.

5. Braithwaite, *supra* note 3. “Imagine for a moment that you’re a very silly 22-year-old driving through Florida sometime around 2009. You’re speeding down a road called Alligator Alley at approximately 92 miles an hour, which is about 20 miles above the speed limit. It’s late. Maybe the windows are down. Maybe the music is blaring. Maybe you’re singing off-key. You’re basically living your best life until police lights appear behind you, and you remember you’re not in a coming-of-age film. You’re a black woman driving alone in the middle of the night. In the South.

This is how I die, you think, as a stoic police officer takes your license and registration from your shaking hand. The police killing of Michael Brown that thrust Black Lives Matter into the national spotlight hadn’t happened yet. But you grew up hearing about Sean Bell and Amadou Diallo, Brown’s forefathers on the list of black people killed by police, his companions in this traumatic, helpless club. You know how dangerous this can be.” *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

normal circumstances. But when this process happens as often as it does for Black people in the United States, the repeated activation of stress responses leads to poor health outcomes.<sup>10</sup> Weathering is measurable at the chromosomal level. The stabilizing caps on the ends of chromosomes—telomeres—naturally shorten throughout the aging process, but environmental factors can speed the process up.<sup>11</sup> Through a study of telomere lengths, Geronimus found that Black women ages 49 to 55 had a biological age that was approximately 7.5 years older than white women of the same age.<sup>12</sup> There were a number of limitations to the study on telomeres, but the cumulative biological damage from an overexposure to stress, the allostatic load, can also be measured through lab tests that indicate stress-related impairment to the body.<sup>13</sup> Further, methylation changes can be an indicator of biological age when advanced by environmental factors.<sup>14</sup> Through social and environmental factors, DNA methylation—which occurs when a group of molecules attach methyl groups to specific areas of a gene’s promoter region—either prevents the reading of certain genes or expresses the gene’s product.<sup>15</sup>

Weathering can have a wide range of health implications, but it “seems to be an inextricable part of black maternal mortality.”<sup>16</sup> Pregnancy is one of the easier ways to study weathering because it is short-term and has measurable effects, like birth weight.<sup>17</sup> This is how researchers have linked poor pregnancy outcomes for Black women in their twenties—across income levels—to the chronic stress of racism.<sup>18</sup> It is the specific symptoms of chronic stress, such as decreased appetite, insomnia, and hypertension, that lead to significantly impacted fetal growth and preterm labor.<sup>19</sup> To refute the idea that the differences observed are innate to Black women, a 2017 study showed that U.S.-born Black women have worse pregnancy outcomes than African immigrants.<sup>20</sup>

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10. *Id.*

11. *Id.*

12. Arline T. Geronimus et al., *Do US Black Women Experience Stress-Related Accelerated Biological Aging?: A Novel Theory and First Population-Based Test of Black White Differences in Telomere Length*, 21 HUM. NAT. 19, 27 (2010).

13. *See Id.*

14. Ronald L. Simons et al., *Economic Hardship and biological weathering: The epigenetics of aging in a U.S. sample of black women*, 150 SOC. SCI. MED. 192, 198 (2017).

15. *This Racism is Killing Me Inside*, NAT’L PUB. RADIO CODE SWITCH (Jan. 10, 2018, 12:01 PM), <https://www.npr.org/transcripts/576818478>.

16. Braithwaite, *supra* note 3.

17. *Id.*

18. Hope Lane, *Medical Bias, Weathering and the Deadly Impact on Black Mothers*, MATERNAL MORTALITY & MORBIDITY (June 29, 2020), <https://www.communitysolutions.com/medical-bias-weathering-deadly-impact-black-mothers/>. Racism is not the only stressor that can cause weathering—similar trends were observed in mothers of autistic children. Gene Demby, *This Racism is Killing Me Inside*, CODE SWITCH (Jan. 10, 2018), <https://www.npr.org/transcripts/576818478>.

19. Lane, *supra* note 18.

20. Hui-Ju Tsai et al., *Differential Effects of Stress and African Ancestry on preterm Birth and Related Traits Among US Born and Immigrant Black Mothers*, 96 MED. 1, 3 (2017); Braithwaite, *supra* note 3.

The trauma associated with experiencing frequent acts of racism and sexism may also contribute to fertility challenges.<sup>21</sup> Infertility is defined by the CDC as “not being able to get pregnant (conceive) after one year (or longer) of unprotected sex.”<sup>22</sup> People over a certain age, however, can be diagnosed after only six months of unprotected sex.<sup>23</sup> One study, controlling for intercourse frequency at twice per week, resulted in infertility rates of 8% for 19 to 26-year-olds, 13–14% for 27 to 34-year-olds, and 18% for 35 to 39-year-olds.<sup>24</sup> Age is “perhaps the single most important factor in assessing an ovarian reserve.”<sup>25</sup> The total ovarian reserve is a reflection of a person’s “cumulative hypothetical pregnancy chance.”<sup>26</sup> Black women have “significantly higher odds of . . . infertility than white women.”<sup>27</sup> And the risk factors of infertility such as smoking, obesity, fibroids, and ovarian volume do not adequately explain the infertility differential between races.<sup>28</sup> “Among non-surgically sterile women,” Black women had twice the odds of experiencing infertility, as compared to white women.<sup>29</sup> Although there seem to be no comprehensive studies linking weathering to infertility, weathering is linked to biological aging and aging is indisputably linked to infertility.

In an interview with Gene Demby of NPR’s Code Switch, Dr. Geronimus implied that there is nothing that can be done to reverse weathering.<sup>30</sup> When asked if there was a way to restore health that has been damaged by weathering, her answer consisted of suggestions like access to healthcare and early diagnosis.<sup>31</sup> American racism is irreversibly diminishing the reproductive capacities of Black people, for which they deserve an equitable chance at parenthood through reparations.

## II. ARTs & INSURANCE COVERAGE

Infertility can be treated in a few ways. If it is because of an ovulation disorder, people can take fertility drugs that regulate ovulation.<sup>32</sup> Another option is

21. Valinda R. Nwadike, *Uncovering the Trauma Pregnant Black Women Experience in the U.S.*, HEALTHLINE (Dec. 3, 2020), <https://www.healthline.com/health/black-women-pregnancy-trauma>.

22. CTRS. DISEASE CONTROL & PREVENTION, *Infertility | Reproductive Health* (last reviewed Jan. 16, 2019), <https://www.cdc.gov/reproductivehealth/infertility/index.htm>.

23. MASS. GEN. LAWS ANN. ch. 176B § 4J (West 2010).

24. David B. Dunson et al., *Increased Infertility with Age in Men and Women*, 103 AM. COLL. OBSTETRICIANS & GYNECOLOGISTS 51, 53 (2004).

25. Korula George & Mohan S. Kamath, *Fertility and Age*, 3 J. HUM. REPROD. SCI. 121, 123 (2010).

26. Norbert Gleicher et al., *Defining Ovarian Reserve to Better Understand Ovarian Aging*, 9 REPROD. BIO. ENDOCRINOLOGICAL 23 (2011). “Ovarian reserve (OR) is a widely used term that has largely remained undefined, and, to some degree, even misused. What is generally referred to as OR, really represents only small components of total ovarian reserve (TOR). A woman’s cumulative hypothetical pregnancy chance is mathematically reflected in her complete follicle pool, her TOR. Since TOR declines with age, ‘ovarian age’ is another frequently heard term to describe a woman’s remaining reproductive capacity.” *Id.*

27. Melissa F. Wellons, *Racial Difference in Self-Reported Infertility and Risk Factors for Infertility in a Cohort of Black and White Women: The CARDIA Women’s Study*, 90 FERTILITY & STERILITY 1640 (2008).

28. *Id.*

29. *Id.*

30. Demby, *supra* note 18.

31. *Id.*

32. MAYO CLINIC, *Infertility – diagnosis and treatment*, <https://www.mayoclinic.org/diseases-conditions/infertility/diagnosis-treatment/drc-20354322> (last visited Dec. 12, 2020).

intrauterine insemination, in which healthy sperm are placed directly into the uterus around the time that the ovaries release an egg.<sup>33</sup> Physicians can perform surgical interventions to address causes of infertility such as endometrial polyps, a uterine septum, intrauterine scar tissue, fibroids, endometriosis, and pelvic adhesions.<sup>34</sup> ARTs are also used to treat infertility. Assisted reproductive technology is any “fertility treatment in which either eggs or embryos are handled.”<sup>35</sup> In vitro fertilization (IVF) is a well-known type of ART and a common infertility treatment.<sup>36</sup> Since the first successful IVF birth in 1978, over eight million babies have been born through use of the procedure. During IVF, mature eggs are taken “from ovaries and fertilized by sperm in a lab.”<sup>37</sup> The embryos are then implanted into a uterus.<sup>38</sup> One cycle of this takes at least two to three weeks and more than one cycle is often necessary to achieve pregnancy.<sup>39</sup> One cycle of IVF can cost an average of \$12,000 to \$17,000.<sup>40</sup>

As with most medical procedures, insurance is one way to alleviate the soaring costs of IVF, or it would be if more states mandated coverage. Not only does insurance coverage make ART more accessible, it makes ART safer.<sup>41</sup> ART infants born in states without a mandate were more likely to be multiples, preterm, or low birth weight compared with ART infants in states with a mandate.<sup>42</sup> But as of 2019, only 14 states mandate insurance companies to cover infertility treatment and two states mandate that insurance companies have policies that include coverage options for infertility treatment.<sup>43</sup> There is no federal mandate—and although Senator Cory Booker sponsored a bill that would “have required all private-sector health plans, plus the federal employees plan and the veterans [sic] health-care system, to cover IVF,” it never went to a vote.<sup>44</sup> Additionally, of the states that require either infertility coverage or policies that include coverage options, there are two that specifically

33. *Id.*

34. *Id.*

35. CTRS. DISEASE CONTROL & PREVENTION, *What is Assisted Reproductive Technology?*, <https://www.cdc.gov/art/whatis.html>, (last reviewed Dec. 30, 2020).

36. PLANNED PARENTHOOD, *What is In-Vitro-Fertilization (IVF)?*, <https://www.plannedparenthood.org/learn/pregnancy/fertility-treatments/what-ivf> (last visited Dec. 12, 2020); ARC FERTILITY, *What is IVF?*, <https://www.arcfertility.com/patient-resources/infertility-tutorial/what-is-ivf/> (last visited Dec. 12, 2020).

37. MAYO CLINIC, *In vitro fertilization (IVF)* (June 22, 2019), <https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716>.

38. *Id.*

39. *Id.*

40. NAT’L CONFERENCE STATE LEGISLATURES, *State Laws Related to Insurance Coverage for Infertility Treatment* (June 12, 2019) [hereinafter *State Laws*], <https://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx>.

41. CTRS. DISEASE CONTROL & PREVENTION, *ART and Insurance | Key Findings* [hereinafter *ART and Insurance*], <https://www.cdc.gov/art/key-findings/insurance.html> (last reviewed Apr. 1, 2016).

42. *Id.*

43. *State Laws*, *supra* note 40. The fourteen states that require coverage are Arkansas, Connecticut, Delaware, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Jersey, New York, Ohio, Rhode Island, and West Virginia. The two states that require companies to offer coverage are California and Texas. *Id.*

44. Daniel Hemel, *Insurance Companies Should be Required to Cover In Vitro Fertilization*, WASH. POST (Nov. 15, 2018), <https://www.washingtonpost.com/outlook/2018/11/15/insurance-coverage-vitro-fertilization-should-be-mandatory/>; S. 2960, 115th Cong. (2018).

exclude coverage for IVF. California and Louisiana expressly remove IVF from their mandates.<sup>45</sup> New York's statute mostly excludes IVF coverage, but still requires coverage for up to three cycles of IVF on large group contracts that provide "medical, major medical or similar comprehensive-type coverage."<sup>46</sup>

There is only one state—Massachusetts—that mandates an infertility diagnosis before one year of demonstrated infertility for people over the age of thirty-five.<sup>47</sup> People over thirty-five arguably need a shorter waiting period because the decline in fertility rapidly accelerates in their mid-thirties.<sup>48</sup> States that have enumerated time periods before being eligible for an infertility diagnosis average one year, but some states require people to wait as long as five years before receiving a diagnosis.<sup>49</sup>

In many states, the coverage mandates also include certain exceptions. Some states exempt self-insured employers from the mandate.<sup>50</sup> Quite a few exempt religious employers from their mandates. California's exemption does not "require any employer that is a religious organization to offer coverage for forms of treatment of infertility in a manner inconsistent with the religious organization's religious and ethical principles."<sup>51</sup> Connecticut's exemption narrows the exception for only "methods of diagnosis and treatment of infertility that are contrary to the religious employer's bona fide religious tenets."<sup>52</sup> New Jersey, perhaps the state with the narrowest religious exemption, only allows the religious employer to request an exemption from the coverage mandate for "in vitro fertilization, embryo transfer, artificial insemination, zygote intra fallopian transfer and intracytoplasmic sperm injection, if the required coverage is contrary to the religious employer's bona fide religious tenets."<sup>53</sup> While the Supreme Court has not ruled on any cases regarding the constitutionality of coverage mandates for infertility diagnoses and treatments, it has ruled on coverage mandates for contraceptives. The Court, in *Burwell v. Hobby Lobby*, held that a Health & Human Services contraceptive mandate substantially burdened the exercise of religion.<sup>54</sup> It is possible that the states with express religious exemptions are preempting a *Burwell* challenge.

For same-sex couples, the regulatory scheme for insurance coverage differs only slightly. The Affordable Care Act (ACA) mandates that insurance companies cover

45. CAL. HEALTH & SAFETY CODE § 1374.55 (West 2014); LA. STAT. ANN. 22 § 1036 (2009).

46. N.Y. INS. LAW § 4303 (3)(C) – (G) (McKinney 2020).

47. MASS. GEN. LAWS ANN. ch. 176B, § 4J (West 2010).

48. AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, *Having a Baby After Age 35: How Aging Affects Fertility and Pregnancy* (Oct. 2020) [hereinafter *Having a Baby After Age 35*], <https://www.acog.org/womens-health/faqs/having-a-baby-after-age-35-how-aging-affects-fertility-and-pregnancy#:~:text=The%20number%20of%20eggs%20decreases,as%20uterine%20fibroids%20and%20endometriosis> (last visited Oct. 9, 2021).

49. *State Laws*, *supra* note 40.

50. *ART and Insurance*, *supra* note 41.

51. CAL. INS. CODE § 10119.6 (West 2014).

52. CONN. GEN. STAT. ANN. § 38a-536 (8)(c)(1) (West 2018).

53. N.J. STAT. ANN. § 17:48-6x (West 2013).

54. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 719 (2014).



procedures for same-sex couples if it does so for opposite-sex couples.<sup>55</sup> But because only 16 states require that insurance companies provide some type of coverage for infertility, the ACA's mandate did only so much in expanding coverage for same-sex couples. Some individual states have actively removed legislative barriers between same-sex couples and ART.<sup>56</sup>

The structure of the ACA is also relevant to providing a complete picture of insurance coverage for infertility treatments, including IVF. The ACA established essential health benefits (EHBs), which stop insurance companies from denying claims based on pre-existing conditions.<sup>57</sup> The EHB categories include maternity and newborn care, which means that maternity and newborn care is one area in which the ACA "rationalizes benefits across individual medical insurance plans."<sup>58</sup> However, it is up to the states to determine what benefits fall within each category.<sup>59</sup> There are 23 states that have added infertility to the maternal and newborn care EHB. But most of those states have crippling exclusions on the procedures that are covered.<sup>60</sup> Alabama has a blanket exclusion on ART. Connecticut has a lengthy list of exclusions including cryopreservation of eggs, embryos, or sperm; expenses of donors; reversal of sterilization; surrogacy; genetic analysis; and sexual dysfunction medications.<sup>61</sup> Fifteen states exclude IVF coverage, and three states enumerate a maximum for the number of IVF cycles that must be covered.<sup>62</sup>

Many scholars have suggested that the regulatory scheme of fertility treatments elicits a larger conversation about the right to have children.<sup>63</sup> Because of the significant income disparities in the United States, this conversation narrows into who can access the right to have children, if that right exists. Health insurance has the potential to equalize access to parenthood across racial and economic barriers. It cannot heal past harms, but it can correct the market in ways society has failed to.

### III. COVERAGE EXPANSION AS REPARATIONS

Despite Black women being overrepresented among the number of infertile women in the United States,<sup>64</sup> they are underrepresented in the number of women using infertility services.<sup>65</sup> To the extent this disparity is due to economic access, insurance coverage for infertility treatment can equalize positive outcomes across racial

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55. HEALTHCARE.GOV, *Health care coverage options for same-sex couples*, <https://www.healthcare.gov/married-same-sex-couples-and-the-marketplace/> (last visited Oct. 9, 2021).

56. See, e.g., MD. CODE ANN. INS. § 15-810.

57. Patricia Stapleton & Daniel Skinner, *The Affordable Care Act and Assisted Reproductive Technology Use*, 34 POL. & LIFE SCI. 71, 71 (2015).

58. *Id.* at 73.

59. *Id.*

60. *Id.*

61. *Id.* at 77.

62. *Id.* at 78.

63. *Id.* at 82; see also Sandra T. Jimenez, Note, "My Body, My Right": A Look into IVF Regulation through the Abortion Legal Framework, 33 WOMEN'S RTS. L. REP. 375, 386 (2012).

64. George & Kamath, *supra* note 25, at 123.

65. Nanette R. Elster, *ART for the Masses? Racial and Ethnic Inequality in Assisted Reproductive Technologies*, 9 DEPAUL J. HEALTH CARE L. 719, 724 (2005) [hereinafter *ART for the Masses*].

groups, and the justice in creating an avenue to equal outcomes is one of many arguments for reparations.

### A. *The Reparations Debate*

The debate on reparations for American slavery has been ongoing since the end of the Civil War, when formerly enslaved people demanded redress from the government. Yet, in the more than a century since then, the United States has failed to institute a policy to distribute reparations due to a lack of consensus on what reparations would look like.<sup>66</sup> One uncertainty arises around the question of sources: would funding come from the academic institutions that amassed wealth from the slave trade, the religious institutions whose halls were built by enslaved people, or the government that sustained its economy on slave labor? In 1989, Congressman John Conyers introduced a bill that would have established a commission to study the lingering effects of slavery and discrimination and then recommend an appropriate remedy. The bill suggested that, if that remedy was compensation, a recommendation on the amount, form, and eligibility requirements ought to be established.<sup>67</sup> Although the bill never made it out of the House Judiciary Committee, in 2016, then-President Barack Obama legitimized the logistical concerns of reparations critics by stating, it is “hard to find a model in which you can practically administer and sustain political support for those kinds of efforts.”<sup>68</sup> It is important to note that none of these concerns prevented the passage of Public Law Number 96-317, which commissioned a study into the wrongs committed against Japanese-Americans during World War II and resulted in reparations.

Reparations has been a topic widely discussed in legal academia for nearly three decades.<sup>69</sup> A Note published by the Virginia Law Review in 1993 discussed “contemporary and historical proposals for African-American reparations,” including a redistribution of land, education and healthcare funds, and direct compensation from Christian churches and Jewish synagogues.<sup>70</sup> The proposal for an education and healthcare fund reflected the understanding that racial justice requires a wide range of remedial justice. Indeed, insurance coverage is within that range.

The idea of insurance as reparations is not entirely new, but prior comments have denounced insurance mandates because of their similarities to reparations. Despite the Affordable Care Act making no mention of race, or the optional Medicaid

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66. Manisha Sinha, *The Long History of American Slavery*, WALL ST. J. (Sept. 20, 2019, 11:00 AM), <https://www.wsj.com/articles/the-long-history-of-american-slavery-reparations-11568991623>.

67. Commission to Study Reparation Proposals for African Americans Act H.R. 3745, 101st Cong. § 3 (b)(7)(D) (1989).

68. Ta-Nehisi Coates, ‘Better is Good’: Obama on Reparations, *Civil Rights, and the Art of the Possible*, ATLANTIC, Dec. 21, 2016, <https://www.theatlantic.com/politics/archive/2016/12/ta-nehisi-coates-obama-transcript-ii/511133/>.

69. See, e.g., Symposium, *Documenting the Costs of Slavery, Segregation, and Contemporary Racism: Why Reparation are in Order for African Americans*, 20 HARV. BLACKLETTER L.J. 49 (2004); Robert A Sedler, Comment, *Claims for Reparations for Racism Undermine the Struggle for Equality*, 3 J.L. SOC’Y 119 (2002); Rhonda V. Magee, Note, *The Master’s Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863 (1993).

70. Magee, *supra* note 69, at 879, 883, 886.



expansion limiting its benefit to poor Black people, it was still denounced as a form of reparations.<sup>71</sup> But perhaps expanding insurance coverage can be a middle ground to monetary reparations. And perhaps this model could include a six-month waiting period. As stated above, Massachusetts is already allowing diagnoses of infertility after six months to women over thirty-five. If insurance companies can fund fertility treatments for women over thirty-five after only six months, then Black people should be afforded that same opportunity since their biological age likely reaches thirty-five well before their chronological age due to the stress and trauma of American racism. Indeed, insurance companies themselves have played a significant role in American racism.<sup>72</sup>

In 2020, the National Association of Insurance Commissioners formed a special committee to combat racial discrimination in the industry and “address policies that disadvantage minorities.”<sup>73</sup> According to the Center for Economic Justice, the insurance industry’s use of “insurance credit scores, criminal history scores, facial analytics for life insurance underwriting, and occupation and educational levels” systematically discriminates against protected classes.<sup>74</sup> In the auto insurance industry, companies insist that they do not consider race, but then use socio-economic proxies for race that increase the rates of insurance for people of certain races.<sup>75</sup> Insurance “is a reflection of the society it aims to protect.”<sup>76</sup> While the racism in the insurance industry is certainly a reflection of American society, if the true goal of insurance is to protect the public through risk-spreading measures, then the industry could be doing a lot more to protect Black Americans against the physical manifestations of racism—it could expand coverage as a form of reparations.

A 2002 Comment published in the *Journal of Law in Society* took a pointedly critical view on reparations. Robert Sedler, a professor of law at Wayne State University, wrote that “[c]laims for reparations for slavery and past racism will endanger white support for equality for blacks in the United States.”<sup>77</sup> Sedler supports his point by arguing that there are two ways to secure white support: interest convergence<sup>78</sup> and appealing to their “sense of injustice.” Reparations, he claims, neither converge with white interests nor appeal to a “sense of injustice,” and thus are impractical in

71. Coates, *supra* note 68.

72. Bobbi M. Bittker, *Racial and Ethnic Disparities in Employer-Sponsored Health Coverage*, 45 HUM. RTS. MAG. (Sept. 8, 2020), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/health-matters-in-elections/racial-and-ethnic-disparities-in-employer-sponsored-health-coverage/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/health-matters-in-elections/racial-and-ethnic-disparities-in-employer-sponsored-health-coverage/) (“White supremacy influenced an evolving, private, job-based, health care infrastructure that deliberately excluded the Black population, preventing it from sharing in its societal benefits. Our health care history is another disgraceful chapter where race often determines treatment and outcomes.”).

73. Jason Metz, *Insurance Regulators Pledge to Address Racism and Discrimination Within the Industry*, FORBES, July 23, 2020, <https://www.forbes.com/sites/advisor/2020/07/23/insurance-regulators-pledge-to-address-racism-and-discrimination-within-the-industry/?sh=7f5d763d2f2c>.

74. *Id.*

75. *Id.*

76. *Id.*

77. Sedler, *supra* note 69, at 120.

78. Interest convergence, one of Derrick Bell’s theories, is the idea that racial justice will only be possible if it is aligned with the best interests of white people. Derrick Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

Sedler's view. Sedler overlooks how reparations appeal to a sense of injustice because he is largely viewing them as reparations for slavery, for which there are no living participants. The argument for reparations, however, is not only about the 246 years of slavery, but also the 60 years of Jim Crow segregation and the racism and racialized brutality that persist today. All Black Americans are victims of this legacy and its contemporary manifestations. The biological weathering and reduced reproductive capacity of Black people, discussed in Part I, is just one manifestation of how the harms of racism have endured the test of time.

Ta-Nehisi Coates extensively chronicled the harms beyond slavery in *The Case for Reparations*, a well-known piece published in *The Atlantic*. The story recounts the systemic racial injustice that survived slavery and secured lasting poverty for Black Americans, including exclusion from the home-mortgage market and redlining. He also dispels impracticality as the argument against reparations and draws on "something more existential." "If we conclude that the conditions in . . . black America are not inexplicable but are instead precisely what you'd expect of a community that for centuries has lived in America's crosshairs, then what are we to make of the world's oldest democracy?"<sup>79</sup> As Coates points out, the opposition to reparations must go deeper than impracticality since Congressman Conyers and others have been offering practical solutions since at least 1989. It is more likely that this opposition stems from a lack of interest in racial justice.

### *B. Procreation & the Expansion of Coverage for Fertility Treatments*

Sedler did advance one useful argument in his piece: the utility of appealing to a sense of injustice. Reproduction, the opportunity to bear children, may be one cause uniquely positioned to appeal to addressing a sense of injustice. As expressed through numerous United States Supreme Court opinions, procreation is "fundamental to the very existence and survival of the race" and is "one of the basic civil rights of man."<sup>80</sup> The Court read the right to bear children into the fundamental liberties protected by the United States Constitution. Neither economic, utility, or cultural theories can explain why Americans still want children—they just do.<sup>81</sup> Research shows that "children are not seen as consumer durables; they are seen as the threads from which the tapestry of life is woven."<sup>82</sup> This shows how significant the right to bear children is in the American context.

Like most constitutional rights, however, the fundamental right to procreate is not a positive right. The United States Court of Appeals for the Eighth Circuit has expressly rejected the extension of *Skinner's* holding to IVF. The court reasoned that "the costs of the IVF-related procedures at issue were not paid for the purpose of affecting the taxpayer's own reproductive function—and therefore are not deductible—and

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79. Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC, June 2014, <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

80. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

81. Robert Schoen et al., *Why Do Americans Want Children?*, 23 POPULATION & DEV. REV. 333, 333–34 (1997).

82. *Id.* at 350.

that the IRS did not violate the Constitution in disallowing the deduction.”<sup>83</sup> The Seventh Circuit, on the other hand, has affirmed a case that found “[i]t takes no great leap of logic to see that within the cluster of constitutionally protected choices that includes the right to have access to contraceptives, there must be included within that cluster the right to submit to a medical procedure that may bring about, rather than prevent, pregnancy . . . .”<sup>84</sup> Of course, *Skinner* was decided two years before the first successful IVF of a human egg and decades before the first birth resulting from IVF; the Court was not considering the possibility of encompassing ARTs. But while there may not be a winning constitutional argument, the Supreme Court’s jurisprudence still emphasizes how deeply the United States values parenthood.

The effect that weathering has on the bodies of Black people ages them into infertility and possibly deprives them of one of our society’s most valued life experiences.<sup>85</sup> If expanding insurance coverage could help remedy this injustice, then states should mandate that companies do so. Perhaps this proposal also provides an argument for universal public health insurance. Perhaps it is not appropriate to mandate private actors to make racial distinctions, even for the goal of a more equitable society. Possibly all a private market could withstand is something like an ASRM recommendation that encourages physicians to diagnose and treat infertility with an eye toward weathering. But if that measure would be insufficient to address diminished reproductive capacities caused by weathering, then a single-payer system that would support racial distinctions required by reparative insurance coverage is a necessary part of the solution.

Racial distinctions are subject to strict scrutiny upon challenge to their constitutionality. It could be argued that the statute proposed below would not meet constitutional muster, but there are formidable arguments for why it does. Mandating a looser standard only for infertility diagnoses and treatments seems to be as narrow as it gets in addressing the government’s compelling interest in promoting the right to procreate. Perhaps there is even an argument that these mandates would not be subject to strict scrutiny because they are addressing a physiological difference racism has inflicted on Black Americans. In determining that gender begged a standard more lenient than strict scrutiny, the Supreme Court once cited the enduring physical differences between the male and female sex.<sup>86</sup> With this in mind, one could convincingly argue that weathering creates a reason for this race-based distinction to be subjected to a lesser scrutiny in this context.

This expansion would require different efforts from different states. For example, states without coverage mandates for fertility treatments would need to adopt legislation doing so. States with coverage mandates that exclude IVF would need to

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83. *Morrissey v. United States*, 871 F.3d 1260, 1268–70 (2017).

84. *Lifchez v. Hartigan*, 735 F. Supp. 1361, 1377 (N.D. Ill. 1990), *aff’d*, *Scholberg v. Lifchez*, 914 F.2d 260 (7th Cir. 1990).

85. I must provide a caveat here: the way society pathologizes motherhood is a separate cause for concern. However, if motherhood is going to be given this significance, then Black people who want to benefit, should be able to benefit.

86. *See, e.g., United States v. Virginia*, 518 U.S. 515, 533 (1996).

eliminate that exception. Massachusetts has the least to do as its mandate already creates a shorter, six-month period for women over 35.<sup>87</sup> Modeled after Massachusetts's coverage statute and Maryland's protection of same-sex couples, the expansion would be as follows:

Any subscription certificate under an individual or group medical service agreement, except certificates which provide supplemental coverage to Medicare or other governmental programs, which is delivered, issued for delivery or renewed in the commonwealth while this section is effective shall provide as a benefit for all individual subscribers or members within the commonwealth and all group members having a principal place of employment within the commonwealth, to the same extent that benefits are provided for other pregnancy-related procedures and subject to the other terms and conditions of the subscription certificate, coverage for medically necessary expenses of diagnosis and treatment of infertility. Said infertility benefits shall meet all other terms and conditions of the subscription certificate. *For purposes of this section, 'infertility' shall mean the condition of an individual who is unable to conceive or produce conception during a period of 1 year if the person is age 35 or younger or during a period of 6 months if the person is over the age of 35 or is a Black American.* For purposes of meeting the criteria for infertility in this section, if a person conceives but is unable to carry that pregnancy to live birth, the period of time they attempted to conceive prior to achieving that pregnancy shall be included in the calculation of the 1 year or 6 month period, as applicable. An entity subject to this section may not require as a condition of coverage, for a patient who is in a relationship to an individual of the same sex, that the patient's partner's sperm be used in the covered treatments or procedures or that the patient demonstrate infertility exclusively by means of a history of unsuccessful heterosexual intercourse.

This proposed statute is necessary because Black people and couples experience infertility at greater rates than their white counterparts.<sup>88</sup> If the brutality and pervasiveness of white supremacy has contributed to that, then the least states can do is level the playing field by mandating coverage for all necessary fertility treatments, including IVF. It is appropriate that there is a rush on an infertility diagnosis for people over 35 as that is typically the age the decline in fertility begins to rapidly increase—there is little time to spare.<sup>89</sup> But this is likely also true for Black people under the age of 35 because of their increased chronological age caused by the stress of racism.

#### CONCLUSION

Adopting this proposed legislation would be a small step states could take to remedy the reproductive consequences of American racism. If the goal of this Note were not to garner support for the expansion, it would be recommending a grandiose reconstruction of the eligibility requirements for infertility treatments. Some of the

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87. MASS. GEN. LAWS ANN. ch. 176B § 4J (West 2010).

88. Elster, *supra* note 65 at 724 (noting that 10.5% of Black women are infertile compared to 6.4% of white women).

89. *Having a Baby After Age 35*, *supra* note 48.

current requirements for coverage are grounded in economics much more than they are in science. Fertility is widely defined within the terms of one year, and six months for women over 35. In that case, how does Maryland justify its two-year period? How do Texas and Hawaii justify their five-year periods?

The current definition of infertility is also heteronormative—focusing the definition on procreative sexual intercourse and attaching a same-sex modification at the end of the definition centers opposite-sex couples. This heteronormativity is a constant in the cis-heteropatriarchal society of the United States. Language is important and a close attention to language is necessary in the battle for inclusive reproductive justice.

Additionally, Free Exercise Clause permitting, coverage statutes would not allow for religious exemptions to providing ART services—especially because of the role religion has played in perpetuating the racism that is aging the bodies of Black people. To protect that restriction from constitutional challenge, this Note would also call for *Burwell v. Hobby Lobby* to be overturned. In *Burwell*, Justice Alito speaking for the majority, stated that federal courts should not address the reasonableness of religious beliefs,<sup>90</sup> a position that is sure to introduce havoc on reproductive justice.<sup>91</sup> That statement has grievous implications both in the context of infertility coverage and in society at large. The absurd result of the Court's declaration could be that any sincere belief masked as religion, no matter how unreasonable, is prioritized over fundamental constitutional rights. While the Court limited its holding to contraceptive mandates, it is not difficult to see how opponents of ART would use *Burwell* to diminish coverage mandates for infertility diagnoses and treatments. As the dissent stated, employers “can opt out of any law . . . they judge incompatible” with their religious beliefs.<sup>92</sup>

Finally, a sweeping policy would not only address reproductive capacity after it has already been diminished to the point of infertility. There are ways to expand reproductive options earlier—Black women in their early twenties should also have access to technologies that extend fertility. One way to do so is through oocyte cryopreservation—a procedure where eggs are harvested, frozen unfertilized, and stored for future use.<sup>93</sup> The ASRM recently updated its committee opinion addressing egg freezing to acknowledge that “planned oocyte cryopreservation”—egg freezing—is a preventative approach to fertility decline.<sup>94</sup> The change could represent a shift from viewing cryopreservation as elective to viewing it as necessary to combat an impending decline in fertility—and in this context, to combat diminished reproductive capacity caused by weathering.

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90. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014).

91. See *id.* at 740 (Ginsberg, J., dissenting) (“Persuaded that Congress enacted RFRA to serve a far less radical purpose, and mindful of the havoc the Court’s judgment can introduce, I dissent.”).

92. *Id.* at 739–40 (Ginsberg, J., dissenting).

93. MAYO CLINIC, *Egg Freezing* (Feb. 1, 2019), <https://www.mayoclinic.org/tests-procedures/egg-freezing/about/pac-20384556>.

94. Ethics Committee of the American Society for Reproductive Medicine, *Planned Oocyte Cryopreservation for Women Seeking to Preserve Future Reproductive Potential: An Ethics Committee Opinion*, 110 FERTILITY & STERILITY 1022 (2018).

This Note calls only for Black people aged by American racism to be covered for fertility diagnoses and treatments, including IVF, after six months of unsuccessfully trying to conceive. There have been calls to mandate infertility insurance for at least the last two decades.<sup>95</sup> But with the continuing research on the biological effect of weathering on Black people, racial and reproductive justice urges states to mandate infertility treatment insurance coverage to repair the reproductive freedom diminished by white supremacy. While there are many legal and market complexities that complicate this proposal, it should start a conversation on affording Black Americans the same right to procreate as all other Americans.

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95. See, e.g., Elster, *supra* note 65, at 731.