

Article

Rethinking the Procreative Right

Carter J. Dillard[†]

Few principles are as universally accepted in legal scholarship today, but based on such scant support, as the fundamental nature and broad scope of the right to procreate. What is perceived as a vague but nonetheless justified legal and moral interest to procreate freely without regard to others is, upon closer examination, based on little more than misconstrued or inapposite case precedent and blurry statements in non-binding sources of international law. By relying on this authority, conflating procreation with conceptually distinguishable behaviors, presuming its intrinsic value, and ignoring competing rights and duties, lawyers have largely overlooked procreation and its legal and normative limits. Interpreting U.S. constitutional and international law sources, and finally employing Locke's model of natural rights, this Article redefines the right in law and practice as satiable and narrow, acknowledging the competing rights and duties that both qualify and justify the right. It posits that the procreative right, properly stated, includes at least the act of replacing oneself and at most procreation up to a point that optimizes the public good.

[†] Sincere thanks to Karyn Brudnicki, Katherine Desormeau, Tina Miranda, and Michael Tan for their assistance. All of the positions taken in this article are my own.

TABLE OF CONTENTS

I. INTRODUCTION	3
A. A Different Approach.....	3
B. Redefining What Is at Stake in the Procreative Right.....	7
II. THE PROCREATIVE RIGHT IN CONTEXT	10
A. U.S. Constitutional Law	11
1. <i>Skinner</i> deconstructed.....	13
2. Modern substantive due process.....	15
3. Tradition	20
4. Prisoners, probationers, and asylees	22
B. International Law.....	27
1. Binding sources of international law	28
2. Non-binding declarations and agreements.....	31
3. Customary international law	35
C. Locke and Procreation.....	37
1. Locke's limited right of procreation.....	38
2. Population and political society	39
3. Parents' duties to their children.....	40
4. Locke's residual state of nature	42
III. THE PROCREATIVE RIGHT RE-EXAMINED.....	44
A. Properly Stating the Legal Right.....	44
B. The Right and Its Reasons	45
1. The intrinsic value of procreating	46
2. Relational concerns.....	49
IV. CONCLUSION.....	63

I. INTRODUCTION

A. A Different Approach

Is procreation in all circumstances just? Common wisdom tells us that both positive law and the morality beneath it ensure our right to procreate freely—in other words, to procreate without restriction—and hence that procreation in all circumstances *is* just. We assume a moral and legal interest to procreate freely, without being subject to law and without regard for others.¹ Scholars debate its outer edges: what duty of assistance the state owes its prisoners, whether financial incentives to undergo sterilization are inherently coercive, or whether one has the right to clone oneself. But with few exceptions, we persist in our conviction that there exists a personal and private right to create others.

Where society's interest in procreation has been forced from abstract legal thought into policy by the effects of population growth, the debate among Western lawyers has declined to focus squarely on the morality and legality of procreation at will. Lawyers made a "late entry into the population field";² the issues surrounding population growth had already been framed by the natural and social sciences, and had become controlled by narrow Malthusian and anti-Malthusian perspectives in a debate over the Earth's resources.³ This Malthusian debate and its myopic focus on the

1. See, e.g., JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 24 (1994) ("[P]rocreative liberty should enjoy presumptive primacy when conflicts about its exercise arise because control over whether one reproduces or not is central to personal identity, to dignity, and to the meaning of one's life."); Paula Abrams, *Population Control and Sustainability: It's the Same Old Song but with a Different Meaning* 27 ENVTL. L. 1111, 1113 (1997) ("Reproductive decisions are among the most personal and primary choices made by an individual."); Albert P. Blaustein, *Arguendo: The Legal Challenge of Population Control*, 3 L. & SOC'Y. REV. 107, 109 (1968) ("A law directly limiting the number of children which a family can have would be repugnant to American ideals."); Reed Boland, *The Environment, Population, and Women's Human Rights*, 27 ENVTL. L. 1137, 1157 (1997) (Government population policies "represent the intrusion of government into the very core of individual's [sic] lives."); Johnson C. Montgomery, *The Population Explosion and United States Law*, 22 HASTINGS L.J. 629, 629 (1971) ("That there is a 'right' to found a family and have children cannot be seriously questioned."); Amartya Sen, *Fertility and Coercion*, 63 U. CHI. L. REV. 1035, 1041 (1996) (There is a "personal right to decide freely how many children to have."); Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669, 678 (1985) ("The Supreme Court has clearly guaranteed, at least for married persons, the fundamental right to procreate."). But see Laura Shanner, *The Right to Procreate: When Rights Claims Have Gone Wrong*, 40 MCGILL L.J. 823, 827 (1995) ("[T]he claim of a 'right' to procreate, while echoing important rights claims and striking an emotionally resonant chord, is nevertheless an invalid claim."). However, even Shanner cannot resist later implying at least a firm negative right for some. *Id.* at 873 ("[F]ertile people are not asking for assistance, and it would be extremely intrusive to restrict their procreative options.").

2. Luke T. Lee, *Legal Implications of the World Population Plan of Action*, 9 J. INT'L L. & ECON. 375, 380 (1974); Montgomery, *supra* note 1, at 634 ("The legal profession has largely ignored the problems posed by the population explosion."). See also Luke T. Lee, *Law, Human Rights, and Population Policy*, in POPULATION POLICY: CONTEMPORARY ISSUES 1, 10-11 (Godfrey Roberts ed., 1990).

3. See generally Charles C. Mann, *How Many Is Too Many?*, THE ATLANTIC MONTHLY, Feb.

physical limits of human population, revived in part with publication of Paul Ehrlich's "The Population Bomb" in 1968,⁴ has influenced and limited the way many legal scholars approach the issue of procreation.

Malthus himself assumed that the law had little if anything to say about procreation. He argued that natural law ensures a broad and inviolable procreative right, as "[p]rudence cannot be enforced by laws without a great violation of natural liberty."⁵ Malthus removed direct regulation from the population debate, turning to Locke's theory of property to indirectly check population growth by removing public support for the poor and creating disincentives to procreate.⁶ Thus, the focus moved to laws that obliquely influence the voluntary exercise of the procreative right or ameliorate its effects in order to avoid some apocalyptic future scenario — leaving the right itself unquestioned.⁷

Amartya Sen offers a contemporary example of the indirect approach. Sen challenges advocates of coercive family planning programs, arguing that they recognize the utilitarian value of "the personal right to decide freely how many children to have" and only insist on coercion because they believe (wrongly) that without state intervention the consequences would be disastrous for the welfare of society.⁸ Sen challenges this thinking by examining the social and economic factors that indirectly influence fertility rates, as well as the consequences of population growth,⁹ asking, "How critical is the situation already? Do we have time to spare?"¹⁰ Sen implies that the "private" behavior of procreation can have disastrous results for others, but inexplicably Sen gives it priority over other rights,

1993, at 47.

4. PAUL R. EHRlich, *THE POPULATION BOMB* (1968).

5. Thomas Malthus, *A Summary View of the Principle of Population*, in *THREE ESSAYS ON POPULATION* 40 (Mentor Books, 1960).

6. *Id.* at 55 ("The existence of a tendency in mankind to increase . . . must at once determine the question as to the natural right of the poor to full support in a state of society where the law of property is recognized."). But see Robert M. Hardaway, *Environmental Malthusianism: Integrating Population and Environmental Policy*, 27 *ENVTL. L.* 1209, 1216-17 (1997) ("Or is civilized human society capable of devising more humane checks which can be imposed consistent with human dignity and compassion?"). Condorcet, a precursor to Malthus, believed there would be a voluntary reduction in fertility rates based on the spread of reason, with people choosing to limit procreation "rather than foolishly choose to encumber the world with useless and wretched beings." Sen, *supra* note 1, at 1045 (citing MARIE JEAN ANTOINE NICOLAS DE CONDORCET, *SKETCH FOR A HISTORICAL PICTURE OF THE PROGRESS OF THE HUMAN MIND* 189 (June Barraclough trans., Weidenfield & Nicolson 1955)).

7. See, e.g., Blaustein, *supra* note 1 (suggesting changes in education, tax, and contraceptive laws to influence Americans to marry older and plan for births, and arguing that "[t]he lawyer's job today is to find the best laws to encourage population limitation"); Note, *Legal Analysis and Population Control: The Problem of Coercion*, 84 *HARV. L. REV.* 1856, 1871 (1971) [hereinafter Note, *The Problem of Coercion*] (discussing the competing "voluntarist" and "regulationist" views of population control). See generally Diana Babor, *Population Growth and Reproductive Rights in International Human Rights Law*, 14 *CONN. J. INT'L L.* 83 (1999).

8. Sen, *supra* note 1, at 1041. Sen's model is a compromise of utilitarian goal-based and libertarian rights-based analyses; rights may themselves be goals with intrinsic utilitarian value and be limited based on the consequences of having exercised them. *Id.* at 1039-40.

9. *Id.* at 1041-42.

10. *Id.* at 1049-50.

such that persons must actually suffer before it can be limited.¹¹ Throughout, Sen implies that the negative ramifications of population growth are only some potential future event.¹²

Legal commentators have joined in this debate and taken up its terms, basing their analyses of the legality of population programs not on moral theory or political philosophy, but on disputed scientific, sociological, and economic theories regarding the number of humans the Earth can sustain.¹³ Much of the legal scholarship that followed Ehrlich's book exemplified this approach; as one commentator put it, "[t]hat there is a 'right' to found a family and have children cannot be seriously questioned."¹⁴ Rather than question the right, or attempt to define its inherent scope, so-called "regulationists" focused instead on derogations from it based on emerging evidence of an impending disaster.¹⁵

This approach continues,¹⁶ despite a current population beyond that which many earlier legal scholars had anticipated,¹⁷ the advent of reproductive technologies giving humans the opportunity to procreate more easily,¹⁸ and new patterns of consumption that amplify the effects of

11. *Id.* at 1051 ("Given the intrinsic importance of rights, including reproductive freedom, the problems would have to be very severe (and rather unmanageable otherwise) in order to justify coercive intervention in private life and in reproductive decisions. None of the carefully presented scenarios indicates that things are disastrous right now.").

12. *See, e.g., Id.* at 1035. Sen also criticizes Paul Ehrlich's predictions. *Id.* at 1043.

13. *See, e.g.,* JAQUELINE KASUN, *THE WAR AGAINST POPULATION* 29 (1988) (questioning "whether government has the right or duty to preside over the reproductive process . . . for what reasons, to what extent?," which she attempts to answer with anti-malthusian, free-market economic arguments regarding population and resources); Henry B. Van Loon, *Population, Space, and Human Culture*, 25 L. & CONTEMP. PROBS. 397, 405 (1960) ("The scientist and the lawyer must work together . . . the scientist to give us facts, the lawyer to help us make them useful."); Rod N. Andreason, Comment, *The International Convention on Population Development: The Fallacies and Hazards of Population 'Control'*, 1999 BYU L. REV. 769, 771 (2000) (suggesting the world population could, and perhaps should, be allowed to reach forty billion people); Diane L. Silfer, Comment, *Growing Environmental Concerns: Is Population Control the Answer?*, 11 VILL. ENVTL. L.J. 111, 158 (2000) ("[i]f we are being realistic, the Earth will most likely not run out of resources during the life of any adult or child living today.").

14. Montgomery, *supra* note 1, at 629-37, 645-47 (proposing legislation legalizing and subsidizing abortions, based on concerns regarding the carrying capacity of the Earth).

15. *See, e.g.,* Bettye S. Elkins, *Constitutional Problems of Population Control*, 4 U. MICH. J.L. REFORM 63, 77 (1970) (discussing the state's compelling interest in "national survival"); Note, *supra* note 7, at 1870-75, 1882 (discussing a compelling state interest in avoiding demographic ills).

16. *See, e.g.,* Symposium, *Population Law, From Malthus to the Millennium*, 27 ENVTL. L. 1091 (1997). The symposium, though organized with the express goal of seeking solutions to overpopulation, focused on subjects other than the direct regulation of procreation and concluded that the resolution lies in changing "the socioeconomic factors motivating high fertility and consumption." *Id.* at 1095. As one participant put it, "If there were indisputable evidence that specific disasters would occur . . . strong measures might be warranted. But there is no such evidence." Boland, *supra* note 1, at 1161. *See also* Mona L. Hymel, *The Population Crisis: The Stork, the Plow, and the IRS*, 77 N.C. L. REV. 15, 15-18 (1998) (arguing for a revision of the U.S. tax system's incentives to procreate, in order to avoid catastrophic environmental results).

17. *See, e.g.,* Homer H. Clark, Jr., *Law as an Instrument of Population Control*, 40 U. COLO. L. REV. 179, 185 (1968) ("Do we resign ourselves to a potential population of 300,000,000 in thirty years, or do we try to control our growth?").

18. *See generally* ROBERTSON, *supra* note 1; John A. Robertson, *Procreative Liberty in the Era of*

a growing world population.¹⁹ Must we still assume that Malthus was correct about the “natural liberty” to procreate? Doing so has led to the outmoded and ineffective voluntarist and regulationist approaches. The former denies any legitimate state interest in individual acts of procreation. The latter assumes too that procreation is a basic right, but it allows for derogation as necessary to avoid impending disaster and ensure mere collective survival.

The better approach is to determine what the procreative right consists of in the first place. Rather than rushing to find a compelling state interest to justify derogating from the right, getting mired in the science and economics of sustainability, or relying exclusively on moral obligations owed to politically impotent future generations,²⁰ this Article questions the scope of the *pre-derogation* right itself, and it views competing rights “not as necessary derogations but rather as inherent limitations on the scope.”²¹ It posits that population law must start from a rigorous determination of the exact scope of the legal procreative right, as well as the moral procreative right, based on 1) its intrinsic value and 2) its relation to other rights,²² rather than pursue the development of legal policies based on unfounded presumptions about that right. We should at least begin to question the notion of a limitless procreative right now that China, the largest polity in the world with a unique perspective on the effects of procreation, expressly rejects it.²³

While this approach is similar to that of Luke T. Lee, who presumes that the procreative right must be limited by competing rights and correlative duties,²⁴ this Article goes beyond Lee, examining in detail the legal and normative justifications for the right and the intrinsic value of the underlying behavior. It seeks to dispel the illusion of procreation as a private act, and to recognize competing state interests as a mere reflection of the rights of others²⁵—whose interests we discount when we assume the right to procreate is unlimited. No right, procreation included, is limitless if

Genomics, 29 AM. J.L. & MED. 439 (2003).

19. See Paul R. Ehrlich & Anne H. Ehrlich, *The Population Explosion: Why We Should Care and What We Should Do About It*, 27 ENVTL. L. 1187, 1188 (1997) (arguing that environmental impact (I) of a given society is determined by the number of people (P), multiplied by the per capita affluence or consumption (A), multiplied by an index of the environmental damage caused by the technologies employed to service the consumption (T); the I=PAT equation.).

20. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 284-93 (1971) (recognizing moral obligations to future generations).

21. Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. INT'L L. 311, 344 (2001) (discussing the Supreme Court of India in *Ahamed Nassar v. State of Tamil Nadu*, 1999 S.O.L. Case No. 631, P32).

22. While this discussion approaches the issue from a rights-based perspective, the same questions apply for utilitarians. Will the action or forbearance in question add to or subtract from the good?

23. See *infra* note 171 and accompanying text.

24. See, e.g., Luke T. Lee, *Population: The Human Rights Approach*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 327, 339 (1995) (using public safety limits on free speech as a model, with the familiar example of not being able to yell “fire” in a crowded theater).

25. See Joseph Raz, *Rights and Politics*, 71 IND. L. J. 27, 35 (1995) (“The public interest is, and is generally taken to be, a function of individual interests. So is the common good or the common interest.”).

it is capable of conflicting with other valid and perhaps hierarchically superior rights.²⁶ Population law's failure to address this conflict by properly defining the right, to be remedial rather than prophylactic, ignores the fact that merely ensuring the survival of the citizenry falls well below what is required of government, the legitimacy of which is contingent on its ability to balance competing rights. Thus, this Article seeks to define the procreative right and posits that the question is not how many people can live on Earth, but how many people should live on Earth, not whether unfettered procreation is sustainable, but whether it is just.²⁷

B. Redefining What Is at Stake in the Procreative Right

Common formulations of the procreative right are remarkably imprecise in specifying what behavior, exactly, the right is protecting. While most formulations contemplate unfettered procreative freedom, the various ways they phrase the content of the right entail a range of diverse legal consequences.²⁸ The often-cited "right to found a family and have children"²⁹ entails various privileges, immunities, and disabilities. It is a general claim-right, placing a duty on others not to interfere with acts of procreation (a negative right), and a power in the privileged procreator to create and change the legal relations of the prospective child or children.³⁰ The related "entitlement to family planning services"³¹ involves an additional claim-right (a positive right) on the government to provide assistance to both procreate and avoid procreation. In *Griswold v. Connecticut*, Justice Goldberg viewed the act of procreating as inseparable from other behavior such as "the right . . . to marry, establish a home and bring up children,"³² thus positing a right specifically held by married couples, entailing an even broader series of claim-rights, immunities, and powers based on constitutional guarantees to privacy. More recently, commentators have tended to lump procreation in with the broad concept of reproductive rights, which includes a series of negative and positive

26. See, e.g., JOEL FEINBERG, *SOCIAL PHILOSOPHY* 86 (1973).

27. While this Article focuses on procreation and attempts to define its legal and moral limits, lurking behind this question is a universe of questions about the legality and morality of implementing such limits. This Article does not address the morality of particular methods of state regulation. The issue of whether China's "one child policy" as applied is justified or has been effective, see Abrams, *supra* note 1, at 1129, differs from whether having any family-size limit violates its citizens' procreative rights (or whether failure to enact such a policy would violate other rights its citizens should or do have). Logically, one must first define the procreative right (a controversial enough undertaking) before determining how it is to be applied.

28. Regarding the constituent elements of legal rights generally, see Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913), reprinted in *FUNDAMENTAL LEGAL CONCEPTIONS* 65 (1923).

29. Montgomery, *supra* note 1, at 629.

30. See *infra* Part III.B.2.

31. Paula Abrams, *Population Politics: Reproductive Rights and U.S. Asylum Policy*, 14 *GEO. IMMIGR. L.J.* 881, 890 (2000).

32. 381 U.S. 479, 488, 495 (1965) (Goldberg, J., concurring) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

rights ensuring unfettered choice to conceive or not conceive, and to bear or not to bear children.³³

However, it is a mistake to analyze rights by clumping together conceptually distinct acts under one rubric and seeking out authority for the existence of that rubric.³⁴ As discussed in Part II.A.2, scholars argue that all “reproductive rights” are protected by modern substantive due process case law, but in fact, that authority concerns the right *not* to procreate, not the right to procreate, and these are two very different rights. Proponents of a broad procreative right simply muddle these distinct acts to take advantage of such authority. Rather, one must first determine the conceptually distinct behavior or state of being which is of concern, and then seek out authority for its protection.³⁵ “There is no compelling logic in lumping together all activities closely related to reproduction under an umbrella-like fundamental right.”³⁶

While procreators must cooperate with others, the act of procreating can be divided into individual voluntary acts that can themselves be the subject of regulation.³⁷ Furthermore, the act of procreating, or creating others, is distinct from forbearing procreation by, for example, using contraception or terminating one’s pregnancy. Governments can and do place restrictions on the act of conceiving children, without any restrictions on the choice not to conceive them (often with the state simultaneously providing family planning services).³⁸ Because the behaviors of procreating, not procreating, and even birthing are conceptually and legally distinguishable, they give rise to different rights and duties. Laws prohibiting contraception or abortion impinge on the general reproductive freedoms or “non-reproduction rights” described above, but not the right

33. See, e.g., *Davis v. Davis*, 842 S.W.2d 588, 601 (Tenn. 1992) (“[T]he right of procreational autonomy is composed of two rights of equal significance—the right to procreate and the right to avoid procreation.”); Lauren Gilbert, Ann Shalleck & Claudio Grossman, *Preface to the Conference on the International Protection of Reproductive Rights*, 44 AM. U. L. REV. 963 (1995) (discussing the “concept of reproductive rights, which includes the right to attain the highest standard of sexual and reproductive health, as well as the right to make decisions concerning reproduction free of discrimination, coercion, and violence”); Kimberly A. Johns, *Reproductive Rights of Women: Construction and Reality in International and United States Law*, 5 CARDOZO WOMEN’S L.J. 1, 3-4 (1998) (describing reproductive rights as broadly encompassing rights to sexual and reproductive health, and rights to freedom from sexual discrimination).

34. See, e.g., Robertson, *supra* note 18, at 447-50 (admitting that procreative liberty has two “independently justified aspects” but conjoining those aspects and other distinct interests throughout the analysis).

35. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 595-96 (2003) (Scalia, J., dissenting) (framing the issue at hand as sodomy, and not specifically homosexual conduct); John Hill, *What Does It Mean To Be a “Parent?” The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 368 (1991) (noting that “[t]he right to procreate very simply is the right to have natural children The custody, care, companionship, and nurturing that follow birth are not parts of the right to procreation,” and citing *In re Baby M*, 537 A.2d 1227, 1253 (1988)).

36. Note, *The Problem of Coercion*, *supra* note 7, at 1882. See also Shaner, *supra* note 1, at 826.

37. Graciela Gomez, *China’s Eugenics Law as a Grounds For Granting Asylum*, 5 PAC. RIM L. & POL’Y J. 563, 567-68 (1996) (explaining in detail the enforcement methods, including individual criminal liability, associated with China’s family planning laws).

38. *Id.*

to procreate *per se*.³⁹

To better focus on the conceptually distinguishable and salient behavior, this Article views procreation in isolation, an act requiring its own justification and protection. As discussed herein, an act of procreation refers to any voluntary⁴⁰ act taken by an individual that is either one of the two most proximate causes of the conception of a future person or persons, with such person or persons eventually being born.⁴¹ For example, one does not procreate at the moment one decides to conceive, at the moment one engages in sexual intercourse or artificial insemination with the purpose of conceiving, or even upon conceiving, but rather upon the birth of the relevant child or children. Individual persons engaging in sexual intercourse that results in the birth of a child, regardless of intent, will have procreated. A couple that enters into a surrogacy contract and bears no biological relationship to the resulting child, but whose acts might be considered the proximate cause of its conception and birth, has arguably procreated.⁴² The relevant consideration is whether a person or persons have voluntarily acted to cause the creation of another being, and those actions have resulted in the birth of a child.

Choosing to focus on this conceptually distinguishable behavior does not mean that the authority that supports or refutes its protection does not also support the protection of some other behavior or state. The authority discussed below may imply affirmative duties on the part of the state to help its citizens procreate or not procreate, or may support the protection of some other interest. This Article, however, is exclusively concerned with the "negative" general claim-right of noninterference that would-be procreators (as that act is defined above) hold against the state and other persons. As such, it is also not concerned with the right to support a family, the right to parent, or the right to raise a child over time. Arguably, it might seem more natural to think of the relevant freedom not as "the right to procreate" but as "the freedom to have and raise a healthy, happy child," the former only valued because of the latter. However, these concepts are distinct. One need not procreate to have and raise children, nor does procreation ensure that one will do so. Moreover, each set of behaviors

39. Linguistically, it is important to distinguish procreation from reproduction. Procreation is the act of *creating* an entity distinct from the procreator, rather than its replica.

40. Admittedly, this Article does not address non-voluntary procreation resulting from rape, state-induced pregnancies, and other non-voluntary acts. If any of the persons contributing a necessary physical element to the conception and birth of a new person or persons are compelled to do so, they are presumed not to have exercised their procreative right.

41. Of course, even this attempt at a narrow definition raises questions. For example, does a physician who oversees an in-vitro fertilization procedure engage in procreation? Do donors and surrogates both engage in procreation? See Hill, *supra* note 35, at 354-56. See also In re Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998) (holding that a couple that entered into a surrogacy contract were lawful parents of the child, by virtue of consent, although neither bore any biological relationship to the child).

42. However, a couple that chooses embryonic implantation (rather than adoption from surrogate parents) has arguably intervened to eliminate the causal responsibility any egg or sperm donor might have had; that couple, and not the donor, would be the proximate cause of birth.

entails very different consequences for others.

Why does it matter how we conceive of the right to procreate? Why undertake this analysis at all? Aside from furthering theoretical clarity on this point, this Article's approach has practical ramifications because law provides more than a justification for compulsion. In what is perceived as our personal lives, law (and how it defines rights) becomes a forceful normative guide, an effective reflection of societal consensus, whether or not there is ever an attempt to enforce it. With regard to population law, "the educative and deterrent functions of the law" can outweigh its punitive role,⁴³ providing a concrete social norm, guidance and reasons to procreate or not to procreate.⁴⁴ So too can the absence of law and accurate definitions—suggesting that the behavior in question is not susceptible to any constraints, that society has no interest or right to define and regulate it because it is irrelevant, nonconsequential. Indeed, law may be most effective in "making statements"⁴⁵ where behavior is perceived as personal and logistically difficult to regulate—like procreation.

Part II of this Article will discuss the right to engage in procreation as it has developed in U.S. constitutional law, including the modern substantive due process cases and cases involving the rights of convicts and asylees. It then examines the right as it obtains in international law. Finally, it reviews a natural or moral legal basis for a broad procreative right, using John Locke's theory of natural rights as a model. Part II identifies a common thread in how these authorities formulate and apply the right—what I term the replacement thesis—treating procreation as a special interest qualified and in some cases justified by societal interests, narrowed by the interests of prospective children, and capable of being fulfilled and exhausted. Part III argues that, based on the forgoing analysis, the legally defensible right is much narrower than commonly stated, and finally argues that the moral right is equally narrow, based on procreation's limited intrinsic value and the overriding relational concerns it creates.

II. THE PROCREATIVE RIGHT IN CONTEXT

There is a common thread in the ways U.S. constitutional law, international law sources, and Lockean natural law treat the procreative right. Despite suggestions in all of those sources of a broad right, when analyzed more closely these authorities merely provide for a right to continue the species, a right to perpetuate the race and have offspring, and the right to simply found a family, respectively. They recognize a special right, necessary for the continuation of society, and qualified by societal

43. See Lee, *supra* note 24, at 334.

44. Compare the role norms play in environmental protection. See CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 283-85 (1994).

45. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996). See also Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765 (1998).

interests and the interests of prospective children. This Part argues that these sources protect a right that is capable of being fulfilled. That right may be fulfilled by a single act of procreation, or it may be fulfilled by procreation for optimized societal replacement, but it is no broader.⁴⁶

A. U.S. Constitutional Law

If there is a basis for a procreative right in the United States today it does not appear expressly in the text of the Constitution, and thus it would have to be imported into our constitutional jurisprudence through modern due process, either as a liberty interest or a fundamental right. While such rights reflect those natural rights once defined by commands of God, reason, and survival in the state of nature, today courts must determine whether they are “deeply rooted in this Nation’s history and tradition,”⁴⁷ and “implicit in the concept of ordered liberty.”⁴⁸ Once a particular right is identified, it is subject to derogation, weighed against the aggregate of all competing rights, and characterized as “state interest.”⁴⁹ The greater the individual’s right or interest, the greater the state’s interest (signifying the total aggregation of others’ rights) must be to limit it.⁵⁰ Regardless, “all rights are qualified . . . for the good of the polity,”⁵¹ and “state intervention in domestic relations has always been an unhappy but necessary feature of life in our organized society.”⁵²

Many commentators analyzing the procreative right in U.S. constitutional law insist that, based upon the Supreme Court’s decision in *Skinner v. Oklahoma*⁵³ and cases following it, procreation is a fundamental right.⁵⁴ Others avoid analyzing the right by arguing that curbing population growth constitutes such a subordinating and compelling state interest as to overcome the strictest scrutiny.⁵⁵ Even one seemingly radical proposal for a national licensing system for parents carefully avoids challenging the fundamental nature of the right.⁵⁶ John Hill, likening

46. See *infra* note 324 and accompanying text.

47. *Lawrence*, 539 U.S. at 593 (Scalia, J., dissenting) (citation omitted).

48. *Id.* at n.3.

49. *Id.*

50. *Id.*

51. Rodney A. Smolla, *Limitations on Family Size: Potential Pressures on the Rights of Privacy and Procreation*, 1 WM. & MARY BILL RTS. J. 47, 62 (1992).

52. *Santosky v. Kramer*, 455 U.S. 745, 771 (1982) (Rehnquist, J., dissenting).

53. 316 U.S. 535 (1942).

54. See, e.g., Note, *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1297 (1980) [hereinafter Note, *Developments in the Law*] (discussing the fundamental right to procreate, which includes the right to prevent procreation and the right to terminate pregnancy); Note, *The Problem of Coercion*, *supra* note 7, at 1897 (noting that a compelling justification would be required to limit procreative rights). But see Alexander M. Peters, *The Brave New World: Can the Law Bring Order Within Traditional Concepts of Due Process?*, 4 SUFFOLK U. L. REV. 894, 895 (1970) (“It is not, therefore, inconceivable to see the production of unwanted children become a social crime.” (quoting GORDON TAYLOR, *THE BIOLOGICAL TIME BOMB* 45 (1968))).

55. *Montgomery*, *supra* note 1, at 651.

56. Eisenberg offers a compelling proposal to license parents, but expressly avoids the

procreation to an act of fundamental personal expression, argues that "[t]he right of procreation should extend to anyone intending to have a child and capable of producing a child, either biologically or by putting together the necessary biological components with the assistance of others."⁵⁷ John A. Robertson argues that the procreative right is so broad as to absolutely protect such things as the negative selection of offspring for gender and other traits using preemptive abortion and corrective intervention,⁵⁸ as well as cloning,⁵⁹ based on its central importance to individual meaning, dignity, and identity, and he proposes that procreative liberty be given presumptive priority in all conflicts with other liberties.⁶⁰ The right would protect coital and non-coital procreative decisions, regardless of the person's fitness to parent, his or her having tested positive for HIV, or his or her desire to reproduce posthumously.⁶¹ Relying in part on *Skinner*,⁶² he states: "[W]e must not deny the importance of procreative liberty just to escape the discomfort that its use often engenders."⁶³ Elaine Sutherland, relying on the *Skinner* line of cases,⁶⁴ begins her criticism of restrictions on prisoners' procreative rights with a discussion of the history of eugenics and a reference to the Nazi regime.⁶⁵ She later suggests that procreative liberty should protect a female prisoner's right to artificial insemination.⁶⁶

procreative rights issue by focusing on parenting. Howard B. Eisenberg, *A "Modest" Proposal: State Licensing of Parents*, 26 CONN. L. REV. 1415, 1446 (1994).

57. See Hill, *supra* note 35, at 385-88.

58. See ROBERTSON, *supra* note 1, at 172.

59. See generally John A. Robertson, *Reproductive Liberty and the Right to Clone Human Beings*, 913 ANNALS N.Y. ACAD. SCI. 198 (2000); Robertson, *supra* note 18, at 153, 169.

60. See ROBERTSON, *supra* note 1, at 4-18.

61. See Ann MacLean Massie, *Regulating Choice: A Constitutional Law Response to Professor John A. Robertson's Children of Choice*, 52 WASH. & LEE L. REV. 135, 139 n.16, 144 (1995) (citing Robertson, *supra* note 18).

62. See ROBERTSON, *supra* note 1, at 22-45.

63. *Id.* at 235.

64. Elaine E. Sutherland, *Procreative Freedom and Convicted Criminals in the United States and the United Kingdom: Is Child Welfare Becoming the New Eugenics?*, 82 OR. L. REV. 1033, 1037-39 (2003).

65. *Id.* at 1033-34.

66. *Id.* at 1051-52. Under what authority would Congress or the states regulate procreation? Montgomery finds that "Congress has the power under the commerce clause to take those actions it deems necessary to effectuate population control." Montgomery, *supra* note 1, at 643. Howard Means rejects any commerce clause based authority to regulate procreation, but would rely on the federal treaty making power as "something properly negotiable with foreign states." Howard Means, *The Constitutional Aspects of a National Population Policy*, 15 VILL. L. REV. 854, 861 (1970). See also Elkins, *supra* note 15, at 69, 74 (arguing that the states could rely on their police power or their *parens patriae* power to protect existing children by ensuring a certain ratio of children to existing resources); Lynn Wardle, "Multiply and Replenish": *Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771, 782 (2001) (identifying states' authority to regulate marriage based on its interest in responsible procreation, perpetuation and survival of the species, public health and child welfare, and child rearing).

1. *Skinner* deconstructed

Skinner involved a challenge to an Oklahoma law that allowed for the sterilization of men and women convicted of three or more “felonies involving moral turpitude,” but that expressly excluded “prohibitory laws, revenue acts, embezzlement, or political offenses.”⁶⁷ Jack Skinner committed all of his crimes prior to the act’s passage.⁶⁸ The Court, acknowledging without disapproval the eugenics rationale for the law, found the distinction between the list of predicate crimes and excluded crimes arbitrary, and held the law unconstitutional on equal protection grounds.⁶⁹

Skinner however contained impressive language, referring to procreation as a human right “basic to the perpetuation of a race” and as “one of the basic civil rights of man,” and noting that “[m]arriage and procreation are fundamental to the very existence and survival of the race.”⁷⁰ But putting aside notions of its fundamental and basic nature, the underlying right the court perceives here is a very specific one. Despite expansive rhetoric, the constant focus on perpetuation suggests that what is at stake is a right to replacement (or continuity)—or, as the Court put it, simply “to have offspring”—and not a right to unlimited procreation.⁷¹ Lynn Wardle argues that the right *Skinner* recognized is simply “procreation for social survival,”⁷² but “[t]he public interest in procreation for survival does not mean procreation for maximum population at subsistence level; the social interest is in *responsible* procreation.”⁷³

This is assuming *Skinner* even established a fundamental right. Alternatively, one can view *Skinner* as merely an equal protection case, and

67. 316 U.S. 535, 536-37 (1942).

68. *Id.* at 537.

69. *Id.* at 542.

70. *Id.* at 536, 541. One could speculate as to why Justice Douglas considered it a civil right, which in Lockean parlance is acquired after the formation of society, as opposed to a primary natural right. Douglas’ reference to marriage as fundamental to the very existence and survival of the race is odd. It has been suggested that Douglas here limited the right to married couples. See Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, *supra* note 1, at 676. See also Laurence Drew Borten, Note, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV. 1089, 1114-15 (2002) (attributing the trend of courts’ conflating marriage with procreation to a desire to avoid illegitimacy).

71. *Skinner*, 316 U.S. at 536.

72. Wardle, *supra* note 66, at 782 (citing *Skinner*).

73. *Id.* at 804-05. See also Shanner, *supra* note 1, at 856 (“As noted in *Skinner*, therefore, reproduction is necessary for the survival of the *species*, not of the individual.”). Alternatively, Ann MacLean Massie argues that the Court in *Skinner* refers to “natural procreative *capacity*, not to procreative acts.” Massie, *supra* note 61, at 150. Massie criticizes Robertson’s expansive right, arguing that only coital reproduction within marriage is a fundamental right. *Id.* at 152-62. “Although the cases most directly related to procreative liberty speak in terms of the ‘right to decide whether to bear or beget a child’ (a mental process), the holdings fall far short of protecting all possible behaviors related to that choice.” *Id.* at 159 (footnotes omitted). Massie further distinguishes between belief and conduct, citing First Amendment authority to show that the latter is subject to regulation “for the protection of society,” often without any required “compelling state interest.” *Id.* at 154-56 (citations omitted).

the reference to procreative rights as dicta.⁷⁴ The Court itself noted:

Several objections to the constitutionality of the Act have been pressed upon us We pass those points without intimating an opinion on them, for there is a feature of the Act which clearly condemns it. That is, its failure to meet the requirements of the equal protection clause of the Fourteenth Amendment.⁷⁵

Following its broad reference to procreation as “one of the basic civil rights of man,” the Court warned, “[w]e mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential,” referring to the law’s “unmistakable discrimination.”⁷⁶ Presumably, had the law not conspicuously excluded white-collar and political crimes, it could have survived review.

So, despite the Court’s broad language, *Skinner* does not establish a broad right to procreate at will. One concurring opinion in *Skinner* expressly approved state eugenic sterilization programs.⁷⁷ Moreover, *Skinner* did not overrule and in fact relied upon the Supreme Court’s decision in *Buck v. Bell*,⁷⁸ which upheld a eugenics-based Virginia law providing for the sterilization of mental defectives. *Buck* was more recently relied upon in *Roe v. Wade* to reject the extreme position that “one has an unlimited right to do with one’s body as one pleases,”⁷⁹ and one commentator has noted that compulsory sterilization is still practiced in many states, often under court order and without statutory authorization.⁸⁰

In *Skinner*, the Court was faced with a statute that would have resulted in a prisoner being forcibly subject to surgery against his will,⁸¹ pursuant to an arbitrarily discriminatory statute and based upon a state rationale supported by scant evidence. The Court was equitably bound to overturn the law, and did so without going further than necessary, and certainly without establishing the broad right for which it is often cited.

74. See Elkins, *supra* note 15, at 78; Massie, *supra* note 61, at 150.

75. *Skinner*, 316 U.S. at 537-38. Does use of strict scrutiny mean that *Skinner* nonetheless assumed that procreation is a fundamental right? As the court stated, its reference to strict scrutiny merely explained how it would go about equal protection analysis and does not automatically indicate the existence of a fundamental right. *Id.* at 541.

76. *Id.* at 541 (citations omitted).

77. *Id.* at 544 (Stone, C.J., concurring) (stating that “[u]ndoubtedly a state may, after appropriate inquiry, constitutionally interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies,” and citing *Buck v. Bell*, 274 U.S. 200 (1927)).

78. *Skinner*, 316 U.S. at 539-40 (citing *Buck v. Bell*, 274 U.S. 200 (1927)).

79. See Note, *Procreative Rights*, *supra* note 54, at 1300 n.28 (citing *Roe v. Wade*, 410 U.S. 113, 154 (1973)).

80. See *id.* at 1297-98.

81. *Skinner* explicitly refused to rely on the Eighth Amendment, as incorporated by the Fourteenth Amendment, to overrule the Oklahoma law. 316 U.S. at 538.

2. Modern substantive due process

If *Skinner* does not provide us with authority for a broad constitutional right to procreate, arguably *Griswold v. Connecticut*⁸² and its progeny do, recognizing procreation as a fundamental privacy right.⁸³ However, these cases deal not with laws restricting procreation, but instead with laws interfering with the right to avoid procreation—or “non-procreation rights.”⁸⁴ Nonetheless, like *Skinner*, the cases contain expansive language that would seem to preclude state restrictions on procreative decisions.

In *Griswold*, Justice Douglas, who wrote the Court’s opinion twenty-three years earlier in *Skinner*, refers only to the protection the Constitution affords the “intimate relation of husband and wife,”⁸⁵ citing *Skinner* once in a string cite as support for privacy generally.⁸⁶ Goldberg’s concurrence quotes *Meyer v. Nebraska* in support of what he sees as the right “to marry, establish a home and bring up children.”⁸⁷ But *Meyer* dealt with a state law forbidding the teaching of modern languages to young children in school; its reference to procreative rights was dicta. Furthermore, the majority in *Meyer*, in the same sentence quoted by Goldberg above, employs *Lochner*’s⁸⁸ discredited rationale, recognizing at the same time a constitutional right to enter into contracts.⁸⁹

Goldberg later admits that the right to procreate is not “specifically” mentioned in the Constitution,⁹⁰ but he reasons that the right to prevent procreation is indistinguishable from the right to procreate, and that the Court’s failure to recognize the former would allow draconian restrictions on the latter:⁹¹ “Surely the government, absent a showing of compelling, subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them.”⁹² Commentators have critiqued *Griswold*’s nebulous statement of “personal liberty,” arguing that the Court’s vague conclusions regarding procreation are based on layers of dicta.⁹³

82. 381 U.S. 479 (1965).

83. See Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, *supra* note 1, at 676-77 (“decisions about procreation are protected by the individual’s constitutional right of privacy”); Note, *Developments in the Law*, *supra* note 54, at 1303-04.

84. See Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy – Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 527-38 (1983) (arguing that *Eisenstadt* and *Roe* are in essence anti-procreative, preventing children being born out of wedlock).

85. *Griswold*, 381 U.S. at 482.

86. *Id.* at 485.

87. *Id.* at 488, 495 (Goldberg, J., concurring) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

88. *Lochner v. New York*, 198 U.S. 45 (1905).

89. *Griswold*, 381 U.S. at 515 n.7.

90. *Id.* at 496-97.

91. See *id.* at 497.

92. *Id.* at 496-97.

93. See Note, *The Problem of Coercion*, *supra* note 7, at 1876 (noting that Goldberg’s reasoning ignores the difference between laws limiting the use of contraception and mandating sterilization). The author breaks *Griswold*’s holding into multiple constitutional

Expanding *Griswold's* privacy beyond the family to individuals, the Court in *Eisenstadt v. Baird*⁹⁴ states that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁹⁵ However, as in *Griswold*, the issue being addressed is the right to *not* bear or beget a child, specifically Baird's right to distribute birth control while speaking on the subject of overpopulation (which Douglas referred to as one of the exigencies of the time),⁹⁶ despite a restrictive pro-natalist law.⁹⁷ While it characterizes procreation as private, the Court attacks the law because under it "persons must risk for themselves an unwanted pregnancy . . . and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights."⁹⁸ Moreover the Court finds it plainly unreasonable that the state would prescribe pregnancy and the birth of an unwanted child as punishment for fornication in part because of the "scheme of values that assumption would attribute to the State."⁹⁹ Its dicta reference to an insulated private right aside, the Court views procreation as involving competing rights and interests of society and the prospective child.

Again, in *Roe v. Wade*,¹⁰⁰ Justice White cites *Skinner* in finding that privacy extends to activities relating to procreation,¹⁰¹ but he echoes *Eisenstadt's* recognition of the danger unwanted children pose to others,¹⁰² relying on *Buck v. Bell* to reject an "unlimited right to do with one's body as one pleases."¹⁰³ Nonetheless, almost two decades later the Court in *Planned*

limits (a "differentiated right to sexual privacy"), rather than a blanket right to procreation, and argues that the Court's underlying fear of the state being physically present in the bedroom cautions more against laws preventing the use of contraceptives, than against laws limiting family size with financial incentives and disincentives. *Id.* at 1889-91. Elkins notes that the authority Goldberg relied upon for his statements on procreative choice had little to do with that issue. Elkins, *supra* note 15, at 75-77.

94. 405 U.S. 438 (1972) (holding that a state law prohibiting the distribution of contraceptives to unmarried persons violated the equal protection clause).

95. *Id.* at 453 (citing *Stanley v. Georgia*, 394 U.S. 557 (1969), *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905)). *Stanley* overturned aspects of a state obscenity law on First Amendment grounds; *Jacobson* defended compulsory immunization requirements against religious objections. See *Stanley*, 394 U.S. at 557; *Jacobson*, 197 U.S. at 11. Neither involved procreative or reproductive rights. Three years later the Court used virtually the same language, without further support, when it struck down a state law prohibiting the sale of contraception to minors. *Carey v. Population Services International*, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices.").

96. *Eisenstadt*, 405 U.S. at 456-57.

97. *Id.* at 452-53.

98. *Id.* (quoting *Eisenstadt v. Baird*, 429 F.2d 1398, 1402 (1st Cir. 1970)).

99. *Id.* at 448.

100. 410 U.S. 113 (1973).

101. *Roe*, 410 U.S. at 152 (1973) (citing *Skinner*, 316 U.S. at 541-42).

102. See *id.* at 153 (White, J., concurring) ("There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.").

103. *Id.* at 154.

Parenthood of Southeastern Pennsylvania v. Casey again refers to procreation as a privacy right, with Justice Stevens suggesting it might be absolute.¹⁰⁴ In all, from *Griswold* through *Casey*, the Court does no more than imply in dicta that a broad procreative right is somehow protected by vague notions of privacy.

However, in *Lawrence v. Texas*¹⁰⁵ the Court's approach deviates significantly. In overruling *Bowers v. Hardwick*¹⁰⁶ and including private, consensual homosexual conduct as part of the liberty protected by the Fourteenth Amendment, the Court avoids formulaic categorizations of fundamental and non-fundamental rights,¹⁰⁷ relying more on the concept of liberty than privacy,¹⁰⁸ and making no mention of *Skinner*. It employs a clearer test, limiting protection to "conduct not harmful to others"¹⁰⁹ and "absent injury to a person."¹¹⁰ If the Court now defines the sphere of privacy or liberty based on the absence of harm to others, i.e., the absence of competing rights and duties, behavior which involves others should fall outside the sphere, outside of the protection of modern substantive due process. As discussed below, unlike the acts of possessing contraceptives or obscenity, or engaging in consensual sodomy, there are few behaviors that involve other non-consenting persons more than procreation.¹¹¹

In addition to cases involving state criminal sanctions on what is considered private behavior, the Court has both struck down and upheld laws that indirectly burden procreative choice. In *Cleveland Board of Education v. LaFleur*,¹¹² the Court overturned school board requirements for mandatory maternity leave as burdening "the decision whether to bear or beget a child."¹¹³ Indeed, the Court singles out and relies on *Skinner* in

104. See 505 U.S. 833, 859 (1992). See also *id.* at 915 n.3 (Stevens, J., concurring in part and dissenting in part) ("[A] state interest in population control could not justify a state-imposed limit on family size or, for that matter, state-mandated abortions.").

105. 539 U.S. 558 (2003).

106. 478 U.S. 186 (1986).

107. See *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting).

108. See Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1403 ("As an initial matter, the Court chose to lodge the right at stake in liberty and not privacy.").

109. *Lawrence*, 539 U.S. at 572 (citing MODEL PENAL CODE, Commentary 277-80 (Tent. Draft No. 4, 1955)). See also *id.* at 567 (referring to private liberty as "counsel[ing] against attempts by the State, or a court, to define the meaning of [a personal] relationship or to set its boundaries absent injury to a person").

110. *Id.* at 567.

111. See *infra* Part III.B.2. See also Note, *The Problem of Coercion*, *supra* note 7, at 1886-88 (citing Louis Henkin's arguments regarding the lack of a rational basis for the legislation of "morality which has no secular, utilitarian, or social purpose," and distinguishing such legislation from the regulation of procreation where the presence (interests) of others is represented as a compelling state interest). Contrast this with Robertson's reading of *Lawrence*. Robertson, *supra* note 18, at 454 (interpreting the case as suggesting extended protection for the use of reproductive technologies.)

112. 414 U.S. 632 (1974).

113. *Id.* at 640. Massie finds that "[a]lthough no case attempts to define a positive right to procreate as such, recognition of such a right is certainly implicit in *Cleveland Board of Education v. LaFleur*," Massie, *supra* note 61, at 150-51 (footnotes omitted), but notes that the Court cited cases protecting the right not to procreate as supporting "an expansive positive constitutional concept of procreative liberty." *Id.* at 151.

finding that the rule burdened "one of the basic civil rights of man."¹¹⁴ This would seem to expand *Skinner* to prohibit any state regulation of procreative choice. However, the Court characterizes the right merely as a "protected constitutional liberty,"¹¹⁵ and applies an expressly deferential standard of review,¹¹⁶ finding that the rule bears no rational relationship to proffered state interests.¹¹⁷ Justice Powell concurs, stating:

[C]ertainly not every government policy that burdens childbearing violates the Constitution. . . . Undoubtedly Congress could, [for] example, constitutionally seek to discourage excessive population growth by limiting tax deductions for dependents. That would represent an intentional governmental effort to 'penalize' childbearing. . . . If some intentional efforts to penalize childbearing are constitutional . . . then certainly these regulations are not invalid as an infringement of any right to procreate.¹¹⁸

Powell cites *Dandridge v. Williams*,¹¹⁹ in which four years earlier the Court applied mere rational basis review to approve a state maximum limit on grants under the "Aid to Families with Dependent Children" program based on family size, effectively cutting off subsistence level support for families with more than five children.¹²⁰ The Court did so despite the families' argument, based on *Skinner*, that this violated fundamental procreative choice.¹²¹ One commentator sees *Dandridge* as sanctioning state financial disincentives to limit family size.¹²²

Despite all of this, the Court in its modern substantive due process opinions is perceived as protecting a broad right to procreate because it is willing to proclaim in dicta and ipse dixit as it did recently in *Carey v. Population Services International* that "decisions whether to accomplish or to prevent conception are among the most private."¹²³ Unlike *Skinner* and *Buck*, these broad statements conflating distinct rights occur in cases that do not deal with limitations on procreation at all and thus they are of little value.

More importantly, reading them to nonetheless protect a broad procreative right under notions of privacy employs a faulty rationale. The

114. *LaFleur*, 414 U.S. at 640.

115. *Id.* at 651.

116. *See id.*

117. *See id.* at 643.

118. *Id.* at 651-52 (Powell, J., concurring) (citing *Dandridge v. Williams*, 397 U.S. 471 (1970)).

119. 397 U.S. 471 (1970).

120. *Id.* at 509 (Marshall, J., dissenting). *But see Zablocki v. Redhail*, 434 U.S. 374 (1978) (finding unconstitutional a state statute that prohibited residents from marrying if they were in arrears on their child support obligations, or if such children were likely to become public charges, as a violation of the equal protection clause and unjustified interference with the fundamental right to marry).

121. *Dandridge*, 397 U.S. at 521 n.14 (Marshall, J., dissenting).

122. Note, *The Problem of Coercion*, *supra* note 7, at 1858, 1860.

123. 431 U.S. 678, 685 (1977).

act of procreation does not fit into the substantive due process frame because the concepts of privacy and autonomous liberty are inapposite. Unlike the decision to prevent it, the decision to accomplish procreation substantially affects the prospective child and the society into which it is born, taking it out of Lawrence's autonomous liberty, into the realm Justice Rehnquist in *Roe* called *sui generis*.¹²⁴ Laws barring contraceptives or consensual sodomy involve a lack of countervailing state interest, a lack of duties to others. The actor is alone or with others who consent. Procreation cannot be characterized in the same way.

Louis Henkin's argument that autonomy with a lack of opposing state interests is the protected "right" that is mislabeled "privacy" in modern substantive due process jurisprudence sheds light on this point.¹²⁵ Henkin notes that things like statutory rape, suicide, and compulsory education of one's children fall within the realm of the everyday understanding of the concept of privacy, but are nonetheless subject to regulation.¹²⁶ Privacy is thus irrelevant; rather, some acts implicate state interests while others do not. This Article has argued that state interests are synonymous with duties to others.¹²⁷ Viewed in this way, modern substantive due process posits that the government may only act in the presence of such duties, based upon this presence of others. It can only be utilitarian, or "social."¹²⁸ What then, is the difference between possession of condoms, and the creation and possession of a child? Is the latter an "autonomous" act? If there exists a spectrum between autonomous and social (perhaps with *Roe* at the center), what justifies placing procreation closer to autonomy?

Every act of procreation inevitably involves the special and general rights or interests of other members of that society, as well as the rights of the prospective children procreation will create.¹²⁹ Consider *Jacobson v. Massachusetts*,¹³⁰ in which the Supreme Court delineated the relevant boundary of rights that affect others in upholding the state's compulsory vaccination program, arguing that real liberty cannot exist where it is exercised "regardless of the injury that may be done to others."¹³¹ In

124. See *infra* Part III.B.2. For a discussion of the right to procreate balanced against the right not to procreate, see *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992) (concluding that "Mary Sue Davis's interest in donation is not as significant as the interest Junior Davis has in avoiding parenthood."). The court takes into account the insufficiency of the prospective child's foreseeable life, and at the same time refuses to evaluate what Ms. Davis argued was a diminishment of her future life for not having procreated. *Id.* at 603-04. The court in dicta determines that prior agreements to donate pre-embryos, i.e., to procreate, as opposed to agreements to obtain abortions, are enforceable because they do not implicate privacy and autonomy rights. *Id.* at 597.

125. Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1410-11 (1974) ("What the Supreme Court has given us, rather, is something essentially different and farther reaching, an additional zone of autonomy, of presumptive immunity to governmental regulation."). See also Note, *The Problem of Coercion*, *supra* note 7, at 1886-88.

126. See *id.* at 1429-30.

127. See, e.g., Joseph Raz, *supra* note 25 and accompanying text.

128. See *id.* at 1432.

129. See *infra* Part III.B.2.

130. *Jacobson v. Commonwealth*, 197 U.S. 11, 26 (1905).

131. *Id.*

Massie's terms, "[a] potential detrimental effect of an individual's behavior upon a third person is necessarily of concern from a public policy perspective; in constitutional parlance, it may often rise to the level of a state interest sufficiently significant to justify regulation designed to prevent the perceived harm."¹³²

Because procreation is inherently interpersonal, and without limitation becomes injurious to others,¹³³ it involves limiting duties, and thus countervailing state interests. It does not fit into a framework based on privacy and autonomy and, the dicta discussed above aside, falls outside of the protection of modern substantive due process.

3. Tradition

If the broad procreative right is not established in *Skinner* or modern substantive due process, it must then be found in tradition. To determine whether a particular fundamental right exists or not, the Court has applied various tests,¹³⁴ including recognizing that "only fundamental rights which are 'deeply rooted in this Nation's history and tradition' qualify for anything other than rational basis scrutiny under the doctrine of 'substantive due process.'"¹³⁵

The broad procreative choice suggested by dicta in the *Skinner* line of cases is not consistent with the legal history and tradition of the United States. The right to procreate has, by law, historically been limited to the confines of state-sanctioned monogamous and lifetime marriages.¹³⁶ This is perhaps best demonstrated by the pervasive history of bastardy and illegitimacy laws in the United States. Under this tradition, there is no recognized right to procreate outside of marriage.¹³⁷ Recently, the Supreme Court relied on this tradition to deny any fundamental right of a biological

132. Massie, *supra* note 61, at 163.

133. See, e.g., Hardaway, *supra* note 6, at 1222-23.

134. See *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring) (specifically using a due process analysis controlled in part by "continual insistence upon respect for the teachings of history").

135. See *Lawrence v. Texas*, 539 U.S. 558, 588 (Scalia J., dissenting) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). See also *Michael H. v. Gerald D.*, 491 U.S. 110, 122 n.2 (1989) (considering "a societal tradition of enacting laws denying the interest").

136. See NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION*, 2-3 (2000); Helen M. Alvaré, *The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective*, 40 HARV. J. ON LEGIS. 1, 42 (2003) (noting long history of laws and social policies banning or discouraging procreation outside of marriage); Rachel F. Moran, *How Second-Wave Feminism Forgot the Single Woman*, 33 HOFSTRA L. REV. 223, 238 (2004) ("Laws of adultery, fornication, and bastardy were designed to preserve the sanctity of sex within marriage."). Nor have courts abandoned this view. See *Standhardt v. Super. Ct.*, 77 P.3d 451, 463-64 (Ariz. Ct. App. 2003) (holding that Arizona's prohibition of same-sex marriage is not unconstitutional because the state has an interest in procreation and child-rearing within the marital relationship). See generally Wardle, *supra* note 66.

137. See, e.g., William M. Hohengarten, Note, *Same-Sex Marriage and the Right of Privacy*, 103 YALE L.J. 1495, 1519 n.93 (1994) ("The disabilities under which 'illegitimate' children long suffered provide dramatic legal evidence of the favored status of marriage as a locus for childbearing. . . . not so much to promote procreation in marriage as to discourage procreation outside of marriage."). See also Borten, *supra* note 70, at 1114-19.

father to disturb the presumed parentage of others, simply because the child was born into their marriage.¹³⁸

Aside from limiting procreation to the confines of marriage, there is a long-standing tradition of state regulation of who may marry and procreate. Laws regulating marriage (which are in fact designed to target procreation), such as prohibitions on marriage between those who are closely related, persons carrying certain diseases, and large classes of persons deemed unfit based on eugenics, have a long history in the United States and continue today.¹³⁹ In almost every state minors have been subject to limitations.¹⁴⁰ Thus, the law has historically only recognized the right of certain persons to procreate in certain circumstances.

Furthermore, persons viewed as somehow lacking mental capacity have historically been denied the right to procreate. The tradition is reflected in widespread statutory authority permitting the sterilization of the mentally ill and disabled, and in court decisions finding such authority inherent in courts even without explicit statutory authorization.¹⁴¹ Despite commentators' rhetoric, *Buck* seems to control over *Skinner*, with certain classes of persons subject to forcible sterilization even today.¹⁴²

In addition to widespread anti-natal regulation, some have convincingly argued that as a nation we have a tradition of vigorous pro-natal policies that also limit broader procreative decision-making.¹⁴³ Paula Abrams criticizes modern reproductive rights analysis¹⁴⁴ for its historically restrictive pro-natal view of procreative choice, at least with regards to women, whose "paramount destiny and mission" was "to fulfill the noble

138. See *Michael H.*, 491 U.S. at 124-27.

139. Wardle, *supra* note 66, at 788; Note, *The Problem of Coercion*, *supra* note 7, at 1883.

140. See *Thompson v. Oklahoma*, 487 U.S. 815, 824 (1988) ("[I]n all but four States a 15-year-old may not marry without parental consent."); Kaye Sutherland, *From Jailbird To Jailbait: Age Of Consent Laws And The Construction Of Teenage Sexualities*, 9 WM. & MARY J. OF WOMEN & L. 313, 314 (2003) ("The age of consent for sexual intercourse ranges from 12 to 18 under various state laws, the most common age of consent being 16.").

141. Note, *Developments in the Law*, *supra* note 54, at 1297-98; Note, *The Problem of Coercion*, *supra* note 7, at 1883 n.128.

142. Kris W. Druhm, Comment, *A Welcome Return to Draconia: California Penal Law 645, the Castration of Sex Offenders and the Constitution*, 61 ALB. L. REV. 285, 323 (1997) ("Sterilization of the mentally incompetent is still carried out in several states to this day.") (footnotes omitted). See also Katheryn D. Katz, *The Clonal Child: Procreative Liberty and Asexual Reproduction*, 8 ALB. L.J. SCI. & TECH. 1, at 31 n.149 (1997) (citing *In re Sterilization of Moore*, 221 S.E.2d 307 (N.C. 1976), and *North Carolina Assoc. for Retarded Children v. North Carolina*, 420 F. Supp. 451 (M.D.N.C. 1976), which upheld legislation allowing for the sterilization of the mentally retarded in institutions against constitutional challenges).

143. See Clark, *supra* note 17, at 186 n.47 ("As is usual with the law, this very real concern with maintaining fertility was disguised as a lack of concern, and we had statements by political leaders that population policy was not the business of government."); Means, *supra* note 66, at 855 (noting a pre-constitutional U.S. policy of pro-natalism, the goal being population growth in the fledgling colonies). See also *Kreyling v. Kreyling*, 20 N.J. Misc. 52, 23 A.2d 800 (1942) (holding that a spouse that did not wish to have children was violating the obligations of marriage).

144. See Paula Abrams, *The Tradition of Reproduction*, 37 ARIZ. L. REV. 453, 490-92 (1995). "The pronatalist tradition conflicts with the sphere of privacy accorded reproductive choices under current law." *Id.* at 456.

and benign offices of wife and mother."¹⁴⁵ Historical limitations on the right to voluntarily sterilize oneself further highlight this point.¹⁴⁶

Thus, the history and tradition of regulating procreative choice in this country suggest something very different from a limitless "basic right of man," but instead something constrained by various factors including the institution of marriage, one's age and mental capacity, and the state's pro-natal policies. To the extent that tradition reflects what is and is not a fundamental right, U.S. history does not support the notion of a broad procreative right. As with the substantive due process precedent, beyond the oratory there is little support.

4. Prisoners, probationers, and asylees

While modern substantive due process precedent characterizes procreation as private and unfettered in dicta, when the right is tested in proximate and concrete controversies involving the competing interests of children and society, courts have been quick to limit it. The Supreme Court in cases like *Skinner* and *Meyer* consistently likened and linked procreation to marriage. Yet when the Court enunciated the current standard of review for prisoners' constitutional rights claims in *Turner v. Safley*,¹⁴⁷ holding that prisoners did retain the constitutional right to marry, it implied that inmates who married while in prison would not be able to consummate their marriages until released.¹⁴⁸ The cases following *Turner* have restricted the procreative rights of men and women in prison and on probation. While courts have invoked *Skinner* and the line of cases discussed above in vociferously defending the right as fundamental and inviolable in theory,¹⁴⁹ they have denied the right when forced to examine it more closely. The procreative right, in practice, is treated differently from truly personal fundamental rights like marriage.

Three years after *Turner v. Safley*, the Eighth Circuit in *Goodwin v. Turner*¹⁵⁰ denied a prisoner's request to procreate by sending a sample of his sperm to his wife. After relying on the standard line of cases discussed above to find that the right to procreate is fundamental, the court

145. *Id.* at 485 (citing *Bradwell v. Illinois*, 83 U.S. 130, 141-42 (1872)).

146. See Note, *Developments in the Law, supra* note 54, at 1308 n.95 (discussing prohibitions on voluntary sterilizations).

147. 482 U.S. 78, 94-99 (1987) (creating a two-fold inquiry in which prisoners retain only those rights not fundamentally inconsistent with incarceration, and prison regulations abridging those rights must be reasonably related to legitimate penological interests).

148. *Id.* at 96.

149. See, e.g., *Gerber v. Hickman*, 291 F.3d 617, 624 (9th Cir. 2002) [hereinafter *Gerber II*] (Tashima, C.J., dissenting) (stating that "[t]here can be no dispute that such a right exists" and citing *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1976), and *Skinner v. Oklahoma*, 316 U.S. 535 (1942)); *Gerber v. Hickman*, 264 F.3d 882, 887 (9th Cir. 2001) [hereinafter *Gerber I*] (also relying on *Carey*, *Skinner*, as well as *Stanley v. Illinois*, 405 U.S. 645 (1972)); *Goodwin v. Turner*, 908 F.2d 1395, 1398, 1402 (8th Cir. 1990) (citing *Carey*, *Stanley*, and *Skinner* for the proposition that "[t]he right to procreate has been consistently recognized as a fundamental right"); *State v. Oakley*, 629 N.W.2d 200, 216 (Wisc. 2001) (Bradley, J., dissenting).

150. 908 F.2d 1395 (8th Cir. 1990).

nonetheless held that denying Goodwin's simple request was reasonably related to the prison's legitimate penological objectives,¹⁵¹ reasoning in part that granting it would require granting female inmates' requests to procreate, which would be impossible.¹⁵² The court accepted that the restriction also limited Goodwin's wife's procreative rights.¹⁵³

Eleven years later in *Gerber v. Hickman*, a panel of the Ninth Circuit reviewed a virtually identical request from a prisoner sentenced to life, and, quoting *Skinner* on the specter of forced sterilization, reasoned that the right to procreate survives incarceration because modern methods obviating the need for physical contact mean that exercise of the right is not inconsistent with incarceration, and that preventing the prisoner from exercising his right via these modern methods was not sufficiently related to a legitimate penological objective.¹⁵⁴ The panel, in dicta, also found that conjugal visits and childbirth were not inconsistent with incarceration.¹⁵⁵ Sitting *en banc*, the court reversed the panel, finding that the right to procreate does not survive incarceration, which inherently limits acts of intimate association—including procreation, regardless of how accomplished.¹⁵⁶ The court also found that *Skinner*, read properly, only narrowly prohibits forced surgical sterilization and does not protect the more general right to procreate.¹⁵⁷

The dissenting opinions sharply criticized the majority for failing to apply *Turner* and other precedents correctly, and for presuming that the retributive aspects of incarceration rule out procreation.¹⁵⁸ However, the most obvious difference between the majority and the dissenters is how the latter characterize the right, ignoring all interpersonal aspects of procreation and reducing it to “procreation *simpliciter*,” or the simple act of sending sperm through the mail.¹⁵⁹ By equating procreation with

151. See *id.* at 1399-1400. See also *Toussaint v. McCarthy*, 801 F.2d 1080, 1113-14 (9th Cir. 1986) (finding that the denial of conjugal visits did not amount to cruel and unusual punishment); *Oakley*, 629 N.W.2d at 210 n.25 (finding that prisoners have no right to procreate and citing *Goodwin*); Adam M. Breault, *Onan's Transgression: The Continuing Legal Battle Over Prisoners' Procreation Rights*, 66 ALB. L. REV. 289, 295-96, 309 (2002) (noting that claims to constitutional rights to conjugal visits are generally disfavored, and noting that a “unanimity of federal court rulings” finds that “penological interests asserted by the states are more compelling than the constitutional right to procreative liberty claimed by prisoners.”).

152. *Goodwin*, 908 F.2d at 1399-1400. In contrast to the limits placed on prisoners' right to procreate, the Third Circuit has found states constitutionally obligated under the due process clause to ensure female prisoners the right to elective abortions. See *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987). Furthermore, denial of this right to prisoners constitutes a violation the Eighth Amendment. *Id.*

153. *Goodwin*, 908 F.2d at 1399.

154. *Gerber I*, 264 F.3d at 888-92.

155. *Id.* at 890. Breault argues that the court was able to find that the right survived incarceration because it distinguished between the right in the abstract and its exercise, the state being able to modulate restrictions on the latter. See Breault, *supra* note 151, at 313-14.

156. *Gerber II*, 291 F.3d at 620-23.

157. *Id.*

158. *Id.* at 624-31 (Tashima, J., dissenting). See also Breault, *supra* note 151, at 319.

159. *Id.* at 624, 629 (analogizing *Gerber's* conjugal request with a prisoner's presumed freedom to masturbate). See also Kristin M. Davis, *Inmates and Artificial Insemination: A New Perspective on Prisoners' Residual Right to Procreate*, 44 WASH. U. J. URB. & CONTEMP. L. 163, 190

masturbation, the dissenters are able to strip away any of the interpersonal aspects of procreation that might fundamentally conflict with incarceration, i.e., the effects the act of procreation has on others. Much like the rhetoric of the substantive due process cases, procreation here becomes wholly personal and private, with no ramifications for other individuals or society.

The interpersonal nature of procreation has proven even harder for courts to ignore in the context of probation, where prospective parents and children are free to interact. Again courts have been quick to limit the right despite the rhetoric. These cases show that it is not only in the context of incarceration that courts see fit to limit individuals' procreative rights. In *State v. Kline*¹⁶⁰ the defendant, who abused methamphetamine, had his parental rights terminated after breaking his son's arm, and was subsequently arrested after abusing his infant daughter and fracturing her leg.¹⁶¹ He claimed a violation of his fundamental right to procreate after a court imposed, as a condition of probation, that he participate in a drug treatment and anger management program before having more children.¹⁶² The Oregon Court of Appeals disagreed, and found the condition sufficiently tailored to provide "potential victims with protection from future injury."¹⁶³

Similarly, in *State v. Oakley*,¹⁶⁴ the Supreme Court of Wisconsin rendered perhaps what is the most thorough analysis of the procreative right by any U.S. court,¹⁶⁵ concluding that "in light of Oakley's ongoing victimization of his nine children and extraordinarily troubling record manifesting his disregard for the law," the stipulation that he be required to avoid having children until he could show the means to support them was not overly broad and was reasonably related to his rehabilitation.¹⁶⁶ The court made clear that the condition also met the higher standard of being narrowly tailored to serve the state's compelling interest in having parents support their children.¹⁶⁷ The court chided the dissent for finding that Oakley "has an absolute right to refuse to support his current nine children and any future children . . . thereby adding more child victims to the list,"¹⁶⁸ analogizing the behavior of the defendant to that in *Kline*.¹⁶⁹

(1993) (distinguishing between conjugal visits and what the author sees as the narrow act of artificial insemination).

160. 963 P.2d 697 (Or. Ct. App. 1998).

161. The defendant later explained: "[B]abies are so hard to understand. They are so frustrating." *Id.* at 699.

162. *Id.* at 699.

163. *Id.* See also Rachel Roth, "No New Babies?": Gender Inequality and Reproductive Control in the Criminal Justice and Prison Systems, 12 AM. U. J. GENDER SOC. POL'Y & L. 391, 405-06, 417-18 (2004) (citing research showing that the practice of lower courts restricting defendants' procreative rights is quite common). But see *People v. Pointer*, 151 Cal. App. 3d 1128 (Cal. Ct. App. 1984) (overturning a "no pregnancy" parole condition for an abusive mother because the state could have tested her for pregnancy, monitored for abuse, and removed children from her custody).

164. 629 N.W.2d 200 (Wis. 2001).

165. See Roth, *supra* note 163, at 409.

166. *Oakley*, 629 N.W.2d at 201.

167. *Id.* at 208-12.

168. *Id.* at 208-09. See also *id.* at 215 (Bablitch, J., concurring) ("[T]he harm to others who

Thus courts in practice have sharply limited and even forbidden altogether convicts' right to procreate in prison, treating it differently in this context from other fundamental rights (religious exercise, free speech, access to the courts, and freedom from cruel and unusual punishment) which are at least partially guaranteed despite incarceration.¹⁷⁰ Leaving aside notions that courts have been motivated by retribution or eugenics, the distinction is perhaps better explained by viewing procreation as *sui generis*, or different from these other rights. As discussed in Part I.B, aspects of procreation that critically distinguish it from other fundamental rights aptly explain why it is limited when other rights are not. One simply cannot compare the act of conceiving a child with the act of practicing one's religion, consulting a lawyer, or publishing a book. Rhetoric aside, courts in practice have recognized this, and they manage without a clear definition of the procreative right in U.S. law.

This lack of a clear definition, however, has led to absurd results when Congress has attempted to codify the right as an abstract policy statement. In 1996, as a statement regarding China's family planning policy,¹⁷¹ Congress amended U.S. asylum law to mandate that persons who in any way resist coercive population programs should be considered persecuted on account of their political opinion and offered asylum.¹⁷² Previously,

cannot protect themselves is so overwhelmingly apparent and egregious here that there is no room for question. . . . [A]ny child he fathers in the future is doomed to a future of neglect, abuse, or worse. That as yet unborn child is a victim from the day it is born.”)

169. Cf. *id.* at 219 (Bradley, J., dissenting) (“Men and women in America are free to have children, as many as they desire. They may do so without the means to support the children and may later suffer legal consequences as a result of the inability to provide support.”).

170. See *Gerber I*, 264 F.3d at 882; Breault, *supra* note 151, at 313.

171. For a description of China's policy, see *Li v. Ashcroft*, 356 F.3d 1153, 1159-60 (9th Cir. 2004); Charles E. Schulman, *The Grant of Asylum to Chinese Citizens Who Oppose China's One-Child Policy: A Policy of Persecution or Population Control?*, 16 B.C. THIRD WORLD L.J. 313, 316-19 (1996); Gerrie Zhang, Comment, *U.S. Asylum Policy and Population Control in the People's Republic of China*, 18 HOUS. J. INT'L L. 557, 561-67 (1996) (discussing the history, goals, methodology, and waning efficacy of the program). China's constitution addresses the balance between procreative rights and state interest expressly, stating that “both the husband and wife have the duty to practice family planning,” and notes that individual rights may not impinge on the interests of society. See Schulman, *supra*, at 316; Zhang, *supra*, at 562. Descriptions of the policy refer to competing rights and duties. See Information Office of the State Council of the PRC, *Human Rights in China* § I (Nov. 1991), available at <http://english.people.com.cn/whitepaper/4.html> [hereinafter 1991 White Paper] (referring to unbridled reproduction as competing with other “human rights,” including the right to subsistence, the “most important of all human rights”). China's family planning policy seeks to combine “universal principles of human rights with its national conditions.” Information Office of the State Council of the PRC, *White Paper on Population in China*, para. 10 (Dec. 19, 2000) [hereinafter 2000 White Paper]. See also Gomez, *supra* note 37, at 567-68 (explaining in detail enforcement methods, including the flexibility associated with the quota system); Xiaorong Li, *License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China's Family-Planning Program*, 8 YALE J.L. & FEMINISM 145 (1996) (detailing the history of the program, its rational and national legality, and contradictory government policies).

172. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 § 601, 8 U.S.C. § 1101(a)(42)(B)(Supp. II 1997)); H.R. REP. NO. 104-469, at 174 (1996) (specifically objecting to precedent denying asylum to persons fleeing China's family planning policy); 142 CONG. REC. S4593 (daily ed. May 2, 1996) (one senator referred to the measure as a “foreign policy statement”). The legislation “apparently was intended to single out and benefit a

such applicants were generally denied asylum based upon the important distinction between persecution (which is committed on account of one's race, religion, nationality, membership in a particular social group, or political opinion) and prosecution under facially neutral laws of general application.¹⁷³ Courts and the Board of Immigration Appeals have since applied the provision literally, granting asylum to an applicant who resisted by siring three children in an attempt to father a male child,¹⁷⁴ an applicant who was fined and terminated from work after having her fourth child,¹⁷⁵ and a young couple who were threatened and subjected to physical examination when they voiced their intention to marry and have as many children as they desired.¹⁷⁶ Commentators have noted that Congress's provision broadly condemns regulation of procreation in general, even the government's failure to provide contraception and family planning services.¹⁷⁷

Some have offered unconvincing rationales attempting to square Congress's proclamation with existing asylum law,¹⁷⁸ but the provision is unique, declaring that procreation is a meta-right, not in conflict with other fundamental rights and moreover unlimited. Presumably China's extreme population growth and resource scarcity¹⁷⁹ constitute sufficient compelling state interests to justify derogating from the right even by U.S. constitutional standards, and yet its family-planning policy and

particular group of foreign nationals for purely ideological reasons." Katherine L. Vaughns, *Retrofitting the "Refugee" Definition: The New Immigration Reform Law's Impact on United States Domestic Asylum Policy*, 1 RUTGERS RACE & L. REV. 41, 45 (1998).

173. See *De You Chen v. INS*, 95 F.3d 801 (9th Cir. 1996); *Xin-Chang Zhang v. Slattery*, 55 F.3d 732, 751 (2d Cir. 1995) (referring to China's policy as "facially neutral"); *Matter of Chang*, 20 I. & N. Dec. 38, 43-44 (B.I.A. 1989); Vaughns, *supra* note 172, at 68 ("[T]he unanimity of the circuit courts addressing this issue is a rare jurisprudential occurrence.").

174. See *Matter of C-Y-Z*, 23 I. & N. Dec. 693, 921-22 (B.I.A. 1997) ("[T]he right [sic] to unfettered reproductive choice are fundamental individual rights, recognized domestically and internationally.").

175. See *Li v. Attorney General*, 400 F.3d 157, 175 (3d Cir. 2005) (Sloviter, C. J., dissenting) (defending the policy as "instituted to avoid the true starvation that would result for many of its 1.3 billion people were the population growth to continue unabated").

176. See *Li v. Ashcroft*, 356 F.3d 1153, 1164 (9th Cir. 2004) (Kleinfeld, C.J., dissenting) (criticizing the decision as "protecting young love").

177. See Abrams, *supra* note 31, at 883, 900.

178. It has been argued that prosecution for engaging in behavior that is a fundamental right is persecution. See Stanford M. Lin, *Recent Development: China's One-Couple, One-Child Family Planning Policy As Grounds For Granting Asylum - Xin-Chang Zhang v. Slattery*, No. 94 Civ. 2119 (S.D.N.Y. Aug. 5, 1994), 36 HARV. INT'L L.J. 231, 242 (1995). See also Abrams, *supra* note 31, at 884, 902-03; Schulman, *supra* note 171, at 335; James M. Wines, *Guo Chun Di v. Carroll: The Refugee Status of Chinese Nationals Fleeing Persecution Resulting from China's Coercive Population Control Measures*, 20 N.C. J. INT'L L. & COM. REG. 685, 714 (1995). Does this mean that all foreign prosecutions are now subject to due process review? Chang clarified that "fundamental right" in the asylum context obviously does not mean U.S. constitutional rights. See *Matter of Chang*, 20 I. & N. Dec. 38, 46 (B.I.A. 1989). Another argument is that resisting the policy is necessarily political. See Lin, *supra*, at 242 (relying in part on a case where the applicant was punished under general laws for attempting to overthrow a government which prohibited democratic change); Schulman, *supra* note 171, at 331, 333; Wines, *supra*, at 697-98, 715-716. This simply conflates opposition to laws with opposition to the government that creates them.

179. See *infra* note 233.

enforcement methods are condemned. Does this mean Congress would not limit procreative rights if the United States faced similar circumstances? Ironically, Congress limited the number of persons qualifying under the new standard to 1,000 per year,¹⁸⁰ unwilling to admit more than a fraction of the daunting number of qualified applicants.¹⁸¹ In one vacuous breath, Congress both condemned China's population control policy and affirmed its own.¹⁸²

Thus, despite the protection modern substantive due process should offer to procreation, when courts are pressed to consider it concretely, it is routinely denied. Where Congress is free to cast it in abstract policy terms, it is absurdly broad. International law addresses the right in much the same way.

B. International Law

In the context of international law, the narrow procreative right this Article identified in Part I.B is often considered part of a broader category known as international reproductive rights.¹⁸³ The narrow procreative right, which is a negative or "first generation" right, is linked to a bundle of fundamental negative rights regarding bodily integrity as well as to positive, "second generation" economic and social rights (or entitlements) like rights to reproductive education and actual means to choose family size.¹⁸⁴ This conflation leads to the presumption that practices that may violate certain liberty rights—compulsory sterilization for example—also violate the narrower and distinct procreative right.¹⁸⁵ If we restrict our search to the distinct procreative right defined in Part I.B, we find that it appears in both binding and non-binding sources of international law,¹⁸⁶ but as between these two kinds of sources, it appears in two different forms. Does international law recognize a broad procreative right that limits state action, or is this commitment largely rhetorical? The way the

180. Vaughns, *supra* note 172, at 81.

181. *See id.* at 81-85. *See also* 142 CONG. REC. S4593 (1996).

182. Compare immigration policies to coercive population control policies: both forcibly direct who may enter a given society, how many may enter that society, and by what means. "[I]nterests in population control support a policy of limiting the entry of these potential citizens." *Planned Parenthood v. Casey*, 505 U.S. 833, 915 n.3 (1992) (Stevens, J., concurring in part and dissenting in part) (referring to population control as a valid basis for immigration law). *See also* *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (acknowledging that asylum law avoids interpretations that would open a floodgate of the world's population into America).

183. *See* U.N. Dept. of Economic and Social Information and Policy Analysis, International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, *Preliminary Report*, ¶ 7.3, U.N. Doc A/CONF.171/13 (Oct. 18, 1994) (declaring that "reproductive rights embrace certain human rights that are already recognized . . .").

184. *See* Babor, *supra* note 7, at 98-101.

185. *See* Hannah A. Saona, Comment, *The Protection of Reproductive Rights Under International Law: The Bush Administration's Policy Shift and China's Family Planning Practices*, 13 PAC. RIM L. & POL'Y J. 229, 253-54 (2004) (conjoining bodily integrity and procreative rights when discussing China's coercive practices).

186. For a discussion of the normative value of the different sources, see generally Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983).

right differs between binding and non-binding sources suggests the latter.

1. Binding sources of international law

Taking a traditionalist view of the sources of international norms,¹⁸⁷ one finds a relatively concise body of authority on the procreative right. The International Covenant on Civil and Political Rights ("ICCPR")¹⁸⁸ and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"),¹⁸⁹ which implement rights guaranteed by the nonbinding Universal Declaration of Human Rights ("UDHR")¹⁹⁰ and with it form the "International Bill of Rights,"¹⁹¹ are the primary sources. The UDHR states that "[m]en and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family."¹⁹² The ICCPR requires that "[t]he right of men and women of marriageable age to marry and to found a family shall be recognized."¹⁹³ Finally, the ICESCR provides that "[t]he widest possible protection and assistance should be accorded to the family . . . particularly for its establishment and while it is responsible for the care and education of dependent children."¹⁹⁴

This formulation of the right, to simply "found a family," does not expand on the basic right Locke pronounced some three centuries earlier,¹⁹⁵ or the right *Skinner* recognized.¹⁹⁶ "The right to found a family implies, in principle, the possibility to procreate and live together."¹⁹⁷ Nonetheless,

187. Article 38(1) of the Statute of the International Court of Justice recognizes international conventions, international custom, recognized general principles of law, and finally the subsidiary authority of judicial decisions and scholarly publications, as the sources of international law. Statute of the International Court of Justice art. 38(1)(a)-(d), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. See generally IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (4th ed. 1990).

188. Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 1999 U.N.T.S. 171 [hereinafter ICCPR].

189. Dec. 16, 1966, S. Exec. Doc. D, 95-2 (1978), 993 U.N.T.S. 3 [hereinafter ICESCR].

190. G.A. Res. 217 A(III), U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR], available at <http://www.un.org/Overview/rights.html>.

191. See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 117-65 (1996).

192. UDHR, *supra* note 190, art. 16-1.

193. ICCPR, *supra* note 188, art. 23-2.

194. ICESCR, *supra* note 189, art. 10-1.

195. See *infra*, Part II.C.

196. The provisions have been described as reactionary to Nazi reproductive policies, see Rebecca J. Cook, *International Protection of Women's Reproductive Rights*, 24 N.Y.U. J. INT'L L. & POL. 645, 700 (1992), and have been interpreted narrowly. See Paula Abrams, *Reservations About Women: Population Policy and Reproductive Rights*, 29 CORNELL INT'L L.J. 1, 13 n.70 (1996) (stating that the treaties "fail to include any language addressing reproductive decision-making").

197. U.N. Human Rights Committee, *General Comment No. 19*, art. 23 (Thirty-ninth session 1990) in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 107, U.N. Doc. HR1/GEN/1/REV. 4 (2000) [hereinafter *Comment*].

Because the right to "found a family" also arguably protects acts taken to support that family, and the state of that family living together, it encompasses interests broader than the general and negative claim-right of non-interference (as defined in Part I.B) that is the focus of this Article. However, none of those interests contradict my argument regarding the nature of

commentators have inflated the right, assuming the ICCPR guarantees unfettered procreative choice.¹⁹⁸ Finding violations of the ICCPR, one commentator argues that since “[t]hose living in the PRC do not have the right to found a family because they are allowed to have only one child and they are told when they may do so,”¹⁹⁹ both the government’s coercive practices and the policy itself violate the Covenant.²⁰⁰ Leaving aside the dramatic way this argument would redefine the term “family,” liberty rights protected by the ICCPR prohibit government practices like forced sterilization, but they do not imbue the phrase “right to found a family” with any additional meaning. In fact, this right is treated differently from other rights contained in the ICCPR and is left noticeably imprecise, lacking the stipulation common to other rights²⁰¹ that it not be unlawfully restricted. Furthermore, it can be derogated from, unlike certain other rights.²⁰²

Consider also competing rights and correlative duties.²⁰³ The ICCPR guarantees peoples the freedom to dispose of their natural wealth and resources for their own ends,²⁰⁴ and it guarantees individuals the right to liberty of movement and to choice of residence,²⁰⁵ and the freedom to leave one’s country.²⁰⁶ The ICESCR guarantees “the continuous improvement of living conditions”²⁰⁷ and calls for steps to ensure the equitable distribution of food and a reduction of the stillbirth-rate and infant mortality, for the healthy development of the child,²⁰⁸ the improvement of all aspects of environmental hygiene,²⁰⁹ the prevention of disease,²¹⁰ the creation of conditions to assure medical attention in the event of sickness,²¹¹ the provision of paid leave or leave with adequate social security benefits to

the procreative right; they do not posit a right to support and live with an *unlimited* number of children.

198. See Reed Boland, *Civil and Political Rights and the Right to Nondiscrimination: Population Policies, Human Rights, and Legal Change*, 44 AM. U. L. REV. 1257, 1263 (1995) (arguing that the ICCPR “implies the right to make fully voluntary decisions about childbearing”).

199. Saona, *supra* note 185, at 254.

200. *Id.* at 253-54.

201. See e.g., ICCPR, *supra* note 188, art. 22 ¶¶ 1-2 (stipulating, in the context of “the right to freedom of association with others,” that “[n]o restrictions may be placed on the exercise of this right other than those which are prescribed by law”).

202. *Id.* art. 4.

203. See ICCPR, *supra* note 188, art. 5 (“Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.”); ICESCR, *supra* note 189, art. 5 ¶ 1 (same); UDHR, *supra* note 190, arts. 29 ¶ 2, 30 (recognizing that rights must necessarily be limited by others’ rights and by the general welfare).

204. ICCPR, *supra* note 188, art. 1 ¶ 2. See also UDHR, *supra* note 190, art. 17 ¶ 1 (guaranteeing “everyone . . . the right to own property alone as well as in association with others”).

205. ICCPR, *supra* note 188, art. 12 ¶ 1. See also UDHR, *supra* note 190, art. 13 ¶ 1.

206. ICCPR, *supra* note 188, art. 12 ¶ 2. See also UDHR, *supra* note 190, art. 13 ¶ 2.

207. ICESCR, *supra* note 189, art. 11 ¶ 2(b).

208. *Id.* art. 12 ¶ 2(a).

209. *Id.* art. 12 ¶ 2(b).

210. *Id.* art. 12 ¶ 2(c).

211. *Id.* art. 12 ¶ 2(d).

mothers before and after childbirth,²¹² and the introduction of free primary through higher education.²¹³ The Convention on the Rights of the Child creates a vast array of additional state obligations.²¹⁴ While parents have the primary responsibility for care of the child,²¹⁵ states are the final obligors²¹⁶ and must ensure development, expression, an environment that is in the best interests of the child (including state custody when necessary), special assistance for disabled children, health care, pre- and post-natal health care for mothers, social security, an adequate standard of living, education, and protection from exploitation.²¹⁷

These and other rights compete with the procreative right. When states must reallocate wealth to care for the children of poorer parents, or provide mothers with social security at the time of childbirth, citizens are rendered less free to dispose of their natural wealth and resources for their own ends. Children's rights to a share of finite resources compete with the rights of limitless prospective children who would compete for the same.²¹⁸ Unlimited procreation in a finite space limits liberty of movement and the freedom to choose one's residence, because no two things can occupy the same space at the same time. Population explosions and mass emigrations in one state raise immigration restrictions in another, limiting the freedom to leave one's country. Emerging international environmental rights are violated as populations skyrocket.²¹⁹ If the right "to found a family" must be interpreted so as not to derogate from competing rights, then those competing rights necessarily limit it. Conflicts between rights may be justly resolved by limiting competing rights with correlative duties, but interpreting the procreative right as limitless destroys the requisite balance.

In contrast to the vague formulations above, however, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)²²⁰ requires signatories to ensure that men and women have "[t]he same rights to decide freely and responsibly on the number and

212. *Id.* art. 10 ¶ 2.

213. *Id.* art. 13 ¶ 2.

214. Convention on the Rights of the Child, G.A. Res. 25(XLIV), U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/25 (Nov. 20, 1989) [hereinafter CRC].

215. *See id.* art. 18 ¶ 1.

216. *See id.* art. 3 ¶ 2. Contrast with the Lockean model, *infra* Part II.C. Under the CRC the final obligation is on the state, and by operation, on other individuals.

217. *See id.* arts. 6 ¶ 2, 13 ¶ 1, 20, 23-24, 26-28, 36. *See also* Babor, *supra* note 7, at 103.

218. Consider children as needs, incapable of and in fact prohibited from themselves producing resources. *See* CRC art. 32. The degree to which any state can fulfill children's rights depends upon its finite public resources, added to the private resources parents provide each need, divided by the number of existing needs. If, however, one interprets the sources as neither obligating parents to have a minimum of private resources before procreating, nor limiting the number of needs they may produce, nothing prevents needs from exceeding resources.

219. *See generally* Hardaway, *supra* note 6, at 1222-28. *See also* CHRISTOPHER MILLER, ENVIRONMENTAL RIGHTS: CRITICAL PERSPECTIVES (1998); Luis E. Rodriguez-Rivera, *Is the Human Right to Environment Recognized Under International Law? It Depends on the Source*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 1, 37-45 (2001).

220. *See* Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/36 (Sept. 3, 1981) [hereinafter CEDAW].

spacing of their children and to have access to the information, education, and means to enable them to exercise these rights.”²²¹ This seems to assure a limitless procreative right. However, it has been argued that CEDAW merely “presumes the existence of procreative freedom in order to create an equal protection requirement.”²²² CEDAW thus aims to eliminate discrimination between the sexes in the enjoyment of rights, but it relies on the UDHR, ICCPR, and ICESCR as having established the underlying substantive rights CEDAW addresses.²²³ States agree under Article 16 to eliminate discrimination by ensuring that men and women have the “*same rights*, to decide freely and responsibly.”²²⁴ If a state recognizes a broader procreative right as part of its law, it must ensure that men and women may exercise that right equally, but CEDAW does not create any new rights beyond those provided for by the UDHR, ICCPR, and ICESCR.

Thus under binding international law the formulation of the procreative right is narrow – guaranteeing no more than the replacement and continuity we see in *Skinner*. The right is further hemmed in by competing rights and duties, and left derogable. But perhaps the best evidence of this right’s limits is the pervasiveness of a much broader formulation in non-binding international sources.

2. Non-binding declarations and agreements

Non-binding sources of law contain a broader, more detailed articulation of the procreative right than the above binding sources do. In 1968, the United Nations Conference on Human Rights in Tehran agreed that “[p]arents have a basic human right to determine freely and responsibly the number and spacing of their children.”²²⁵ One year later the formulation was reiterated by the General Assembly in its Declaration on Social Progress and Development,²²⁶ and in 1974, it was added to the World Population Plan of Action (“Plan of Action”), an authoritative

221. *Id.* art. 16(e). Note though that an unusual number of countries have reserved to the treaty and Article 16 in particular, making it “one of the most reserved international human rights documents.” Abrams, *supra* note 196, at 19.

222. See Walter C. Long, *Escape from Wonderland: Implementing Canada’s Rational Procedures To Evaluate Women’s Gender-Related Asylum Claims*, 4 UCLA WOMEN’S L.J. 179, 235 n.244 (1994).

223. See CEDAW, *supra* note 220, at Preamble.

224. See *id.* art. 16(e) (emphasis added).

225. International Conference on Human Rights, Tehran, Iran, Apr. 22-May 13, 1968, *Final Act*, ¶ 16, U.N. Doc. A/CONF.32/41 (1968). It had previously been argued by the Secretary General that because the UDHR “describes the family as the natural and fundamental unit of society,” procreative choice must “irrevocably rest with the family itself.” See Lee, *supra* note 24, at 328 (quoting the Declaration on Population by World Leaders, POPULATION NEWSL., Apr. 1968, at 44 (published by the United Nations Population Division, Dep’t of Economic and Social Affairs)). Note that one does not follow the other. If the family is vital to society, society has an interest in its formation and development which limits the otherwise autonomous interests (and rights) of the prospective family members.

226. See Lee, *supra* note 24, at 329 (citing the Declaration on Social Progress and Development, G.A. Res. 2542, at 50, U.N. GAOR 24th Sess., Supp. No. 30, U.N. Doc. A/7630 (1969)).

consensus document that created no binding legal obligations.²²⁷ At the time, however, the right was qualified with the requirement that “the responsibility of couples and individuals in the exercise of this right takes into account the needs of their living and future children, and their responsibilities towards the community.”²²⁸ The same formulation was reiterated in 1984 at the United Nations International Conference on Population in Mexico City,²²⁹ and in 1994, at the United Nations International Conference on Population and Development (“ICPD”), the most current statement of the right was declared, ensconced in a broad spectrum of reproductive rights.²³⁰

This broad and multifaceted articulation of the procreative right, implicating various negative and positive rights, is markedly different from the UDHR’s mere “right to found a family.” But what does it mean in practice? Commentators’ analyses of this iteration provide a starting point, and give an indication of how they may view the procreative right generally.

Because they seem to view any form of coercion as violating the right, the right is transformed from the protection of distinct behavior to one of autonomy generally. For example, Abrams notes that these texts qualify the right by noting individuals’ responsibility to others, thus “limit[ing] the legitimacy of [its] exercise,”²³¹ but she maintains nevertheless that governments are constrained in the way they may limit the right;²³² she finds incentive programs,²³³ and possibly even the policy of a family size limit (enforcement aside), unduly coercive.²³⁴ Diana Babor notes that there

227. Abrams, *supra* note 196, at 22 n.135. Note though that the right is absent from the 1993 Vienna Declaration. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (July 12, 1993).

228. U.N. World Population Conference, Bucharest, Rom., Aug. 19-30, 1974, *World Population Plan of Action*, ¶ 14(f), U.N. Doc. E/CONF.60/19 (1974) [hereinafter *Plan of Action*].

229. International Conference on Population, Mexico City, Mexico, Aug. 6-14, 1984, *Report of the International Conference on Population*, ¶ 25, U.N. Doc. E/CONF.76/19.

230. Report of the International Conference on Population and Development, Cairo, Egypt, Sept. 5-13, 1994, ch. VII, ¶ 7.3, U.N. Doc. A/CONF.171/13 [hereinafter *ICPD*] (“These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents. In the exercise of this right, they should take into account the needs of their living and future children and their responsibilities toward the community.”).

231. Abrams, *supra* note 196, at 36-37.

232. Abrams notes that the spirit of the Cairo Programme recognizes that governments may not limit the right other than with “social policies directed at improvement in the quality of life of individuals” to achieve the desired reduction in the birth rate. Abrams *supra* note 1, at 1124.

233. Abrams, *supra* note 196, at 7. There was general disapproval in Cairo of the use of incentives and disincentives in population programs. See *ICPD*, *supra* note 230, ¶ 7.22; Lee, *supra* note 24, at 338.

234. Abrams, *supra* note 1, at 1115. Contrast this position with the standard for coercion later cited favorably by Abrams, *id.* at 1128 n.102: “Coercive practices can be defined as those involving the application of physical force or threat of severe deprivation to get individuals to do what they otherwise would not do,” citing Donald P. Warwick, *The Ethics of Population*

is authority in international consensus documents authorizing states to pursue effective population policies,²³⁵ but she too finds financial incentives and disincentives essentially coercive, especially for the poor.²³⁶ Reed Boland argues that states have the authority to subordinate reproductive (and presumably procreative) rights to policy goals,²³⁷ and he would allow for states to regulate behavior based on a balancing test.²³⁸ But he warns that offering significant money or social services to the poor will often be found coercive²³⁹ because such methods “leave[] an individual with no practical choice but to comply.”²⁴⁰

In contrast to these commentators, Luke T. Lee would give the state considerably more latitude in balancing the broad right against competing collective and future rights,²⁴¹ including the right of children to be born wanted by parents and society, and the requirement that children would have themselves wanted to be born.²⁴² Lee implies that coercion is really synonymous with law enforcement itself, and that “any governmental regulation or law that carries with it an implied sanction against its violator” could be considered coercion.²⁴³ Even Lee, however, would prohibit “unreasonable or unacceptable coercion” such as torture, compulsory sterilization, and abortion, but would allow for education, shame, incentives, and disincentives—presumably because the former violate some other human right.²⁴⁴

Thus, each scholar (with the exception of Lee) finally defines the contours of the ICPD’s right not based on the contents of the right itself,

Control, in POPULATION POLICY CONTEMPORARY ISSUES 21, 28 (Godfrey Roberts ed., 1990).

235. Babor, *supra* note 7, at 116-17.

236. *Id.* at 119.

237. Reed Boland, *Honoring Human Rights in Population Policies: From Declaration to Action*, in POPULATION POLICIES RECONSIDERED: HEALTH, EMPOWERMENT, AND RIGHTS 93 (Sen ed., 1994).

238. Boland, *supra* note 1, at 1159-60. See also Sen, *supra* note 1, at 1044 (admitting that coercion is an imprecise term, that incentives may be “hard to distinguish from compulsion,” and instead applying a factor test focusing on the threat posed by population, the chance rates will decrease without action, the effectiveness of the coercion, and the availability of alternatives).

239. Boland, *supra* note 237, at 100.

240. Boland, *supra* note 1, at 1160. Boland describes financial incentives and disincentives, including taxes and fines, as “non-physical forms of coercion.” *Id.* at 1144-45. Boland also includes verbal pressure by public and private individuals, and the distribution of hormonal contraceptives without adequate medical oversight in this category. *Id.* at 1146-48.

241. See Lee, *supra* note 24, at 344 (“It is up to each country to decide on the relative weight to be given to each of the rights involved in the population field, taking into account its limited resources and particular circumstances.”).

242. See Luke T. Lee, *Law, Human Rights, and Population: a Strategy for Action*, 12 VA. J. INT’L L. 309, 317 (1972) (comparing limits on the procreative right to limits on the freedom of speech, such as libel, nuisance, and treason laws; “the ‘individual’ right of family planning [must] be harmonized with the ‘collective’ right under certain circumstances . . .”).

243. See Lee, *supra* note 24, at 336 (taking as an example laws prohibiting marrying before a certain age, which are designed to prevent inadequately cared for children). Lee presumes that coercion can be used to further other human rights, such as the right of education (truancy laws), Lee, *Law, Human Rights, and Population Policy*, *supra* note 2, at 5, and right to vote (mandatory voting laws). *Id.* at 6.

244. Lee, *supra* note 24, at 336-37. Lee disagrees with Cairo’s categorical disapproval of financial incentives and disincentives. *Id.* at 338.

but rather, negatively, by referring to the coerciveness of the state action that limits it. A state may regulate procreation up until the point at which the regulation becomes coercive; otherwise, the individual is assumed to be justified in exercising the right. Each scholar's definition thus varies according to his or her individual conception of what constitutes coercion. If we apply Abram's loose version of coercion, exercise of the right may have no bounds. If we apply Boland's, the right is more limited, like other rights in society. Under either approach, however, the procreative right becomes synonymous with the concept of personal free will, divorced from the behavior of procreating and its consequences for others, and without intrinsic limits. Scholars define the right obliquely, debating what is, and is not, too coercive an infringement upon that right, but they do not attempt directly to theorize its content, its substance and where, if at all, the right exhausts itself.

Consider, then, the formulation of the right as it appears in the ICPD, independent from the separate proscription on state coercion. The relevant language recognizes the "basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children."²⁴⁵ While the verb "decide" is modified by the adverb "responsibly," couples and individuals, not the state, are the sole subjects of that verb and presumably alone decide what constitutes responsible action. Couples and individuals "should take into account the needs of their living and future children and their responsibilities toward the community,"²⁴⁶ but in the end they decide "freely." While the state appears as a subject in other sections of the ICPD, there is no basis to presume that the state plays any part in the procreative decision here. Thus the right itself, as stated, is potentially limitless.²⁴⁷

Perhaps this is why the broad and detailed formulation of the procreative right is limited to non-binding sources, in contrast to the narrow and vague right that appears in binding sources. The presence of such a limitless right only in non-binding sources suggests that international law does not really recognize unlimited procreative choice, other than in rhetoric. Only in theory, in hortatory documents that impose no actual duties on their signatories, will the international community suggest such an expansive vision of the procreative right. In contrast, the right as stated in binding sources is narrow, more reflective of the actual right as defined in Part I.B and consistent with *Skinner's* formulation and, as we shall see, with Locke.

245. ICPD, *supra* note 230, ch. VII, ¶ 7.3.

246. *Id.*

247. Alternatively, one could consider the context in which the right was proposed: that is, concern over the threat of population increases. Qualifying the right with the notion of responsible exercise, in this context, implies an *irresponsible* exercise of the right in the past. If the conferences were intended to lower the birth rate internationally, one would not expect the delegates to create a broader procreative right than existed previously.

3. Customary international law

Some have argued that the procreative right as it appears in non-binding sources of international law has nonetheless become binding as a norm of customary international law.²⁴⁸ However, the formation of customary international law requires actual compliance; where states merely assent to non-binding agreements without recognizing the norm in practice, that norm is not part of customary international law.²⁴⁹

Despite the international community's formalization of a broad procreative right, various countries have ignored that right in practice. Throughout the 1980s, Romania pursued a highly restrictive pro-natalist policy that included workplace gynecological check-ups to ensure that any pregnancies were not terminated.²⁵⁰ In the mid-1970s, India pursued an anti-natalist policy that promoted the widespread forcible sterilization of Indian citizens in mass camps, with millions of people sterilized within one six-month period.²⁵¹ Since 1979, China, by far the most populous country in the world, has maintained a strict family planning policy.²⁵²

The use of highly coercive anti-natalist incentive programs has been commonplace in Indonesia, Vietnam and Bangladesh.²⁵³ The Soviet Union historically subordinated women's procreative rights to the needs of the state, which were regarded as superior to personal decisions about birth and sexuality.²⁵⁴ While Colombia included the right of couples to "decide freely and responsibly the number of their children" in its constitution, when the right was recently weighed against the constitutional right to life in a suit challenging the country's prohibition on abortion, the procreative right was deemed of lesser importance.²⁵⁵ Depending on one's view of what constitutes coercion, it is possible that few if any countries respect the broad formulation of the procreative right in practice. Indeed, commentators point to the subtle incentive and disincentive policies of the

248. See Babor, *supra* note 7, at 105 (arguing that the broad formulation has become custom, relying on the widespread use of modern methods of family planning by couples as well as general state assent to the ICPD as evidence). In contrast, Lee has argued that the UDHR has become binding customary international law via its relationship to the Charter of the United Nations, Lee, *Law, Human Rights, and Population Policy*, *supra* note 2, at 4-5, and presumably this would include the right to "marry and found a family."

249. See Babor, *supra* note 7, at 105.

250. Boland, *supra* note 1, at 1140-41.

251. *Id.* at 1142. See also Mahmoud F. Fathalla, *From Family Planning to Reproductive Health*, in *BEYOND THE NUMBERS: A READER ON POPULATION, CONSUMPTION, AND THE ENVIRONMENT* 143, 145 (Laurie A. Mazur ed., 1994). The practice continues today on a much smaller scale. Boland, *supra* note 1, at 1143.

252. Boland, *supra* note 1, at 1143-44. See also BETSY HARTMANN, *REPRODUCTIVE RIGHTS AND WRONGS* 157-69 (1995).

253. Boland, *supra* note 1, at 1145-46. See also James G. Connell, III, Note, *Norplant and the New Paradigm of International Population Policy*, 2 *WM. & MARY J. WOMEN & L.* 73, 97-99, 102-04 (1995) (describing the coercive use of Norplant as part of the population control policies of Bangladesh and Indonesia).

254. Mark Savage, Note, *The Law of Abortion in the Union of Soviet Socialist Republics and the People's Republic of China: Women's Rights in Two Socialist Countries*, 40 *STAN. L. REV.* 1027, 1107 (1988).

255. Boland, *supra* note 198, at 1266-67.

United States as violating procreative rights.²⁵⁶

In light of these practices, there does not appear to be any consistent behavioral regularity by the most populous countries respecting the broad CEDAW and ICPD formulations of the procreative right. Nor is it evident that states feel a sense of obligation to change their practices to come into compliance with any international norm. China has never recognized a conflict between its family-planning policy and the broad procreative right, and, in fact, it has argued that its policy is perfectly consistent with international law.²⁵⁷ It has done so not based simply on notions of state sovereignty, but upon notions of competing rights, and its obligations to protect children and society as a whole from unjustified and destructive behavior.²⁵⁸ It refutes the existence of *opinio juris* prohibiting it from making such decisions. Because it and other “[s]tates traditionally have perceived women’s reproductive function as a legitimate matter of state control,”²⁵⁹ the broad formulation of the procreative right cannot be considered a norm of customary international law. There is little actual state practice respecting it, nor is the norm seen as legally obligatory.

Regardless of the lack of hard authority in any international source supporting a broad procreative right, with one notable exception²⁶⁰ there remains a disconnect as scholars speak of procreation both as inviolable²⁶¹ and as unrecognized by binding sources of international law.²⁶² They err by conflating procreation with other reproductive rights generally, disregarding competing international rights that place obligations on states

256. See Meredith Blake, *Welfare and Coerced Contraception: Morality Implications of State Sponsored Reproductive Control*, 34 U. LOUISVILLE J. FAM. L. 311 (1996); Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492 (1993).

257. China ratified CEDAW in 1980 but has never addressed the treaty’s potential conflict with its family planning policy, presumably because it sees none. See Committee on the Elimination of Discrimination Against Women [CEDAW], *Consideration of Reports Submitted by States Parties under the Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Third and Fourth Reports of States parties: China*, at 2, 9, CEDAW/C/CHN/3-4 (June 10, 1997). Moreover, in 1999 when the treaty Committee commented on China’s reporting and compliance, it did not address the policy at all, but focused on the excesses of local family planning officials and the impact the policy has on female infants. See Report of the Committee on the Elimination of Discrimination Against Women, U.N. GAOR, 54th Sess., 424th mtg. at 30-31, U.N. Doc. A/54/38/Rev.1 (Feb. 5, 1999).

258. See 1991 White Paper, *supra* note 171, § VIII (“China has only two alternatives in handling its population problem: to implement the family planning policy or to allow blind growth in births. . . . Which of the two pays more attention to human rights and is more humane?”).

259. Abrams, *supra* note 196, at 31. See also *id.* at 38 (“[R]eproductive self-determination is rejected by many states . . .”). See generally Rebecca J. Cook, *Human Rights and Reproductive Self-Determination*, 44 AM. U. L. REV. 975 (1995).

260. See Lee, *supra* note 24, at 329-32, 338-41 (arguing that population programs should be assessed based on their “fulfillment of or non-fulfillment” of various human rights in their totality and that procreative rights are subject to complementary duties created by collective and future rights).

261. See Abrams, *supra* note 1, at 1113; Boland, *supra* note 1, at 1157; Cook, *supra* note 259, at 996. But see Richard A. Falk, *World Population and International Law*, 63 AM. J. INT’L L. 514, 518-19 (1969) (criticizing international statements of the procreative right as largely political rather than legal, intended to mollify religious factions).

262. See Abrams, *supra* note 196, at 13 n.70, 16-17; Cook, *supra* note 259, at 988.

to limit procreation, and assuming that coercion itself is forbidden. The narrow and vague formulation of the right in binding sources contrasted with the broad formulation of the right in non-binding sources, and the lack of state practice and *opinio juris* respecting that broader formulation, suggest an international consensus around only the narrow international right. By separating out the narrow procreative right from other rights, and leaving aside the extraneous notion of coercion, we can determine where international law protects procreation and where it does not, distinguishing, for example, between the right to limitless procreation and the right to be free from compulsory sterilization. The actual procreative right is thus far narrower (and more consistent with replacement) than commonly assumed. Here, as in U.S. constitutional law, when the right must be applied in concrete circumstances, expansive rhetoric yields to a far more limited vision.

C. Locke and Procreation

The positive law sources we have considered so far are not the only possible sources of the procreative right. We may also look to natural law to define the substance and limits of that right. Natural law provides a moral basis to disregard unjust positive law, and to rebel against the state that enacted it. This Part focuses on Locke's model of rights, as laid out in his *Two Treatises of Government*. Locke provided the foundation for today's domestic and international conceptions of fundamental rights,²⁶³ and in U.S. constitutional law, his work is the basis for the Court's often-cited proposition that procreation is "one of the basic civil rights of man."²⁶⁴

Locke's model of the state of nature, in which natural liberty occurs primarily in the absence of others (or society), and Locke's analysis of the relations between parent and child, provide a special context in which to consider the act of procreating. Locke was concerned with how rights changed as humans proliferated throughout nature, coming into inevitable contact with one another. Locke's "'protective' conception of natural moral rights"²⁶⁵ also recognizes that rights compete and limit each other.²⁶⁶ Finally, Locke avoids the tendency to treat the public good as something

263. See, e.g., THOMAS PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM: THE MORAL VISION OF THE AMERICAN FOUNDERS AND THE PHILOSOPHY OF LOCKE* (1998); Edward S. Corwin, *The 'Higher Law' Background of American Constitutional Law*, 42 HARV. L. REV. 149, 383 (1928) ("The conveyance of natural law ideas into American constitutional theory was the work preeminently—though by no means exclusively—of John Locke's *Second Treatise on Civil Government* . . ."); Henkin, *supra* note 125, at 1412 (attributing the philosophy of rights in the U.S. Constitution largely to Locke).

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

265. A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* 6 (1992). Most rights correlate in some way to duties, ranging from our natural duties to protect ourselves and others, to duties of non-interference others owe us in some act, *see id.* at 68-79, and are general, or special (arising out of transactions or relationships with others), *see id.* at 85.

266. Rights may conflict, or compete, and one right may override another and limit it, especially to avoid "extraordinary social costs." *See id.* at 94. *See also* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 190-94 (1977) (regarding competing rights).

other than a reflection of each citizen's rights, upon which the legitimacy of the state is contingent.²⁶⁷ For all these reasons, Locke's model of rights provides a most useful framework within which to test the substance and limits of the procreative right.

1. Locke's limited right of procreation

Throughout the *Second Treatise of Government*, Locke only briefly discusses procreation. In his discourse on "Conjugal Society," Locke mentions a "Right in one another's Bodies, as is necessary to its chief End, Procreation,"²⁶⁸ noting that "the Civil Magistrate doth not abridge the Right, or Power of either naturally necessary to those ends, viz. Procreation and mutual Support and Assistance . . . but only decides any Controversie that may arise between Man and Wife about them."²⁶⁹ Clearly Locke identifies a right here, but he cautions that it is "not barely Procreation, but the continuation of the Species,"²⁷⁰ which is the basis for the right. Locke sees procreation as a meaningful act only within the context of marriage and conjugal society,²⁷¹ its ends being not procreation *per se*, but procreation for "the continuation of the species."²⁷² The right, like the right in *Skinner* and that in binding sources of international law, extends only to the point of replacement and continuity. While Locke seems to contemplate parents having more than one child,²⁷³ a right to continue the species is not the same as an unfettered right to procreate. And while it is reason and God's order of self-preservation that lead to the rights of life, health, liberty, and property²⁷⁴—basic rights which nonetheless become qualified by self-preservation and eventually the public good²⁷⁵—Locke places procreation on a much lower and arguably intrinsically less valued level, comparing it to the ways of "inferior creatures" and "viviparous

267. See, e.g., Raz, *supra* note 25.

268. JOHN LOCKE, THE SECOND TREATISE ON GOVERNMENT (hereinafter LOCKE II) ¶ 78 (1690), reprinted in THE TWO TREATISES OF GOVERNMENT 301 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) (hereinafter LASLETT).

269. See *id.* ¶ 83. See also JOHN LOCKE, FIRST TREATISE ON GOVERNMENT ¶ 88 (1690) [hereinafter LOCKE I], reprinted in LASLETT, *supra* note 268 (briefly discussing man's desires of self preservation and propagation of the species).

270. See *id.* ¶ 79.

271. See *id.* ¶ 83.

272. Compare F.C. COPLESTON, AQUINAS 215 (1955) (noting that the natural law obligation to procreate is limited to ensuring continuity of the species), with Lee, *supra* note 24, at 333 (discussing a Pontifical Academy of Sciences study which concluded that high fertility on the part of couples must be diminished "up to a limit that simply assures a potential replacement of generations, that is, from the actual 3.4 to about 2.3 children per woman," (quoting PONTIFICA ACADEMIA SCIENIARUM, POPULATION AND RESOURCES: A REPORT 17-18 (1994)). Pope John Paul II's discourses have allowed for authorities "to issue directives which reconcile the containment of births and respect for the free and personal assumption of responsibility by individuals." COPLESTON, *supra*, at 340 (internal citations omitted).

273. LOCKE II, *supra* note 268, ¶ 80 (referring to multiple births, but focusing on the parental duty to maximize provisions for any children born).

274. *Id.* ¶ 6.

275. *Id.* ¶¶ 87, 123-124, 131, 135; LASLETT, *supra* note 268, at 113.

animals.”²⁷⁶ Locke was not proposing a right to constant and limitless procreation within conjugal society, but rather a right that extended only as far as was consistent with survival (or replacement) of the species.

2. Population and political society

Locke, placing man in a state of nature, identifies natural, negative rights to life, health, liberty, and property, based in reason or “the law of nature” that furthers the peace and preservation of mankind.²⁷⁷ Man in this state and following the law of nature enjoys a “natural liberty,”²⁷⁸ obtaining property as the labor of his body mixes with resources.²⁷⁹ In the state of nature there are few others to compete with in making property of the “vast wilderness of the earth,”²⁸⁰ and “there could be then little room for quarrels or contentions about property so established. . . . Nor was this appropriation . . . any prejudice to any other man, since there was still enough, and as good left; and more than the as yet unprovided could use.”²⁸¹ However, where the “Increase of People and Stock” along with the use of money made the land scarce and valuable, men began to enter into compact.²⁸² “[W]hen there was not room enough in the same place, for their Herds to feed together, they . . . separated and enlarged [sic] their pasture, where it best liked them.”²⁸³

Thus, where populations grow, man’s mere exercise of his natural rights will prejudice and entrench upon others’ rights.²⁸⁴ For Locke “these difficulties increase with the increase in population, the decrease in available resources, and the advent of economic inequality which results from the introduction of money.”²⁸⁵ Locke’s golden age, the state of

276. LOCKE II, *supra* note 268, ¶ 79.

277. LOCKE II, *supra* note 268, ¶¶ 6-7.

278. *Id.* ¶ 22.

279. LASLETT, *supra* note 268, at 101.

280. LOCKE II, *supra* note 268, ¶ 36.

281. *Id.* ¶¶ 31, 33.

282. *Id.* ¶ 45. Locke seems to say it is only the invention of money that drives man out of the state of nature, but he acknowledges that population is a factor, with one man’s mere enjoyment of nature “intrench[ing] upon the right of another,” and his acquisition of property “to the Prejudice of his Neighbour.” It is, however, not the only factor, since without money there was still enough land to hold twice the inhabitants. *See id.* ¶ 36.

283. *Id.* ¶ 38.

284. *See id.* ¶ 37 (referring to the use and acquisition of nature as prejudice to others) and ¶ 108 (“want of People and Money gave Men no Temptation . . .”). If it is not possible for all to take without prejudice to others, to encroach on others’ basic survival needs, there would be strong temptation to violate the law of nature, if only in order to survive. Hence population itself, in a finite space, threatens “natural liberty.”

285. William Uzgalis, *John Locke*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2003 ed.), <http://plato.stanford.edu/archives/win2003/entries/locke>. *See also* JAMES TULLY, AN APPROACH TO POLITICAL PHILOSOPHY: LOCKE IN CONTEXTS 35 (1993) (discussing population as a factor in the formation of society). The introduction of money did not obviate the importance of land, because for Locke land is the “chief matter” of property from which all other property is obtained. LOCKE II, *supra* note 268, ¶ 32. Land is integral to members’ consent and entry to and exit from society, *id.* ¶¶ 119-21, and in relation to land, money has only a “fantastical imaginary value.” *Id.* ¶ 184.

nature,²⁸⁶ is in part defined by “a want of People.”²⁸⁷ Civil society and eventually government are introduced,²⁸⁸ the legitimacy of which is based on protecting those rights and pursuing the public good.²⁸⁹ But, relative to the state of nature, the liberty one enjoys in society under government is naturally unstable. Were it to dissolve, each person’s rights would come into conflict proportional to the density of that society, the growing “difficulties” that were always building with an increase “in population, the decrease in available resources” only held at bay by that government.²⁹⁰ In contrast, liberty in the state of nature is stable, it being impossible to entrench upon others’ rights in the absence of others. The former has a default state of chaos, the latter has no default state at all.

Because Locke perceives population growth itself as a threat to natural rights and hence to the public good, one of the few views he shared with Thomas Hobbes,²⁹¹ his compact would be expected to address the cause of the strife (Locke’s “quarrels and contentions”): “the increase of people” that drove them into it and presumably continues to threaten it.²⁹² It could not do so if the right to procreate were unqualified. In this way Locke’s theory of government does not fit with notions of a procreative right beyond the reach of political society and its laws, but rather implies a more limited right.

3. Parents’ duties to their children

Parents are “procreators, not creators, only deputies and trustees for a higher authority.”²⁹³ For Locke, parental rights are more a product of a natural duty than an independent grant of authority²⁹⁴ or “any prerogative of paternal power.”²⁹⁵ Parents are “by the law of nature, under an obligation to preserve, nourish, and educate the children”²⁹⁶ for their own good, and “[t]he power, then, that parents have over their children, arises from that duty which is incumbent on them.”²⁹⁷ Consider a prospective

286. LOCKE II, *supra* note 268, at ¶ 111 and accompanying note.

287. *Id.* ¶ 108. Jefferson echoed these same concerns almost a century later, writing that a lack of government could be preferable to even a just government, only that the former was “inconsistent with any great degree of population.” Letter from Thomas Jefferson to James Madison (Jan. 30, 1787), in THOMAS JEFFERSON: WRITINGS 882 (Merrill D. Peterson ed., 1984).

288. LASLETT, *supra* note 268, at 107-08.; LOCKE II, *supra* note 268, ¶¶ 87, 131.

289. See LOCKE II, *supra* note 268, ¶¶ 87, 131, 123-24, 135; LASLETT, *supra* note 268, at 113.

290. Uzgalis, *supra* note 285, § 3.3.

291. See generally Paolo Pasqualucci, *Hobbes and the Myth of “Final War,”* 51 J. HIST. IDEAS 647 (1990) (discussing Hobbes’s view that overpopulation justified violent colonization and eventually mass extermination as a “last remedy of all”).

292. Locke likely had in mind an overcrowded England when he wrote THE SECOND TREATISE ON CIVIL GOVERNMENT (1690), and he believed the colonization of North America was a necessary solution to this problem. See BARBARA ARNEIL, JOHN LOCKE AND AMERICA 72, 110-11 (1996).

293. SIMMONS, *supra* note 265, at 181.

294. *Id.*

295. LOCKE II, *supra* note 268, ¶ 67.

296. *Id.* ¶ 56.

297. *Id.* ¶ 58.

parent who will not fulfill the duty,²⁹⁸ but who nonetheless procreates at maximum biological capacity. The duty will then go unfulfilled unless others, individually or through the state, use their resources to provide care, which in turn impinges on their property rights and liberty. In either case, the prospective parent's act violates the parent's duty and another's right (society's or the child's). As such, the act exceeds the scope of the prospective parent's right.²⁹⁹

This conflict is sharpened when one considers the high level and long duration of care owed to children by their parents. In the *First Treatise*, Locke opines that a parent's duty of care goes beyond providing mere subsistence, reaching to the "conveniences and comforts of Life, as far as the conditions of their Parents can afford it."³⁰⁰ Education presents an even greater challenge, lasting until that point at which the child is capable of reason and of following both natural and civil law.³⁰¹ There is a rebuttable presumption that this ability to reason will come at a certain age under the laws of a given civil society,³⁰² but if the child has demonstrated that he cannot follow the law (natural or civil), then letting the child out from under the parents' governance, regardless of the child's age, violates the parents' duty.³⁰³ Reason is the relevant threshold because it is then that persons can follow the law of nature, and hence can live freely in society.³⁰⁴ Before this, children, being unreasonable and incapable of following the law of nature, threaten others' natural rights and the public good. Prospective parents, who provide the future constituents of the polity, are thus bound by duties that society holds against them, and which they may never be free of. The duties of care and education, in Locke's view, are objective and substantial. It is not the parents' prerogative to define care and education, as these are not private concerns, but rather concerns that will have a bearing on society as a whole.³⁰⁵

This duty to society, like the duty to children, is incompatible with a limitless right to procreate. Because no parent has unlimited resources, and

298. The duty Locke refers to is not for the mere provision of physical resources, but also finite things like time and effort, as well as mental and emotional resources. See LOCKE II, *supra* note 268, ¶ 56.

299. See also Onora O'Neill, *Begetting, Bearing, and Rearing*, in *HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLECTIONS ON PARENTHOOD* 25, 25-30 (Onora O'Neill & William Ruddick eds., 1979) (arguing that parental duties limit the pre-derogation procreative right).

300. LOCKE I, *supra* note 269, ¶ 89. Simmons points out that mere begetting is a gift of "dubious benefit." SIMMONS, *supra* note 265, at 188-89. Parents also owe the specific duty of inheritance to their children. See LOCKE II, *supra* note 268, ¶ 190; SIMMONS, *supra* note 265, at 193, 204-09.

301. LOCKE II, *supra* note 268, ¶¶ 58-63.

302. *Id.* ¶ 59.

303. *Id.* ¶ 60 (using the term "may" when discussing whether, with age, children will have sufficient reason) and ¶ 63 (referring to care "as long as they should need to be under it").

304. *Id.* ¶ 59.

305. Compare *Santosky v. Kramer*, 455 U.S. 745, 789-90 (1982) (Rehnquist, J., dissenting) ("[T]he most valuable resource of a self-governing society is its population of children."), with *Michael H. v. Gerald D.*, 491 U.S. 110, 119 (1989) (referring to "the right, as well as the duty, to prepare the child for additional obligations, which includes the teaching of moral standards, religious beliefs, and elements of good citizenship") (citation omitted).

because "it does make sense to protect a potential interest even before it has grown into an actuality,"³⁰⁶ these duties limit the procreative right.

4. Locke's residual state of nature

*A man who is born into a world already possessed, if he cannot get sustenance from his parents, upon whom he has a just demand . . . has no business to be where he is.*³⁰⁷

Locke opens his chapter "On the Beginnings of Political Societies" by stating that man relinquishes his natural liberty for the bonds of civil society by entering a compact with others.³⁰⁸ The "bonds of civil society" do not interfere with a person's natural liberty (the state of nature being "a State of perfect Freedom"³⁰⁹) because we take them on voluntarily, or else choose to remain in the state of nature. Indeed, the possibility of electing to remain in or return to a state of nature, an alternative to political society, is necessary to maintain society's legitimacy.

Does mankind, then, have a natural *right* to the state of nature? Arguably, Locke's residual state of nature is a theoretical construct, a metaphor for the absence of political society, but physically indistinguishable. In one sense this is possible, because Locke at times uses the "state of nature" to refer only to relations between persons.³¹⁰ In this sense, a city can return to the state of nature. However, Locke also uses the "state of nature" in a more physical sense, especially when referring to the natural liberty of pre-society (or later, of leaving society). This concept is one truly more antithetical to notions of society—the "free and unpossessed" state of nature.³¹¹ When looking back to the origins of commonwealths (presumably originating from the state of nature), Locke envisions "much land and few people" and finds "the people of America" (the indigenous tribes) enjoying "their own natural freedom."³¹² Moreover, Locke finds that persons born under government still retain their title to the freedom of the state of nature, the same as those "born in the Woods."³¹³ Children born into societies retain their "title or pretense to the Freedom of the State of Nature."³¹⁴ Any person not bound by express

306. See Joel Feinberg, *The Rights of Animals and Unborn Generations*, in PHILOSOPHICAL AND ENVIRONMENTAL CRISIS 63, 65 (William T. Blackstone ed., 1974) (quoting Coke: "The law in many cases hath consideration of him in respect of the apparent expectation of his birth . . ."; and commenting "Why then deny that the human beings of the future have rights which can be claimed against us now in their behalf?").

307. PAUL NEURATH, FROM MALTHUS TO THE CLUB OF ROME AND BACK x (1994) (quoting Malthus).

308. LOCKE II, *supra* note 268, ¶ 95.

309. *Id.* ¶ 4.

310. LASLETT, *supra* note 268, at 98.

311. See ARNEIL, *supra* note 292, at 21-22 (discussing Locke's state of nature in the physical sense, often epitomized by America).

312. LOCKE II, *supra* note 268, ¶ 105.

313. *Id.* ¶ 116.

314. See *id.* ¶ 73 ("For every Man's Children being by Nature as *free* as himself . . .") and

consent as a member of society may join another commonwealth, or create a new one “*in vacuis locis*, in any part of the World, they can find free and unpossessed.”³¹⁵

This more physical conception of the state of nature, *actual* nature, comports with Locke’s point about persons not being prejudiced by others forming societies, or persons being able to leave them: the act of compact is one which “any number of men may do *because it injures not the freedom of the rest; they are left as they were in the liberty of the state of nature.*”³¹⁶ There is no natural liberty one can enjoy unless there is “still enough, and as good left”³¹⁷ on which to survive. If societies and governments naturally form where persons live together,³¹⁸ those who wish to enjoy their natural liberty and remain in a state of nature must be where others are not.³¹⁹

This competing right—a right to a residual state of actual nature—necessarily limits the right of procreation because limitless procreation populates the world so that individuals³²⁰ would not be able to enjoy the default condition of natural liberty Locke assures, and upon which the legitimacy of all government is based. Is there anywhere “free and unpossessed” that people may live today, enjoying Locke’s guarantee? Persons, as well as political and ethnic factions engaged in civil wars, are no longer offered a frontier, the “free and unpossessed” America in which a rebellious new society flourished. Whether taking into account the world or some small section of it, limitless procreation infringes on the right to a residual state of nature, and endangers the political societies whose legitimacy is premised upon its possibility.

In conclusion, the procreative right as Locke sees it extends no further than required to ensure continuation of the species, and it is limited by the formation and maintenance of political societies. It is especially qualified by natural duties to prospective children and, through them, duties to other members of society. Finally, it conflicts with and is also limited by Locke’s right to a residual state of nature, a physical and not merely metaphorical realm. Thus, Locke places defining limits on the scope of the right itself; they are not merely bases for legitimate derogation from it.

¶¶ 116, 118. This of course changes when the child, or any person, expressly consents to be subject to a government. *See id.* ¶ 121.

315. *Id.* ¶ 121. When discussing evidence of men actually living in a state of nature, Locke looks back to a time before records, to the less populated physical world. *See id.* ¶ 1.

316. *Id.* ¶ 95 (emphasis added).

317. *Id.* ¶ 33.

318. *Id.* ¶¶ 101, 127.

319. Members of a society may not simply acquire tracts of real property and enjoy their natural liberty ensconced therein, because land in a political society is part of that society, under its jurisdiction, and hence out of the state of nature. *See id.* ¶¶ 117, 119, 120.

320. Nor is this right limited to individuals, as whole polities “are left to the common refuge, which God hath provided for all men, against force and violence.” *Id.* ¶ 222; LASLETT, *supra* note 268, at 109. Locke later refers specifically to the state of nature as a default state to which an illegitimate government may return. *See* LOCKE II, *supra* note 268, ¶ 225.

III. THE PROCREATIVE RIGHT RE-EXAMINED

A. Properly Stating the Legal Right

In light of the forgoing, how can we characterize the procreative right? Leaving aside the unhelpful platitude that it is a "basic civil right of man," is this right one deserving "presumptive primacy" in all cases? In this Article's discussions of Locke, U.S. constitutional law, and international law, there is a discernible similarity in how each body of law or theory phrases the procreative right, which is in sharp contrast to the notion of an unfettered right. We are interested not in what these sources say about the conditions of permissible derogation, but about the exact scope of the right in the first instance. To use the distinction aptly suggested by one scholar, the right may simply be the "right to procreate," but not "a right to choose how many children to have."³²¹ This is a vital distinction because the former may exhaust itself, or prove satiable, while the latter would not.

Locke qualifies the procreative right thus: procreation is justified as a necessary component of marriage and conjugal society, whose ends are "not barely procreation" but "the continuation of the species." This authorizes not procreation to maximum biological capacity, but something more like replacement. This reading is consistent with Locke's overall model of political society, and the limits imposed on its members' behavior in the interest of the public good, as well as Locke's view of parents' duties to prospective children and the prerequisite of a residual state of nature.

Centuries later, the U.S. Supreme Court in *Skinner v. Oklahoma* echoes this same notion of replacement and continuation as the basis for the right, a right the Court simply described as "basic to the perpetuation of a race—the right to have offspring."³²² The modern substantive due process cases, despite their rhetoric, do not expand on this right. Instead, in practice, courts treat procreation as an interpersonal, non-autonomous act, and they limit its exercise accordingly.

The international community follows this theme, guaranteeing only "the right to marry and found a family," and creating a set of competing rights that restrain its exercise. In contrast, more expansive formulations of the procreative right are reserved for non-legal sources, which are ignored in practice and customarily disregarded as nonobligatory.

In essence, what these sources envision is the right to continue the species, the right to perpetuate the race and have offspring, and the right to simply found a family, respectively. Each merely guarantees at least an act of replacement, a specialized behavior justified and at the same time limited by interests beyond those of the procreator, by the interests of prospective children and of society. Furthermore, the procreative right is an interest capable of being satisfied or fulfilled, not to be repeated *ad infinitum*. Properly stated, the right authorizes individuals to engage in a

321. Note, *The Problem of Coercion*, *supra* note 7, at 1891.

322. 316 U.S. 535, 536 (1942).

range of behavior between a guaranteed act of procreation or replacement, and procreation for optimized replacement,³²³ and nothing more.

B. The Right and Its Reasons

This Article has addressed legal authority as a source of the procreative right, as well as an indicator of its content. However, rights can have both legal (what the right is) and moral (what the right should be) sources,³²⁴ and courts and commentators rely on both to justify decisions regarding procreative liberty. The following discussion focuses on some of the themes raised above, which suggest what the procreative right should be, what interests the law should protect,³²⁵ and to some extent the practical morality of procreation.³²⁶ First, the discussion evaluates the behavior by itself, based on the presumption that “actions may have intrinsic value or disvalue, which must be taken into account in deciding how to act.”³²⁷ It presumes, solely for the sake of argument, that acts of procreation can conceivably be viewed as non-relational, that is, with exclusive regard for the interests of the procreator and without regard for the interests of others. Secondly, the discussion evaluates the behavior as it relates to others.³²⁸

323. Because mere replacement would mean that a society’s population would remain constant, it may not in every case ensure the public good. One can imagine situations in which a population at its present level does not maximize the public good, and threatens the society’s survival. To address this, replacement cannot be the only permissible standard for the limit of procreative choice. So while the right to self-replacement is always assured as a floor, the upper limit is dictated by society’s interest in an optimal population range, which might be achieved through more than simple replacement.

324. The reader should be aware that several diverse schools of thought have organized regarding the issue of procreative autonomy generally. See, e.g., Tim Bayne & Avery Kolers, *Parenthood and Procreation*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *supra* note 285, <http://plato.stanford.edu/archives/spr2003/entries/parenthood/>. However, no school espouses the particular thesis that is the subject of this Article, and many fall prey to the common approach it criticizes. For example, even policy-liberals like Michael Bayles seem to presume an underlying broad right. See Michael D. Bayles, *Limits to a Right to Procreate*, in ETHICS AND POPULATION 42 (Michael D. Bayles ed., 1976) (evaluating legal limits on the right based on the degree of coercion they employ). But see S.L. Floyd & D. Pomerantz, *Is There a Natural Right to Have Children?*, in SHOULD PARENTS BE LICENSED? 230 (Peg Tittle ed., 2004) (arguing that there is no natural or basic pre-derogation right to have children because the right cannot be based on bodily autonomy, or cast as a relational right to self-determination).

325. See Raz, *supra* note 25, at 36 (“Rights and their boundaries demarcate the degree to which individual and common interests with (the protection of) which the rights under discussion are concerned are to be protected when they clash with other individual and common interests.”).

326. For a persuasive argument challenging the use of a rights framework for procreation, see Shanner, *supra* note 1.

327. Donald H. Regan, *Authority and Value: Reflections on Raz’s Morality of Freedom*, 62 S. CAL. L. REV. 995, 1074 (1989) (characterizing Joseph Raz’s argument).

328. See Raz, *Introduction: The Importance of Rights and Their Limits*, in WESTERN RIGHTS?: POST-COMMUNIST APPLICATION ix, xiv (András Sajó ed., 1996) (“The considerations which shape rights, and determine their existence, their extent and their degree of protection are quite often not confined to the interest of the right-holders only. The interests of all the people who may be affected by the right are relevant.”). See also Raz, *supra* note 25, at 33-35.

1. The intrinsic value of procreating

Assuming there is some intrinsic value in the behavior underlying any liberty or claim-right,³²⁹ one can identify the specific intrinsic value of unfettered procreation, focusing exclusively on the interests of the procreator. John Robertson is perhaps the most outspoken proponent of the value of procreative liberty *per se*, basing his theory of presumptive procreative priority in the hierarchy of rights on "its central importance to individual meaning, dignity, and identity"³³⁰ and the fact that it has "such great significance for personal identity and happiness."³³¹ As he states, "it is not the search for self-fulfillment alone that deserves protection, but the particular kind of self-fulfillment at issue."³³² Leaving aside moral concerns raised by the notion of using a child to engage in self-fulfillment, Robertson's position raises several questions. Can we really say that procreation is intrinsically valuable because it is "important?"³³³ Can we presume that every procreator really views and values the act as Robertson suggests? Is all procreation reflective of these better angels of human nature, and thus deserving of broad protection? Such a lofty and perhaps antiquated view of procreation certainly does not square with the modern sociobiological, psychological, and common-sense reasons for why humans procreate.³³⁴ Moreover, there is something about an endless procreative right that intuitively devalues and cheapens the act, trivializing each instance of the right's exercise.

Using language similar to Robertson's, James Griffin proposes a theory for resolving the inevitable conflicts between rights, arguing that rights

329. While the intrinsic value of rights is presumed for this discussion, their recognition in law, at least in terms of ascertainable and compensable value, is less certain. See *Memphis Community School District v. Stachura*, 477 U.S. 299, 310-13 (1986).

330. ROBERTSON, *supra* note 1, at 16.

331. See John A. Robertson, *Liberalism and the Limits of Procreative Liberty: A Response to My Critics*, 52 WASH. & LEE L. REV. 233, 236 (1995).

332. Robertson, *supra* note 331, at 247.

333. See ROBERTSON, *supra* note 1, at 447 n.37, 448 n.42 (building upon the premise of "the great personal importance of procreative liberty," which protects various distinct activities, and referring to derogation from that right in the event of severe population extremes.) Others also find the "importance" of reproduction sufficient ground on which to base a broad procreative right. Others also find the "importance" of reproduction sufficient ground on which to base a broad procreative right. See Bonnie Steinbock, *Rethinking the Right to Reproduce* (Harvard Ctr. for Population and Dev. Studies, Working Paper No. 98.05, 1998), available at <http://www.hsph.harvard.edu/organizations/healthnet/HUpapers/reproright.html> (arguing that "[t]he right . . . is a basic human right because of its significance and importance to all people."). However, it borders on the tautological to argue that procreative rights are fundamental because procreation is important. Arguably, procreation *per se* is seen as intrinsically valuable because it creates life. Such a view is essentially religious. See RONALD DWORKIN, *LIFE'S DOMINION* 92 (1993) (arguing that notions of sanctity or the intrinsic value of life are inherently religious), and not justifiable on any other grounds.

334. See SIGMUND FREUD, *CIVILIZATION AND ITS DISCONTENTS* 55-58 (James Strachey trans., W.W. Norton & Co. 1961); LOCKE I, *supra* note 269, ¶ 54 ("What father of a Thousand, when he begets a Child, thinks farther than the satisfying [sic] his present Appetite?"); EDWARD O. WILSON, *ON HUMAN NATURE* 3-4 (1978); Robertson, *supra* note 18, at 450-452 (attributing the value of procreation to biological and evolutionary desires).

have differing weights relative to the values they protect, “[a]nd their weights come largely from their centrality to our personhood, the more central the weightier.”³³⁵ The right to free speech would not protect pornography for profit or defamation, which lacks centrality to personhood;³³⁶ thus, not every exercise of a given right is “serious,” and protected.³³⁷ In other words, the intrinsic value of actions “depends on the spirit in which, or on the reasons for which, they are undertaken.”³³⁸

Every act of procreation does not involve centrality of personhood and importance to individual meaning. Procreation is not a biological need for an individual who is already living, or even a primary good.³³⁹ Nor does common experience of the reasons persons give for procreating always comport with the notion of an act of “great significance for personal identity,” or a “serious” act in Griffin’s sense. Consider Oakley, with nine children whom he refused to support, one of whom he abused.³⁴⁰ Presuming the act is even intentional, procreation may be as influenced by social factors as it is by reflective, autonomous decision-making.³⁴¹ If, as Griffin’s theory would suggest, it is only a narrower value that the procreative right protects—such as “serious” procreation or acts of procreation with significant personal meaning—then we would expect the law to formulate the right to specifically address this value, to define it as such, rather than to formulate it to suggest that no norms apply to the behavior or that it may be engaged in *ad infinitum* without consequence.

If we assume, however, for the sake of argument, that all acts of procreation reflect the expressive or personhood-enhancing value Robertson seeks to protect, and all are serious, there is still a question as to the weight that value should be given. One method to determine relative weight is to compare the value to that underlying other rights. In her dissent in *Oakley*, Justice Sykes opined that Oakley should not be required to show financial means to support his existing and future children before procreating again because lesser restrictions, such as jail time with work release for mandatory employment, were available.³⁴² Intuitively, however, the intrinsic value of Oakley’s having a tenth child does not outweigh the intrinsic value of his physical liberty, or his right to forebear mandatory labor. Arguably, given a choice, a significant number of persons would prefer to forgo procreation over being imprisoned or giving up their rights

335. James Griffin, *Rights in Conflict*, in *RIGHTS AND REASON: ESSAYS IN HONOR OF CARL WELLMAN*, 109 (Friedman et al. eds., 2000).

336. *See id.* at 105-19.

337. *See id.* at 111.

338. Regan, *supra* note 327, at 1074 (citing JOSEPH RAZ, *THE MORALITY OF FREEDOM* 363 (1986)).

339. *See* Shanner, *supra* note 1, at 856-57 (“having a child is not a need in any sense comparable to the need for lifesaving treatment, food, water, oxygen, sleep, or other factors that keep a body alive and healthy . . . it is a secondary good, a chosen life plan, rather than a primary good that enables one to choose life plans at all.”).

340. *State v. Oakley*, 629 N.W.2d 200, 215 (Wis. 2001).

341. *See generally* Ronald Lesthaeghe, *On the Social Control of Human Reproduction*, 6 *POPULATION & DEV. REV.* 527 (1980).

342. *Oakley*, 629 N.W.2d at 222 (Sykes, J., dissenting).

to free speech, free religious exercise, or freedom from cruel and unusual punishment. As the majority in *Oakley* noted, “the judge fashioned a condition that was tailored to that particular crime, but avoided the *more severe* punitive alternative of the full statutory prison term.”³⁴³ The court found incarceration to be “undoubtedly much broader than this conditional impingement on his procreative freedom[,] for [incarceration] would deprive him of his fundamental right to be free from physical restraint.”³⁴⁴ One recent examination of cases like *Oakley* suggests that defendants may agree, finding that such restrictions are frequently imposed but rarely reviewed, in part because the “prospect of jail time no doubt has a chilling effect on the pursuit of appeals.”³⁴⁵ Again, even proponents of a broad procreative right tacitly admit its questionable intrinsic value by constantly conflating it with other, higher-priority behaviors or forbearances in order to bolster it.³⁴⁶

Let us again assume that, for purposes of argument, each act of procreation is serious, and that it carries intrinsic value. Still, each successive act of procreation does not carry the same intrinsic value as the one before it. In other words, is there an important difference between a “right to procreate” and “a right to choose how many children to have?”³⁴⁷ The procreative right, unlike other fundamental rights, is capable of being fulfilled. The centrality to personhood, significance for personal identity and happiness, and self-fulfillment Robertson extols as inherent in procreation are satisfied from the perspective of both the right-holder and others after a determinable number of acts. Intuitively, a person prevented from having a second, third, or fourth child is not viewed as having suffered as severe a deprivation as a person prevented from having a first or only child. If the intrinsic value of procreating is the self-fulfillment of the procreator (*Skinner’s* “right to have offspring”), then we can presume this experiential value, this fulfillment, is achieved after the first birth—and merely replicated thereafter.

Finally, let us again assume that each act of procreating is serious, and now that it carries intrinsic value that is *not* capable of fulfillment, but may potentially be experienced ad infinitum. Discussions of such a right raise another curious problem—the apparent tacit recognition that the value of procreating for persons today outweighs the value of procreating for persons in the future. According to Sen, “problems would have to be very severe . . . in order to justify coercive intervention in private life and in reproductive decisions. None of the carefully presented scenarios indicate that things are disastrous right now, or that they will become disastrous

343. *Id.* at 207 (emphasis added).

344. *Id.*

345. See Roth, *supra* note 163, at 406.

346. See Saona, *supra* note 185, at 253-54 (erroneously defining the procreative right under the UDHR as a right to found a family “free of coercion”, conflating rights to bodily integrity with procreative right under the UDHR, and arguing that the transgression of rights to bodily integrity by the various enforcement mechanisms of China’s one-child policy constitutes a transgression of the procreative right as well). See also *supra* Part I.B.

347. Note, *The Problem of Coercion*, *supra* note 7, at 1891.

very soon.”³⁴⁸ This suggests that when the problems become severe, governments may *then* justly limit persons’ right to procreate, according to the present population a more valuable right than future ones. The right thus becomes contradictory and unintelligible. What other fundamental right ensures its own limitation only through its exercise? Arguably none, because such a feature defeats a claim of right. This is the fallacy of defining the right to procreate as intrinsically unlimited.

If like Sen we are willing to admit that, because the world is finite, procreation will eventually be limited, we are either admitting that there is questionable intrinsic value in an *unlimited* right to procreate, or we are willing to deny that value to future persons.³⁴⁹ In the same way, if we all are willing to admit that parents have duties to their children, the fulfillment of which is somewhat contingent on the parents’ finite resources, and that there is thus some numerical limit on the number of children that parents may justly have, then again we must question whether what we value is the unlimited right to procreate, or something else. The real intrinsic value is not in an unfettered right to procreate, but something more limited, closer to the notion of optimized replacement³⁵⁰ and inextricably tied to the correlative duties owed to prospective children and society.

2. Relational concerns

i. Procreation is an interpersonal, not personal, act

While Robertson’s reference to “self-fulfillment” seems plausible enough for truly private decisions,³⁵¹ it does not apply to behavior that creates persons. Recall Henkin’s argument that autonomy with a lack of opposing state interests is the protected “right” that is mislabeled privacy.³⁵² By this logic, the substantive due process line of U.S.

348. Sen, *supra* note 1, at 1051. See also *supra* Part I.A.

349. See Montgomery, *supra* note 1, at 654 (“At one time there may have been a right to have as many children as desired.”) (emphasis added).

350. While John Robertson has been cited throughout this article as a proponent of the broad procreative right, a recent work stating what he perceives as the underlying value of procreative liberty supports the replacement thesis: “Quite simply, reproduction is an experience full of meaning and importance for the identity of an individual and her physical and social flourishing because it produces a new individual from her haploid chromosomes.” Robertson, *supra* note 18, at 450. Elsewhere, Robertson limits the scope of activity which procreative liberty protects, a limitation he calls an “internal constraint,” to the production of genetically related offspring in the next generation. This is the specific behavior he sees as intrinsically valuable and deserving of protection. See John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J.L. & MED. 7, 21 nn.66-67 (2004). This suggests that simple replacement (or continuity) is sufficient to produce the underlying value. Furthermore, Robertson’s characterization of the value as at its base biological and evolutionary, *supra* note 18, at 452, supports rejecting the belief that procreation is a lofty and serious act.

351. See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). *But cf.* Massie, *supra* note 61, at 159 (distinguishing between constitutional protection of privacy and conduct).

352. See *supra*, notes 125-133 and accompanying text. See also Shanner, *supra* note 1, at 872

constitutional jurisprudence is concerned not with privacy, but rather with distinguishing between acts that implicate social utilitarian state interests (arguably synonymous with harm to others), and those that do not. Procreation resides with the former.

In Hohfeld's terms,³⁵³ procreation involves a claim-right to non-interference by anyone else, including the state. Depending on one's view of interference or coercion, the duty to not interfere might prohibit such things as anti-natal tax incentives, education, or mandatory counseling. For those who argue for a positive right to procreate, this includes a claim-right to assistance and a duty on others (via the state) to provide it. Most importantly, the procreative right includes powers over the state and others who automatically enter legal relations with the prospective child or children, as well as powers over the children themselves. A host of liabilities are likewise created by the act of procreation, including those upon the state, with special liabilities for co-procreators, existing family members, and other persons associated with the prospective children. Finally, the right involves immunities, in that others, including the state, cannot derogate (are disabled from derogating) from the procreative claim-rights, privileges (liberties), and powers of the prospective procreators. In short, the procreative right entails broad ramifications for others. Unlike any other right, procreation involves the extra variable of a prospective child, and for this and the other reasons discussed below, it is *sui generis*.

Thus, despite the common rhetoric, procreation is not protected by privacy or autonomy interests because it is not a personal and private act.³⁵⁴ Indeed, it is difficult to think of something less personal than creating another person. It is the antithesis of the personal, changing and creating essential legal relations perhaps more than any other act, most certainly for the person or persons created. "[T]he right of privacy, which encompasses the right to use contraceptives, the right to an abortion, and a variety of other activities associated with a right *not* to procreate, is distinct conceptually from the right to procreate. . . . [T]he right of privacy is nonrelational while the right to procreate is relational in character."³⁵⁵ Thus procreative rights do not follow from underlying fundamental rights to personal autonomy and bodily integrity, as privacy rights do.³⁵⁶

In *Roe*, the Court held that "[t]he pregnant woman cannot be isolated in her privacy. . . . The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly."³⁵⁷ The abortion decision is, "*sui generis*, different in kind from the others that the Court has

(referring to the "inherently social nature of procreating").

353. See generally Hohfeld, *supra* note 28.

354. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 496-97 (1965) (Goldberg, J., concurring) (referring to procreation as part of "the personal liberty guaranteed by the Constitution"); *Abrams*, *supra* note 1, at 1113 ("[R]eproductive decisions are among the most personal and primary choices made by an individual. . .").

355. See Hill, *supra* note 35, at 384 (citations omitted).

356. See *id.* at 385. Arguably, the inclination to view procreation as private may arise from the fact that, until the advent of contraception, it was impossible to distinguish procreation from sexual intercourse.

357. *Roe v. Wade*, 410 U.S. 113, 159 (1973).

protected under the rubric of personal or family privacy and autonomy,"³⁵⁸ because it supposedly involves others. In *Casey*, Rehnquist dissents, arguing that looking at the act of abortion "in isolation from its effect upon other people [is] like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body."³⁵⁹ Arguably, the state's interest here is grounded upon the actual presence of the fetus, which is not yet present when considering procreation. However, the Court in *Roe* goes on to state that "as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone."³⁶⁰

Procreation creates this life or potential life; it is the genesis of the state's interest. If the life or potential life, and thus the state's interest, has its origin in the conduct of procreation, then procreation itself is subject to the state's control.³⁶¹ Conceptually, then, there is no personal autonomy in the decision to create another, which is quintessentially interpersonal.³⁶² Not procreating is personal; procreating is interpersonal. This distinction takes procreation out of the rubric of private and personal acts, defining the first limitations on the procreative right.

ii. Procreation and the competing interests that constrain it

Having established that procreation is interpersonal, what specific interests does it implicate? Generally procreation implicates three categories of interests: those of the children that will be born, those of other persons in society whose lives those children will influence, and more impersonal or collective interests.³⁶³ The law limits the fundamental rights of parents in protecting the interests of extant children and the overlapping interests of society in its future; the "*parens patriae* interest in preserving and promoting the welfare of the child," can completely abrogate parents' fundamental liberty interest in matters of family life.³⁶⁴ Consider adoption,

358. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 951 (1992) (Rehnquist, C.J., dissenting) (discussing the dissenting opinions in *Roe* and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986)).

359. *Id.* at 951-52 (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 124 n.4 (1989)).

360. *Roe*, 410 U.S. at 112 (footnote omitted).

361. The state interest in preventing the act of abortion is different from its interest in a prospective child. Procreation creates competing interests not present in the act of abortion. Will the state ignore the behavior that precipitates an unwanted pregnancy only to wade in after conception, inserting itself between the mother and fetus to assure an unwanted birth? As argued above, *see supra* notes 43-45 and accompanying text, the failure of law to address the scope of the procreative right creates *Roe's* dilemma.

362. *See Hill, supra* note 35, at n.170 (stating that "[r]elational rights can be exercised only with the assistance or, at a minimum, the consent of others," and citing *Floyd & Pomerantz, supra* note 324, at 135-36).

363. *See Bayne & Kolers, supra* note 324, at 9.

364. *Santosky v. Kramer*, 455 U.S. 745, 766 (1982). *See also Lassiter v. Dep't. of Soc. Servs.*, 452 U.S. 18, 47 (1981); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). In some cases parental rights can be abrogated based simply on what is in the best interests of the child, *see MARTIN GUGGENHEIM, THE RIGHTS OF FAMILIES* 178 (1996), or based on broad definitions of neglect, *see Maryana Zubok, Termination of Parental Rights*, 5 *GEO. J. GENDER & L.* 587, 590 (2004).

which is analogous to procreation but heavily regulated to protect such interests.³⁶⁵ The law limits the rights of prospective parents to protect the same interests after conception but before birth because “the State, as *parens patriae*, has a compelling interest in protecting children from abuse, both after and *before* the abuse occurs.”³⁶⁶ The state need not “wait for the abuse to occur.”³⁶⁷

The law can even protect these interests before conception. In *Buck v. Bell*, the Court upheld the sterilization of Carrie Buck in her own interests, as well as in the interests of her prospective children and society.³⁶⁸ That, pre-conception, these are merely future or potential interests is irrelevant; the law recognizes such interests and protects them against the acts of existing right-holders.³⁶⁹ Compare universal laws prohibiting consanguineous marriages, which protect future children and society.³⁷⁰ Hill’s notion of constructive consent is relevant in this regard: “The procreative right arguably is contingent upon the constructive consent of the resulting child.”³⁷¹

As a social policy matter, why would the state recognize the interests of existing children, but not of prospective children? If we no longer presume the overriding interest or intrinsic value of the procreative right, and if we grant that the state may seek to protect the competing interest before it has grown into an actuality, then state action to protect its *parens patriae* interest only after procreation is insufficient, not rationally related to its goal. Once the child is born into inadequate conditions, the state is left with a choice of two evils: relegating the child to a bad home³⁷² or the pain of removal and a potentially worse situation.³⁷³ Furthermore, the parents’ rights must be abrogated, and society must be tasked with attempting to

365. See Erika Lynn Kleiman, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327, 344-47 (1997).

366. See *In re O.R.*, 767 N.E.2d 872, 876 (Ill. App. Ct. 2002) (emphasis added) (upholding a rebuttable presumption that a parent is unfit if he or she tests positive for any amount of a controlled substance, and citing *In re J.B.*, 765 N.E.2d 1093 (Ill. App. Ct. 2002), where the lower court was allowed to consider a parent’s abuse of one child when determining whether the parent is fit to parent his or her other current or future children).

367. *In re J.B.*, 765 N.E.2d at 1106. See also Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999 (1999); Zubok, *supra* note 364, at 593 (discussing mothers who abuse drugs or alcohol during their pregnancy).

368. 274 U.S. 200 (1927) (cited with approval in *Roe v. Wade*, 410 U.S. 113, 154 (1973)).

369. See *Davis v. Davis*, 842 S.W.2d 588, 602 (Tenn. 1992) (“[T]he state’s interest in potential human life may justify statutes or regulations that have an impact upon a person’s exercise of procreational autonomy.”); Feinberg, *supra* note 306, at 63, 65.

370. See Borten, *supra* note 70, at 1095 n.26.

371. Hill, *supra* note 35, at 384 (footnotes omitted). See also Michael Bayles, *Harm to the Unconceived*, 5 PHIL. & PUB. AFF. 292, 303 (1976) (analogizing to tort law to establish minimum standards for procreators); Eisenberg, *supra* note 56, at 1451 (“[S]ocietal interests in assuring the well-being of the entire community are more important than the rights of parents to have children and to raise them—or not raise them—any way they please.”); Shanner, *supra* note 1, at 858-59 (noting that decisions about forming a relationship cannot be said to be “unilateral” because, by definition, they “involve[] another”).

372. See *Santosky v. Kramer*, 455 U.S. 745, 781 n.10 (1982) (Rehnquist, J., dissenting) (describing in detail how the children were abused).

373. See *id.* at 765 n.15.

care for the child or suffering the results of not doing so, entailing a range of collateral compromises to other interests and liberties. There is a net loss of liberty for the state having delayed.

Perhaps sensing the weakness of the broad procreative right in this regard, its supporters have retreated to purely philosophical positions and narrowly focused on the first category above, either arguing against the ontological status of future children,³⁷⁴ or adapting Parfit's non-identity problem to argue against considering their interests.³⁷⁵ However, both of these arguments have been convincingly rejected, for example by Elizabeth Harman whose "person affecting" theory of harm to future persons provides compelling moral reasons to consider the interests of prospective children when procreating.³⁷⁶ Her logical account makes clear what seems intuitive: that procreative choices can harm and benefit the children created.

374. See Richard De George, *The Environment, Rights, and Future Generations*, in RESPONSIBILITIES TO FUTURE GENERATIONS: ENVIRONMENTAL ETHICS 157, 159 (Ernest Partridge ed., 1981) ("Future generations by definition do not now exist. They cannot now, therefore, be the present bearer or subject of anything, including rights." *Id.* at 161.); Laura Shanner admits that future children create extant duties prohibiting us from acting in ways that will cause them harm, but argues that an entity's claiming a right of non-conception negates these future interests because we arrive at an irresolvable metaphysical puzzle as "nothing is claiming the right to remain nothingness." Shanner, *supra* note 1, at 843-46.

375. Parfit's problem arises when we attempt to argue that the same action that creates a person or persons makes them worse off than they otherwise would be. See DEREK PARFIT, REASONS AND PERSONS Part IV (1984). Some have argued that non-consequentialists cannot avoid the non-identity problem, and that one must use utilitarianism or something other than a "person-affecting" approach to resolve it. See TIM MULGAN, FUTURE PEOPLE: A MODERATE CONSEQUENTIALIST ACCOUNT OF OUR OBLIGATIONS TO FUTURE GENERATIONS 1-23 (2006); Robertson, *supra* note 350, at 15-19. Proponents of a broad procreative right have seized upon the non-identity problem to argue that we cannot harm future children at all, and thus cannot consider their interests in limiting the procreative right. See generally Robertson, *supra* note 350. See also ROBERTSON, *supra* note 1, at 117. They find tacit support for this in the holdings of courts which have rejected wrongful-life torts brought by persons with disabilities, arguing that the unspoken premise of the decisions is that a disadvantaged existence cannot be worse than not existing at all. See Robertson, *supra* note 350, at 18-19; Sutherland, *supra* note 64, at 1049. Plaintiffs in wrongful-life cases and persons who commit suicide, who are in a unique position to assess this subjective issue, might disagree. Moreover, the issue usually before the courts in these cases is whether there can be a remedy for the plaintiff's position, which differs from the question of whether the plaintiff is in fact in that position.

376. See Elizabeth Harman, *Can We Harm and Benefit in Creating?*, 18 PHIL. PERSP. 89 (2004). See generally Lukas Meyer, *Intergenerational Justice*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2007 ed.), <http://plato.stanford.edu/archives/spr2007/entries/justice-intergenerational>. Because Harman does not speak in terms of rights, her argument may not completely answer Shanner's objection, see Shanner, *supra* note 1, at 843-46, although if, as Harman argues, we can harm and benefit future children in creating them, it seems plausible to say those children could assert claims. A full discussion of Harman's response to Parfit is beyond the scope of this Article, but it is important to note that her argument does not require a comparison between existence and non-existence, which is arguably impossible. Some have claimed that if a positive life (a life worth living) can be given a value of 1, non-existence can be given a comparative value of 0. In my opinion, this presumes much about the relative state of the unconceived. Harman is able to avoid such a comparison by distinguishing between being harmed and being worse off. She opts not to give a full account of the distinction, but I would argue that one way to demonstrate the difference would be to note that because being harmed (the cause) can make one worse off (the effect), the two are distinct.

Proponents of the broad procreative right have focused less on using moral philosophy to challenge the second and third categories of interests noted above, and it has been persuasively shown that procreation has considerable and morally significant consequences for the lives of persons other than those born from the act,³⁷⁷ and implicates a series of less personal but perhaps even more valued interests, such as our desire for intergenerational justice or the desire to protect children as a class.³⁷⁸

Thus, despite the non-identity problem, procreation implicates the direct interests of the children that will be born (d), the interests of other persons in society whose lives those children will influence (i), and many more impersonal or collective interests (x). If we assume that the intrinsic value of procreation (v) includes at least replacement, and that for the procreative choice in question a positive value can be assigned to represent the degree to which each competing interest would be advanced by a failure to procreate,³⁷⁹ we can posit that after replacement there is a negative pre-derogation right (or privilege) to procreate only if $v > (d + i + x)$. Thus, identifiable and competing interests, including those of the prospective children, constrain the procreative right—both legally and morally.

iii. Genesis of the broad right: Prospective children as property

Proponents of a broad procreative right who disregard the competing rights of the child often place procreation in *Griswold's* "realm of family life,"³⁸⁰ a realm viewed as naturally free from state intervention,³⁸¹ and in which procreative choice becomes unlimited and inviolable. However, this concept of an impermeable family realm is based on the historic and now defunct legal tradition in which children were viewed as the property of

377. See Dan Brock, *Shaping Future Children: Parental Rights and Societal Interests*, 13 J. POL. PHIL. 377 (2005). Robertson acknowledges such interests but gives them little weight. See Robertson, *supra* note 331, at 251-52. The addition of each new person affects the world's environment, and thus others' interests, in a certain, quantifiable, and negative way. See Hardaway, *supra* note 6, at 1222-23. Can we then also consider procreator-specific interests, such as the interest they may have in the elimination of net autonomy-reducing conditions that prevent their existential fulfillment?

378. See, e.g., RAWLS, *supra* note 20, at 284-93 (providing an institutional account of intergenerational justice); Bayles, *supra* note 371, at 300 (arguing for a principle based on the unconceived as a class); Massie, *supra* note 61, at 169 (challenging Robertson's use of the non-identity problem by arguing that the "optimal (not minimal) well-being of the future children" is the preferred basis for public policy). ROBERTSON, *supra* note 1, at 15-18 (discussing moral obligations to avoid harm by substitution, as proposed by Parfit and Brock). Also, while a full examination of the hypothesis is beyond the scope of this Article, one could argue that, if all lives are of equal worth, the relative value of any individual is one divided by the total number of persons in existence. If this were true, persons would have a duty not to reduce the value of existing and future humans, and that duty would in turn limit the procreative right.

379. Rather than advanced by procreation as may certainly be the case, e.g. the creation of a happy child that will love others, and would otherwise better the world.

380. 381 U.S. 479, 502 (1965).

381. *Id.* (citing in part *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) and *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) in support of the private "realm of family life").

their parents.³⁸² Professor Woodhouse, in exposing the persistence of the “child as property” tradition, argues that “[p]aternal property rights grew naturally from a patriarchal account of procreation” in which the parent and child are viewed as one.³⁸³ This flawed logic of children as personal property continues to influence family law, hampering state intervention to prevent child abuse and favoring parental rights over the best interests of the child,³⁸⁴ essentially ignoring competing interests in the “competition between concepts of the child as parental property and as a collective resource.”³⁸⁵

Presumptions about the broad procreative right, again often based on *Griswold's* realm of familial privacy, continue the child-as-property tradition. The view of procreation as personal, rather than interpersonal, sees the parent and prospective child as one, with no regard for competing rights between them. Procreation becomes a proprietary act of the creator,³⁸⁶ with little justification for state intervention. When the *Eisenstadt* Court refers to the right to be free from unwarranted intrusion into matters “so fundamentally affecting a person as the decision whether to bear or beget a child,”³⁸⁷ the person affected is the prospective parent; the child is left virtually a passive object. Yet, the specific interests prospective parents have in procreation, a subset of their total interests, are dwarfed by the interests of the prospective child, whose total quantum of interests are created by the act.

Consider Robertson’s argument that procreation be given “presumptive priority in all conflicts,” with an obligation to show substantial harm to others to overcome the presumption,³⁸⁸ and with that presumption based exclusively on the subjective interests of the parent.³⁸⁹ In this analysis, the rights of the prospective child and duties to it do not exist. The child is merely a vehicle for harm, considered not on the “rights” side of the equation but only in utilitarian derogation from the right. The child is not a rights-holder, but merely an inanimate result of the conduct

382. See Barbara Bennett Woodhouse, “Who Owns the Child?”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1041-50 (1992) (offering a revisionist account of authority protecting parents control of their children as grounded in the view that children are property).

383. *Id.* at 1044. See also Shanner, *supra* note 1, at 859 (“[T]he child is perceived to be an element of extension of oneself, perhaps as one might have brown eyes or a rapier wit.”).

384. See Woodhouse, *supra* note 382, at 1044-45 nn.228-29, 1048 n.246.

385. *Id.* at 1051. Despite the historical rhetoric of property, Woodhouse notes that Locke himself “explicitly renounced the notion that children were property of their fathers or that ‘begetting produces authority.’” *Id.* at 1047 n.239. See also LOCKE II, *supra* note 268, at ¶¶ 50-52. “[B]egetting of children makes them not slaves to their fathers.” *Id.* at ¶ 51.

386. See Elizabeth Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 827-33 (1986) (discussing “the right to produce one’s own children to rear”) (emphasis added); Shanner, *supra* note 1, at 859 (“This acquisitive notion of ‘having’ children reduces them to the status of desirable objects rather than persons.”).

387. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

388. See ROBERTSON, *supra* note 1, at 16.

389. See ROBERTSON, *supra* note 331, at 235, 245. Procreation is primary because of its importance to the self-fulfillment of the procreator. See *id.* at 247.

at issue.³⁹⁰

iv. Dwindling liberties

Even if, however, one could ignore the rights of the prospective child and treat it as mere property, the rights of other members of society implicated by procreation must still be considered. If each person is endowed with rights that compete with and limit others' rights, the creation of new persons in a finite space eventually results in either limiting the rights of some in favor of the rights of others, or a general limiting of each person's overall rights, as the spheres of rights begin to overlap. As Joel Feinberg phrased it when referring to the impossibility of guaranteeing rights, "the situation causing that impossibility is itself the voluntary creation of human beings,"³⁹¹ or in Lockean terms, man's mere exercise of his natural rights will prejudice and entrench upon others' rights³⁹² "these difficulties increas[ing] with the increase in population."³⁹³ Luke T. Lee argues that unrestrained procreation "would result in a proliferation of children, infringing upon both the collective and future rights to privacy."³⁹⁴

Privacy (or liberty as conceptualized in *Lawrence*) is thus the opposite and absence of others' rights. It is *Olmstead's* right "to be let alone," the core description of the right of privacy, which is threatened by an increasing population.³⁹⁵ While *Olmstead* certainly referred to government (as opposed to other persons) encroaching on one's rights, the principle still applies if one considers that government merely represents the rights of others. As more persons are added, their spheres of privacy contract. Consider for example the Court's assurance in *Meyer v. Nebraska*, often cited in support of a broad procreative right, of the constitutionally protected liberty "to marry, establish a home and bring up children."³⁹⁶ This implies a physical as well as a legal sphere of familial privacy that separates and buffers the family from others—something of a desire for one's own plot, perhaps reflected in contemporary suburban sprawl. And yet, this interest is directly threatened by the proliferation of others seeking the same in any given finite space. The privacy and property rights thus conflict directly with the broad procreative right—one must necessarily exclude the other, like marbles in a jar. Leaving aside the argument that privacy and property rights trump unlimited procreation in the hierarchy of competing rights, if

390. See Shanner, *supra* note 1, at 864.

391. See FEINBERG, *supra* note 26, at 87.

392. See LOCKE II, *supra* at note 268.

393. Uzgalis, *supra* note 285. See also TULLY, *supra* note 285, at 35 (discussing population as a factor in the formation of society).

394. See Lee, *supra* note 24, at 338.

395. See Tom Pierce, Comment, *A Constitutionally Valid Justification for the Enactment of No-Growth Ordinances: Integrating Concepts of Population Stabilization and Sustainability*, 19 U. HAW. L. REV. 93, 99 (1997) (referring to increasing population density as directly resulting in the deprivation of constitutional rights, and citing LARRY D. BARNETT, *POPULATION POLICY AND THE U.S. CONSTITUTION* (1982)).

396. 262 U.S. 390, 399 (1923).

we admit the existence of the former, we must deny the latter.

Consider for a moment the role an unlimited procreative right would play in considerations of world ownership, that is, questions regarding the claim each person has to external, natural resources.³⁹⁷ Whether one takes the most libertarian or egalitarian perspective, because resources are scarce, an unlimited procreative right must result in a narrowing of the type, and arguably a reduction in the value, of the average claim.

One can imagine a host of other competing rights and interests, all ranking above unfettered procreation in the hierarchy of rights, such as the right to travel,³⁹⁸ interests in certain natural resources,³⁹⁹ the interest in clean air,⁴⁰⁰ and political rights generally,⁴⁰¹ that are so affected. This principle manifests itself today in the current debate over local no-growth

397. For a discussion of contemporary issues in this field, see, e.g., *LEFT-LIBERTARIANISM AND ITS CRITICS: THE CONTEMPORARY DEBATE* (Peter Vallentyne & Hillel Steiner eds., 2000); MICHAEL OTSUKA, *LIBERTARIANISM WITHOUT INEQUALITY* (2003).

398. See, e.g., Rick Lyman & Ralph Blumenthal, *20 Die in Bus Fire as They Flee Hurricane*, *INT'L HERALD TRIB.*, Sept. 24, 2005, at 1 (quoting the mayor of Houston as referring to overcrowded highways during the evacuation as "a deathtrap"); Andrew Marra, *Best Plans Won't Stop Evacuation Jam in Fla.*, *PALM BEACH POST*, Sept. 24, 2005, at A1 ("Officials have concluded that South Florida is too crowded to evacuate effectively.").

399. For example, Congress created the Alaskan National Wildlife Refuge in 1980 as a national treasure. 16 U.S.C.A. §§ 3101-3233 (West 2004 & Supp. 2005). See also *Hollywood v. Hollywood*, 432 So. 2d 1332, 1335 (Fla. Dist. Ct. App. 1983) ("Before us is the last unspoiled beach area on the Gold Coast, a veritable Shangri-La in an otherwise endless Himalayan mountain range of cement to the south. It is surely a laudable governmental purpose to restrain excessive hotel and apartment house building on it and it is neither arbitrary nor capricious to do so.").

400. See Arnold W. Reitze, Jr., *Air Quality Protection Using State Implementation Plans – Thirty-Seven Years of Increasing Complexity*, 15 *VILL. ENVTL. L.J.* 209, 359-60 (2004) (attributing the failure of states to attain the goals of the Clean Air Act in large part to population increases, which nullified "much of the progress made under the Clean Air Act") (citing Arnold W. Reitze, Jr., *Environmental Policy – It Is Time for a New Beginning*, 14 *COLUM. J. ENVTL. L.* 111 (1989)).

401. Plato and Aristotle argued that successful city-states require optimal population sizes, and advocated government action to achieve it. See Abrams, *supra* note 196, at 8 n.40. Others argue that there is an inverse relationship between the population of a given jurisdiction and the effectiveness of its government. See, e.g., Rainald Borck, *Jurisdiction Size, Political Participation, and the Allocation of Resources*, 113 *PUB. CHOICE* 251 (2002); see also Poul Erik Mouritzen, *City Size and Citizens' Satisfaction: Two Competing Theories Revisited*, 17 *EUR. J. POL. RES.* 661 (1989). Could notions of consensus and meaningful participation in governmental decision-making have been in certain Framers' minds as they extolled the values of agrarian democracy, which impliedly pegs population to land, a scarce resource? See A. Whitney Griswold, *The Agrarian Democracy of Thomas Jefferson*, 40 *AM. POL. SCI. REV.* 657 (1946). Consider Locke's social contract—is the concept consistent with 300,000,000 contract parties, as is the case in the United States today? See generally Arthur S. Miller, *Some Observations on the Political Economy of Population Growth, Law and Contemporary Problems*, 25 *LAW & CONTEMP. PROBS.* 614 (1960) (arguing that an increase in population results in the enhancement of group over individual values, and the diminution of personal freedoms). Writing about the nature of republics and the need for direct action by each of its citizens, Jefferson noted that it "is evidently restrained to very narrow limits of space and population. I doubt if it would be practicable beyond the extent of a New England township." Letter from Thomas Jefferson to John Taylor (May 28, 1816), in *THOMAS JEFFERSON: WRITINGS*, *supra* note 287, at 1392. Writing on the dangers immigration posed to Virginia, he proposed 4.5 million inhabitants as a "competent population for this state." *THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA* 84 (William Peden ed., Univ. of N.C. Press 1955) (1787).

regulation, as communities attempt to protect themselves from the chaotic effects of expanding populations.⁴⁰² In support of such ordinances, Tom Pierce cites *Village of Euclid v. Ambler Realty*⁴⁰³ as recognizing “the elastic relationship between population and law”:⁴⁰⁴ “as the number of Americans increases, life becomes more ‘complex,’ and the scope of law necessarily ‘expands.’ . . . With the expansion of regulation comes a concomitant contraction of rights.”⁴⁰⁵ Put another way, the degree to which a person can exercise certain rights is inversely proportional to the number of other people exercising certain rights—again, like marbles in a jar. The Court, observing the constriction of constitutional rights because of growing population density, suggests that regulations “now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.”⁴⁰⁶

Moreover, exercising a broad right to procreate today also bears an inverse relationship to its exercise in the future; that is, reading the right broadly now means that it must be read more narrowly in the future.⁴⁰⁷ Procreators compete not only with others currently living in society subjected to their behavior, but also with procreators in the future.⁴⁰⁸ To assert that society will be justified in derogating from their rights based on compelling need, when it is the exercise of those same rights today that creates that compelling need, is a dubious assertion.

Thus, procreation in any finite space diminishes various current and future liberties. This fact limits the scope of the right. In theory, one can take all of the various rights that compete with an unfettered right to procreate, both now and in the future, and simply group them into any given society’s collective interest in (and perhaps collective right to) an optimal upper population range—the upper range within which any given society with finite space and resources can successfully fulfill the obligation of optimizing the public good that it owes to its members, and that its legitimacy is contingent upon. Again, we arrive at the concept of procreation for optimized replacement.

402. Pierce, *supra* note 395, at 109 (noting courts’ inclination to strike such no-growth ordinances, presuming the “‘naturalness’ or ‘inevitability’ of population growth in the same way one might speak of the naturalness or inevitability of death”). See also *id.* at 133-35 (noting where sustainable no-growth ordinances, written to combat growing populations, interfere with the constitutionally recognized right to travel). In any finite space procreative rights, the right to travel freely, and the right of citizens to control the essential constituency of their communities must come into conflict. One right must be sacrificed to avoid impinging on another.

403. 272 U.S. 365 (1926).

404. See Pierce, *supra* note 395, at 143.

405. *Id.*

406. *Euclid*, 272 U.S. at 387.

407. See *supra* note 331 and accompanying text.

408. Exercise of the procreative right in the past has arguably narrowed the scope of other rights today, such as various property rights. See *Euclid*, 272 U.S. at 386-87.

v. Contributing causes, migration, and gradual encroachment

There are at least three considerations that can obscure the fact that unfettered procreation interferes with the general rights and liberties of others. First, procreation is merely a contributing factor to the harms that infringe on others' rights.⁴⁰⁹ The acts and omissions of other persons and governments will always be the more proximate cause. The degree to which a child's parents and society provide for his education and other needs will affect how that child performs as a citizen. How successfully a government regulates land use—and to what extent private parties obey that regulation—will determine the degree to which the environment is degraded and access to nature is preserved. This is true irrespective (up to a point) of that society's population.⁴¹⁰ But population growth, as an underlying causal factor, affects the calculus. Indeed, immigration may contribute to population growth too, and governments certainly regulate immigration. Why not procreation as well? Unless procreation is a trump in every case—unless, for example, it is always hierarchically superior to the right to travel—there exists no reason why procreation too should not be regulated. Indeed, assuming the intrinsic value of an unfettered right to procreate is less than the intrinsic value of the other rights it endangers or with which it conflicts, procreation should be the behavior primarily regulated to achieve the public good.

Secondly, the negative effects of unhindered procreation are often masked by large-scale exercises of the right to free movement. By shifting population densities, national and international migration ameliorates the perceived effects of procreation by seemingly overcoming (or delaying a reckoning with) the reality of finite space.⁴¹¹ Were an already-crowded society forced to experience unmitigated growth without the outlet of emigration, the questions raised in this Article would prove more politically salient as the implications of finite space became quickly apparent. Although international migration can be a safety valve in cases of large population growth differentials between countries, the Earth is itself a finite space, so migration merely cloaks the effects of procreation, exacerbating rather than lessening the problem by obscuring the effects of states' regulatory choices.⁴¹²

409. For example, a decrease in mortality rather than an increase in procreation has driven recent worldwide population growth. However, unlike other contributory causes such as immigration patterns or education, this Article presumes that mortality itself is not behavior subject to regulation.

410. See, e.g., Reitze, *supra* note 400, at 362-63. But see generally Hardaway, *supra* note 6 (arguing that overpopulation itself depletes natural resources and degrades the environment).

411. See generally Pierce, *supra* note 395, at 108-17 (discussing court decisions finding that municipalities have duties which require them to absorb a fair share of the growing population, regardless of harms that ensue).

412. Hardaway, *supra* note 6, at 1235-36 (exporting people "becomes the path of least resistance"). If optimized replacement is the guiding star for state regulation, citizens in developed and less developed nations would enjoy different procreative rights. Because this Article generally views the acts of each sovereign society in isolation, it ignores the international justice implications of its conclusion. Different states are entitled, or even

Lastly, the general harm (infringement of others' general rights and liberties) caused by individual acts of procreation aggregates gradually, only slowly manifesting itself.⁴¹³

Because individual acts of procreation appear to have a negligible impact, we overlook them. To the extent these three considerations obscure the fact that procreation impinges on other rights, they forestall serious attempts to address the conflict, moving the focus away from procreation to other behaviors, and perpetuating the common, misguided approach to population law discussed above in Part I.

vi. The primary right

The addition of each new person affects the world's environment in a certain and quantifiable way, creating a footprint, potentially infringing on the rights of others to natural resources—rights grouped under the heading of environmental rights.⁴¹⁴ As discussed above, many environmental harms can be mitigated or eliminated by addressing causal factors other than procreation. There are, however, certain rights upon which each and every act of procreation in a given society inevitably infringes, irrespective of the society's ability to adapt and otherwise balance competing interests. These are the interests, or the collective right, associated with Locke's residual state of nature. This right is primary to, or independent of, the rights for which society and the social compact provide. It represents a subset of environmental rights for which the effects of procreation cannot be ameliorated, and which would place a hard limit on the procreative right. For example, although there is no reason to think that the world could not support a vastly larger, healthier, and happier population by converting every existing natural resource to that end, the specific legal and moral interest at issue here prevents it. Moreover, it is an interest or right that must be protected for governments to remain legitimate.⁴¹⁵

As noted above, Locke refers to the physical world in discussing the state of nature—not some mere abstract concept or metaphor, but natural liberty in a space “free and unpossessed.”⁴¹⁶ Real property and the privacy

morally compelled, to impose lighter or stricter regulations on their citizens' procreative activity depending on local resource constraints; this is a duty they owe to their own citizens, rather than other nations. But this ignores that countries may have legal or moral duties to be “good citizens,” i.e., to modify their immigration, emigration, resource usage, and other policies to minimize any disparity in the rights their respective citizens would enjoy above replacement. These issues are beyond the scope of this Article.

413. Falk, *supra* note 261, at 518-19 (arguing in part that because individual decisions tend to be of both isolated and negligible independent effect, governments cannot rely on voluntary action but must regulate procreative behavior, and citing Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968)).

414. See generally MILLER, *supra* note 219; Hardaway, *supra* note 6, at 1222-23 (describing a quantum of inevitable environmental harm caused by procreation).

415. See *supra* Part II.C.4.

416. Locke here focuses on political rights, but these and the more modern notion of environmental interests, or rights, are entwined. Residual nature is after all, primal nature, with untouched resources. Hardaway argues that the underlying cause of environmental degradation is the demand for resources required to support an ever expanding human

it assures are physical. Each act of procreation poses a direct and obvious threat to the guarantee of natural liberty in space, beating back *in vacuis locis* to an eventual (and perhaps already actual) state of nonexistence. Nature is finite, but procreation is infinite, eventually leaving no state of nature for others to stay in or return to.⁴¹⁷ A partial recognition of this interest has become codified in U.S. statutory law intended to preserve wilderness areas,⁴¹⁸ and is the basis for various international environmental conventions.⁴¹⁹ Collectively, these authorities recognize a specific interest or benefit in creating an enforceable duty of noninterference on other persons, and thus a right—one which constrains procreation.

While the U.S. Constitution does not expressly recognize Locke's interest in a residual state of nature, something parallel to it underlies modern substantive due process law. Reduced to its core, the interest or right in *Griswold* and cases following it is "the right to be let alone—the most comprehensive of rights and the right most valued by civilized

population, with each birth causing quantifiable damage to nature. See Hardaway, *supra* note 6, at 1222-23.

417. See ARNEIL, *supra* note 292, at 1 (For Locke, America was "the second Garden of Eden."). What is being discussed here should be distinguished from the rights of, or moral obligations to, future generations, although these interests certainly place their own hard limits on the procreative right. See generally RAWLS, *supra* note 20, at 284-93 (same); Jeffrey M. Gaba, *Environmental Ethics and Our Moral Relationship to Future Generations: Future Rights and Present Virtue*, 24 COLUM. J. ENVTL. L. 249 (1999) (recognizing moral obligations to future generations). The focus in the present Article is on existing persons who might act to defend their interests better than future generations have defended theirs.

418. See, e.g., 16 U.S.C. § 1131(a) (Supp. IV 2000) ("In order to assure that an increasing population . . . does not occupy and modify all areas within the United States . . . it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness."); 16 U.S.C. § 668dd(a)(2) (Supp. IV 2000) (protecting and restoring "fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans"); 16 U.S.C. § 1531(b) (Supp. IV 2000) ("The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . ."); 16 U.S.C. § 1 (Supp. IV 2000) (conserving "the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."). Cf. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) (Supp. IV 2000) (recognizing that the threat to undeveloped wilderness may give rise to constitutional standing).

419. See, e.g., Convention on Biological Diversity, Jan. 5, 1992, 1960 U.N.T.S. 1087, pmbl. ("[C]onservation of biological diversity is a common concern of humankind . . ."); Convention on International Trade in Endangered Species of Wild Fauna and Flora, pmbl., Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 ("Recognizing that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come. . ."); Convention for the Protection and Preservation of the World Cultural and Natural Heritage, pmbl., Nov. 23, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 ("Considering that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world"); Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, pmbl., Oct. 12, 1940, 56 Stat. 1354, 161 U.N.T.S. 193 ("Wishing to protect and preserve scenery of extraordinary beauty, unusual and striking geologic formations, regions and natural objects of aesthetic, historic or scientific value, and areas characterized by primitive conditions.").

men."⁴²⁰ The Court in *Casey* states that "the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."⁴²¹ In *Lawrence*, the Court recognizes that "there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence."⁴²² These statements parallel Locke's promise of natural liberty.

It will be argued that these interests, unlike those discussed by Locke, are held against the state and not against other individual members of society, that the "right to be let alone" has nothing to do with the physical *in vacuis locis* defined by the absence of others but instead refers to the liberty ensured by right-respecting good governance, in a civil society whose liberties are unaffected by the number of persons occupying it. This however would ignore that the government merely represents and is synonymous with others in society.⁴²³ The presence of others, regardless of the actions of the state, interferes with the right to be let alone, which is synonymous with Locke's natural liberty.

The presence of others also interferes with *Casey's* right "to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."⁴²⁴ When one asks "why am I here?" the *here* part of the question, and the surroundings or context in which it is asked must determine the answer. If the surroundings are defined by others' presence and influences, if one is inevitably trapped in a world of others' making, self-realization will necessarily be affected and its results dictated by others.⁴²⁵

The right to truly be let alone, to enjoy natural liberty and engage in self-realization, competes with and limits the right to procreate. This is not to say that persons cannot achieve liberty in a populous society, but rather that all persons have the right to experience the special natural liberty outside of it if they choose. If we value this right, we must preserve it against an unlimited number of prospective children. This right, like other relational concerns, thus limits the scope of the procreative right.

420. 381 U.S. 479, 494 (1965) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

421. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

422. 539 U.S. 558, 562 (2003).

423. See, e.g., *supra* note 25 and accompanying text.

424. 505 U.S. at 851.

425. See HENRY DAVID THOREAU, *Walking*, in *THE PORTABLE THOREAU* 592, 592 (1964) ("I wish to speak a word for Nature, for absolute freedom and wildness, as contrasted with a freedom and culture merely civil."). See generally HENRY DAVID THOREAU, *Walden or Life in the Woods*, in *WALDEN AND CIVIL DISOBEDIENCE* 3 (1965). See also SOREN KIERKEGAARD, *To the Dedication "That Single Individual"*, in *KIERKEGAARD'S WRITINGS: UPBUILDING DISCOURSES IN VARIOUS SPIRITS* 366, 368 (Howard V. Hong & Edna H. Hong eds. & trans., 1993) ("Even if all individuals who, separately, secretly possessed truth, were to come together in a crowd (in such a way, however, that the crowd acquired any deciding, voting, noisy, loud significance), untruth would promptly be present there."); J.P. SARTRE, *NO EXIT, AND THREE OTHER PLAYS* 47 (Lionel Abel trans., Vintage Books 1955) ("Hell is—other people!"). See generally Freud, *supra* note 334 (tracing neuroses in part to society, to the constant presence of others).

IV. CONCLUSION

Despite the common assumption that there exists a vague, personal and broad (if not unlimited) procreative right, encompassing in its scope various distinct behaviors, that which can legally and morally be regarded as the valuable and protected procreative behavior is much more narrow. This is consistent with any theory of rights and of the public good, for the law must always define and balance behaviors to avoid conflicts. The right to procreate, correctly defined, is a right at least to replace oneself, and at most to procreate up to a point that optimizes the public good.

This satiable and narrow right is not arbitrary, but reflects specific competing rights and duties—especially the rights of prospective children—that both qualify and justify the right. While commentators, courts and even the U.S. Congress have in the abstract inflated the right as limitless in scope and even inviolable, in those instances where the right has been tested in conflicts with other rights, it is invariably limited. This is consistent with the normative relation between law and procreation, and with intuitive limits on the right based on the limited intrinsic value of procreating, its interpersonal nature, and the specific competing rights and duties at issue—those of the prospective children and those of society. Failure to properly define the right in law is tantamount to a public consensus that no norms apply to it, resulting in little if any public direction for citizens regarding their procreative choices and the consequences for their prospective children and other members of society. To procreate is to act with substantial consequence for others, and such acts are subject to law, if only in its role as a guide.

This Article has not considered the manner in which procreative behavior is regulated—when a particular mechanism of state regulation is coercive, and when it is appropriate. It has, however, shown that limiting procreation per se is not inconsistent with a human rights perspective—and indeed is necessary to the integrity and longevity of a system in which rights, mutually limiting and giving rise to correlative duties, have meaning.