Valuing Having Children

Carter Dillard[*]

Are there objective values on which to base the claim of a right to procreate? Can we articulate reasons for having children so powerful that they justify our doing so, as a matter of right, even where it would conflict with the interests and values of others? This Article systematically and critically examines many of the values that, before now, courts and commentators have simply presumed and relied upon when making the claim that there is and ought to be a fundamental right to have children. This Article first develops a methodology for examining the values and interests on which fundamental moral, and eventually legal, rights might be based. It then applies this methodology to three categories of values specific to procreation: autonomy and relational values, as well as self-regarding values, such as the value of creating genetic lineage. This Article then critiques each category as a basis for a right to procreate, rejecting autonomy and relational values, and ending with what might be a surprising conclusion about the final category: that self-regarding values, and the right that would flow from them, are sated when one has a child.

[*] Westerfield Fellow/Assistant Professor, Loyola University New Orleans, College of Law. I am indebted to Jeremy Waldron, Joseph Singer, Isabel Medina, David Archard, Larry Alexander, Daniel Statman, Johanna Kalb, Karen Sokol, Trey Drury, Monica Hof Wallace, Carol Pauli, Dr. Derek Fincham, Caroline Fayard, Justin Boron, and Kate Fletcher for their inspiration and advice. All views expressed are my own.

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Introduction

If there is a universal norm it may be that against taking the life of another, at least absent considerations about who might benefit from the killing or what the person to be killed may have done.[1] And, since some norms are based on values as well as disvalues, it may be that this norm exists because most humans disvalue the act.[2]

If there is universal or objective disvalue in, as well as norms against, the taking of life, are there objective values and norms for the act of giving life? If prospective parents wish to have a child so that they can benefit from her labor, or to prove their virility, or to have an infant to dote upon, or because they want a child of a certain gender, or because they want the numbers of their race to grow, can we say that these are reasons or values on which to base a universal norm against interfering with life-giving? And, would that that norm justify making procreation deserving of protection as a fundamental human right? If not, are there reasons or underlying values that would justify protecting it as such?

This article is concerned with these questions, and provides a critical look – for the first time – at many of the values courts and commentators have always presumed are sufficient to support a fundamental right to procreate. It provides a novel perspective from which to question why we value having children, one that demands objectively good reasons to procreate, beyond mere preference satisfaction.

For example, market-minded readers may immediately think that the way to inquire into the value of procreation would be to create a market of tradable procreation entitlements, as has recently been suggested by David De la Crois & Axel Gosseries.[3] However, while allocating entitlements may indicate relative preferences in a market, it reveals little about intrinsic or objective value. Theorists like Joseph Raz, Thomas Nagel, and Joseph Singer distinguish between objective values and subjective preferences.[4] This article will

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[1] *See* E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARTIVE LEGAL DYNAMICS 286 (1954) ("Homicide with the society is, under one set of conditions of another, legally prohibited everywhere.")

[2] *See e.g.*, Donald H. Regan. *Authority and Value: Reflections on Raz's Morality of Freedom*, 62 S. CAL. L. REV. 995, 1074 (1989) ("[A]ctions may have intrinsic value or disvalue, which must be taken into account in deciding how to act. . . . More specifically, actions have their intrinsic value or disvalue largely in virtue of the moral attitudes which they manifest.") (footnote omitted); RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 78, 79 (1993) (Dworkin implies that actions can have value and disvalue, and he provides the example of the disvalue we find in the act of deliberately destroying a work of art, irrespective of the fact that it happens to result in the loss of art).

[3] *See* David De la Crois & Axel Gosseries, *Population Policy through Tradable Procreation Entitlements*, Université catholique de Louvain, Département des Sciences Economiques Working Paper, at 2, (2006), *available at* http://www.ecineq.org/milano/WP/ECINEQ2007-62.pdf.

[4] *See* JOSEPH RAZ, PRACTICAL REASONS AND NORMS 34 (1999) (distinguishing between subjective values, or what he calls "desires and interests," and objective values); THOMAS NAGEL, THE VIEW FROM NOWHERE 163 (1989) ("The opposition between objective reasons and subjective

be concerned with the former, which tells us things the latter cannot. If we ask someone what the value of a right to have a child is, her response from a market perspective might be: "I would pay $5,000 for the right." This might suggest the right's weight relative to other things she might want to do and for which she would pay more or less, but we still know nothing about why she values procreating, and whether her reasons for doing so justify protecting her having children as a matter of right. Quantifying everything along a simple metric gives us a blinkered view of the matter, and of values that may be unique and incommensurable. Moreover, it tells us absolutely nothing about why other participants in the entitlement market will think that some other person ought not to have entitlements (like a person who is merely hoarding or is using them to obtain child laborers), or why we feel that some things simply cannot be purchased.

Another way to look into the reasons would be to examine what courts and other legal authorities have explicitly or implicitly said about the values underlying legal rights to procreate. I also reject this method, at least as a starting point. I do so primarily because it would make it difficult to sort out the underlying moral values from the legal principles that protect them, that is, difficult to avoid simply jumping ahead to the legal rights in lieu of looking at the values that justify them.

This article takes a very different and novel route. It looks directly at the moral values and interests on which we might build a norm protecting the act of life-giving, or a fundamental right to procreate. It thus moves from our values in the direction of moral rights, and eventually legal rights. This approach tends toward rejecting our subjectivist zeitgeist, which views the choice to have a child as a private matter, and instead asks whether there are objectively good reasons to have children, reasons that others can accept enough to respect that behavior as a right, despite competing interests.

Part I is methodological. It describes a method for ascertaining why we might value procreating as a moral, and eventually legal, right. It also accounts for how legal authorities faced with the same question might actually look at moral values prior to looking at sources of law. Part I begins by placing theoretical claims of rights before judicial authorities, and then narrows the scope of their inquiry, focusing upon a particular view of objective values and rights in general. This method could be called weakly descriptive in that it seems intuitive that actual authorities try to take the step of searching for moral value in the conduct that a claimed right is supposed to protect. The method is also prescriptive, in that it seems desirable to get at foundational moral values without our thinking being infected early on by legal principles and inherently authoritative legal proclamations about moral values.[5] But the method is still

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inclinations may be severe, and may require us to change our lives."); Joseph Singer, *Critical Normativity*, Harvard Public Law Working Paper No. 08-46m, at 1-3, (2008), *available at* http://ssrn.com/abstract=1278154 ("I want to argue that values are not the same as mere preferences. . . . [C]laims are different from preferences because they constitute moral demand directed to others. . . . [A] demand directed to others as well as to ourselves about the appropriate contours of conduct for human beings in society.") Singer argues that critical thinking does not undermine normativity but supports it – that is, we can reason our way towards moral objective truths. *Id.* at 4.

[5] For a description of how conflating law and morality can make inquiries into morals difficult see Liam Murphy, *Better to See the Law This Way*, 83 N.Y.U. L. REV. 1088, 1096-99 (2008) ("They say it is law,

jurisprudential because we are looking at moral values in order to determine whether to eventually base a legal right on them.

Part II applies this methodology to many of the values we associate with procreation. It first categorizes those values, breaking them into the following loose groupings: (1) theories that base the right on the value of autonomy itself, and (2) theories that actually explain (or give reasons for) why we would value procreation as an act, including (a) relational reasons (deriving from the new relationships procreation creates) and (b) self-regarding values, or values from the perspective of the procreator, such as perpetuating/creating a genetic lineage. It then makes some conclusions about how each category of values might serve as the basis for a right to procreate. Part II, and the article, end with what might be a surprising conclusion about one category of values or interests: that they, and the right that would flow from them, are satiable.

I. Putting the Question in Context

It will be vital to keep in mind throughout the article a working definition of the concept of procreation. For the purposes of this article, an act of procreation refers to any voluntary 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. Note that this definition may not require traditional coital procreation, or even require that the procreator and resulting child be genetically related. In theory, a person that clones themselves will have procreated. The necessary and sufficient condition is the creation of a person that did not actually exist before.[6]

With that definition in mind, we can begin to put the question of what values might support a right to procreate into a legal context. A common way for lawyers to examine the values underlying a legal right is to first examine judicial opinions and other sources of law for articulations of moral values. They then might use those values to argue for a particular description/interpretation of the legal right.[7] However, that method has some drawbacks. For example, it would be difficult to isolate the moral matters from the legal matters. The U.S. Supreme Court in *Eisenstadt v. Baird* said that if "the right of privacy means anything it is the right of the individual, married or not, to be free from

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and so it probably is, which means that, because of the way law and morality are mixed, it cannot be too bad.")

[6] Throughout the article I refer to a particular value or interest I call self-replication, or self-replacement. I use these terms interchangeably. As will become more clear in Part II.C, these terms mean the same thing, though procreation (even cloning) is not self-replication or self-replacement, strictly speaking. *See* Frances M. Kamm, *Cloning and Harm to Offspring*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 65, 66 (2000) ("But we all know, strictly speaking, the clone will not be you: 'numerical nonidentity' dictates that there are two different beings.")

[7] Ronald Dworkin and John Robertson use this method in part, specifically looking at United States Supreme Court precedent, to support or arrive at their respective principles of procreative autonomy and procreative liberty. *See* RONALD DWORKIN, FREEDOM'S LAW 102 (1996) (arguing that the principle is integral to a line of Supreme Court precedent); John Robertson, *Liberalism and the Limits of Procreative Liberty: A Response to My Critics*, 52 WASH. & LEE L. REV. 233, 236 (1995) ("I am drawing on widespread notions about the importance of procreative decisions . . . which is reflected widely in our practices and considered intuitions . . . .") (footnote omitted).

government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[8] Is the Court indicating something about the moral value of procreative freedom, apart from describing the legal right? How would we know? Moreover, if we want to decide whether this is a claim based on moral values underlying the legal right *to* procreate, does it matter that the court said these words in a case finding unconstitutional a ban on contraceptives, i.e. a case protecting the right *not* to procreate?

Moreover, how is the court making a claim about moral values if it is here interpreting a constitutional provision, or prior case precedent? Worse yet, if the court is saying something simply about the law, are we nonetheless likely to also take it as an authoritative claim about the morals merely because of the court's authority – such that our thinking about the moral values that might underlie a moral and eventually legal right to procreate is permanently infected with legal principles? If I want to understand the values underlying a moral right to procreate, one which might be made into a legal right, starting with the "law" presents problems, or at least some of the inevitable pitfalls Julie Dickson identifies in all descriptive as well as evaluative jurisprudence.[9]

A better method for getting at the values on which we might build moral and eventually legal rights would be to simply presume, for the sake of argument, (1) that there is a gap in a particular area of rights law, and (2) that a court or other authority has been called upon to fill the gap, i.e., to create law for application where no existing law could be applied.[10] The authority would then be considering a range of potential values on which to build a moral, and eventually legal, right. This method would permit us to reach the moral values upon which we might build the right while avoiding legal principles infecting our thinking early on. It would allow us to get at and critique the values that might justify a right, without confusing those values with other matters (economic, social, political, etc.) that might have led courts and legislatures to talk about the right in a certain way. This method would avoid many of the inevitable criticisms from both positivists and interpretivists that arise when one argues for a particular interpretation of sources of law based on the values expressed by the law,[11] e.g., that a case recognizes such-and-such a value or interest underlying a right to procreate. At the same time the

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[8] Dworkin, *supra* note 7, at 102 (*quoting* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).

[9] *See* Julie Dickson, *Methodology in Jurisprudence: A Critical Survey*, 10 LEGAL THEORY 117 (2004) (describing the inevitable methodological quandaries one finds when undertaking general and descriptive jurisprudence, evaluative and justificatory jurisprudence, and all points in between); *see also* Aaron Rappaport, *The Logic of Legal Theory: Reflections On the Purpose and Methodology of Jurisprudence*, 73 MISS. L.J. 559 (2003) (offering an alternative methodology that is both descriptive and evaluative).

[10] *See* Peter Sankoff, *The Search for a Better Understanding of Discretionary Power in Evidence Law*, 32 QUEEN'S L.J. 487, 502-503 (2007) ("In brief, Hart contended that when a judge deciding a case found a legal rule to be uncertain or unclear - in what Hart called the 'penumbra' - the judge would be forced to exercise discretion by making a policy choice as a means of filling the gap between the established law and the result needed.")

[11] In 1992 Dean Rodney Smolla wrote an article based on a fictitious Supreme Court opinion written in 2023 which upholds as constitutional a federal law limiting the size of families in the United States to two children, with some exceptions. *See* 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). This article takes a different, but related, approach.

method is jurisprudential because it looks at moral values from the perspective of determining whether to eventually base a legal right on them.

As I see it, the method is neither positivist (describing the law) nor interpretivist (interpreting the law in a particular light) because the authority in question would not have yet reached the point of looking at sources or principles of law at all. Though, at the same time, we might be able to assume that positivists acknowledge some judicial discretion in cases where gaps in the law exist, and that in order to fill this gap it is permissible, if not expected, that one consider the relevant values.[12] We might also be able to assume, for the sake of some interpretivists, that such a step would be consistent with eventually positioning oneself to justify state coercion, i.e. with the eventual determination of the legal right. Finally, we might assume that, if we move from moral values, taking them as a *given*, toward norms or legal rights, we are not committing what has been called the naturalistic fallacy[13] such that the whole endeavor goes down in flames.

Thus, the following method and discussion accepts the positivists' sources or separation thesis (stated crudely, that law and morality are separate),[14] then takes the first step a court might take in exercising pre-interpretive discretion, specifically relying on Joseph Raz's view of moral rights. As discussed above, the method could be called weakly descriptive in that we are dealing with fictitious cases, but it seems that actual authorities could take the step of searching for moral value in the conduct that a claimed right is supposed to protect. The method could also be called weakly prescriptive in that it seems desirable avoid our thinking being infected early on by inherently authoritative legal proclamations about moral values if we are examining the values in isolation.

Our goal then is first to create a plausible description of the various moral values that legal authorities, when faced with having to fill a gap in the law, might consider. Our second goal is to evaluate those values as bases for a right to procreate, determining which can and cannot lead to a defensible right. But first we have to introduce our authorities, define the scope of their inquiry, and say something about how they view rights, values, and how the two relate.

A. Our Authorities

Let us assume that both the U.S. Supreme Court and the United Nations Human Rights Committee have before them a similar appeal and individual complaint, respectively. The appellant before the Court asserts that a state court probation order that prohibits him from having a child until he can demonstrate adequate means of supporting his existing children violates his right to procreate, which he claims is protected under the U.S.

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[12] This might, however, be beyond the judicial discretion that Hart envisioned as a result of the open texture of law in that it is not using existing law at all. *See* H.L.A. HART, THE CONCEPT OF LAW 272 (1994) (discussing judicial gap filling).

[13] "There is nothing in the arguments referred to [the naturalistic fallacy objection and others] which suggests that given a certain set of values it is impossible to use them to justify the validity of derivative values or of rules or other reasons for action." Raz, *supra* note 4, at 12.

[14] *See generally* Dickson, *supra* note 9.

Constitution.[15] The claimant before the Committee is a national of the People's Republic of China (PRC) who asserts that his having been forced to pay a social compensation fee for having a third child, pursuant to state family planning policies, violates his right to procreate,[16] which he claims is protected under Article 23(2) of the International Covenant on Civil and Political Rights (ICCPR).[17] Here we are assuming that China has ratified the ICCPR and is a party to the First Optional Protocol.[18]

Let us also assume, again for the sake of argument, that both the Court and the Committee ("our authorities") are aware that there is a gap in positive law sources such that these will be truly hard cases (in fact that may actually be the case).[19] While they are

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[15] This claim is based on the case of David Oakley, who fathered nine children with four different women but intentionally refused to pay child support and was behind in payments in excess of $25,000. *See* State v. Oakley, 629 N.W.2d 200 (Wis. 2001), *cert. denied*, 537 U.S. 813 (2002) (upholding as constitutional a probation condition prohibiting defendant from having children until he could demonstrate adequate means of support).

[16] This claim is based loosely on the successful application for asylum in the United States of a PRC national who, despite state policy, had three child children in an attempt to father a male child. *See* Matter of C-Y-Z, 23 I & N Dec. 693, 921-22 (B.I.A. 1997). For a description of recent changes to state family planning policy see US House of Representatives: Committee on International Relations, "China: Human Rights Violations and Coercion in One Child Policy Enforcement" December 14, 2004, Submission by Human Rights ("HRC") in China, p. 2. HRC testified that:

> The Law on Population and Family Planning was passed . . . in an effort to address abuses by local family planning workers . . . . [t]he new law bans practices such as abandonment, infanticide, and the use of physical force or the confiscation of property as a means of enforcing the policy. The law also replaces the fines that had once been levied for out-of-plan births and implements instead a 'social compensation fee.' The fee and payment schedule for couples that have out-of-plan births is based on average county income levels.

[17] Article 23(2) states that "[t]he right of men and women of marriageable age to marry and to found a family shall be recognized." ICCPR art. 23(2). *See also* 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). The comment states that:

> The right to found a family implies, in principle, the possibility to procreate and live together. When States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory. Similarly, the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.

[18] International Covenant on Civil and Political Rights and Optional Protocol, adopted Dec. 16, 1966, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 301 (1967) ("ICCPR").

[19] *See, e.g.*, Carter J. Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. L. J. 1 (2007) (arguing that neither U.S. constitutional law nor sources of international law protect an absolute right to procreate, but citing a substantial number of commentators arguing the opposite); Carter J. Dillard, *Child Welfare and Future Persons*, 42 GA. L. REV. _ (2008) (forthcoming) (on file with author) (arguing that temporary no-procreation orders are consistent with any constitutional right to procreate, but citing a substantial number of commentators arguing the opposite).

familiar enough with the relevant sources of law to know that there is a gap with regard to the cases before them, our authorities have not used those sources to form views about the morality or the legality of procreating. Rather, they are at one of the earliest stages of their decision, still adhering to the positivist conception of law, but preparing to fill the gap much the way a legislature might when faced with a novel problem.[20]

B. The Scope of Inquiry

To define the scope of inquiry, we have to exclude certain issues that are not before our authorities and will not be discussed.

First, we must remember that we are looking for values to eventually support a legal right to procreate, not to support any given law that relates in some way to procreation. To say that having a child is valuable because it will ensure one's genetic lineage, and that therefore all persons have a right to have a child, does not mean that all laws regarding procreation (i.e., laws regulating marriage, incest, conjugal visits in prisons, etc.) must derive from the value of genetic lineage. We will have specified a basis only for the legal right to have a child, or said that there is a reason the law – whatever *its* reasons - cannot prevent someone from having children at all. In other words, while in Part II.C I argue that the value of self-replication or self-replacement is sated when a person has his/her first child, and that as such a one-child quota may not violate a right to procreate, it does not follow that we ought to have one-child quotas. The PRC may have a legion of values (moral, conventional, economic, etc.) underlying its complex family planning policies,[21] but we need not look at them to understand the reasons a person has for claiming a right against those policies.

Secondly, because this article looks into the reasons that support procreation and a right defending it, unintentional or reasonless acts of procreation (which might include prospective parents sleepwalking their way into parenthood under the influence of social norms they have never examined, as well as the more obvious cases) fall outside of its scope. Our authorities are faced with claimants prepared to give considered reasons for having children. Thirdly, we are not concerned with the right not to procreate, or the positive right one might have to financial or other assistance to procreate, but instead the Hohfeldian general negative claim-right: that right which creates duties on all others, including the state, not to interfere with one's procreating. Although, my conclusions in Part II.B may very well support a positive right to assistance in procreating, I will not pursue that issue here.[22]

Fourthly, and perhaps most importantly, because our authorities are looking for some initial objective moral value in the procreative act, they will not yet be concerned with the potentially conflicting interests or values of others.. These might include the welfare

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[20] *See* Sankoff, *supra* note 10, at 502.

[21] *See, e.g.,* ANDREI MARMOR, POSITIVE LAW AND OBJECTIVE VALUES v (2001) ("Law is founded in social conventions.")

[22] *See infra* note 196 and accompanying text. Others accept a strong negative right while rejecting a positive right altogether. *See* JOHN ROBERTSON, CHILDREN OF CHOICE 23 (1994).

interests of the prospective child, or the environmental and other well-being interests of other persons (including future persons) in society. Procreation is distinct from any other behavior because it creates autonomous and active moral agents that immediately begin to have an impact upon the interests of others, and for that reason, it is hard to evaluate the act in isolation.[23] The competing interests of others in society are so compelling that they often invade attempts to specify the right in isolation. We see this in the procreative right analyses of Onora O'Neill and David Archard.[24] But for that very reason, theorists have almost overlooked or presumed any objective values or interests considered exclusively from the perspective of the procreator. The Malthusian focus on apocalyptic overpopulation draws us away from considering whether there are objectively valuable reasons for having children, and whether our world might have been a much better place had we as a species limited ourselves to procreating when we had objectively valuable reasons to do so.

Nor will we be concerned with the weight of the reasons or values underlying a right to procreate relative to the competing interests of others, that is, how they might stack up against any competing reasons not to procreate. It seems that whatever value people can attach to procreating, there are other values (like an interest in wilderness) which might outweigh the procreation value were the two to conflict. We must know what is the value we attach to procreating, and why, before we can put it on the scales against a competing value.

Lastly, because we are isolating the moral value of procreating from competing values, we need not be concerned with issues of when it might be appropriate to derogate from any right to procreate – which was Malthus' real concern. Ideally, we should be able to define the content and scope of the right before ever getting to the question of whether it is appropriate to derogate.

The following discussion lays out the rights theory to be used. Because that theory relies on values, the section immediately following it lays out a theory of value.

C. Our Authorities' View of Rights

The initial discussion above suggests that our authorities will be exhibiting a very particular view or theory of moral rights (again, not legal rights because this analysis occurs before the interpretation of any sources of law).

C.1. Value or interest based rights

When focusing on the general, negative claim-right to non-interference in procreation, our authorities are seeking to understand and to appreciate the value the right-claimants

[23] A parallel approach to the one taken in this article but based on competing values might look something like T.M. Scanlon's contractualism. *See generally* T.M. SCANLON, WHAT WE OWE TO EACH OTHER (1998). In that case we might ask how our prospective parent would negotiate with all of their possible future children regarding when they will have them, and how to divide the scarce resources among them.
[24] *See infra* note 57 and accompanying text.

attach to procreating. Specifically, our authorities would be viewing rights as based on values or interests, and as first deriving in some way from the status of the right-claimants as fellow humans. "The interests approach is thus primarily concerned to identify the social and biological prerequisites for human beings leading a minimally good life."[25] Our authorities would be looking for some objective, shared value underlying the claimed right that both they—the authorities, the rights-claimants, and presumably all humans share in procreating—one that justifies making the moral right to procreate into a legal right, as our authorities fill the legal gap.[26] Our authorities will empathize with the rights-claimants in order to try to feel the same interests and values that the claimants assert. This would be the kind of reasoning that Duncan Kennedy called "rights reasoning," which "allows you to be *right* about your value judgments, rather than just stating 'preferences'. . . ."[27]

This view of moral rights grounds the right in the objective values and interests of the right-claimant, which is the same view of rights endorsed by Raz.[28] For Raz "[a]ssertions of rights are typically intermediate conclusions in arguments from ultimate values to duties."[29] They save the time we would otherwise spend debating ultimate values.[30]

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[25] Andrew Fagan, *Human Rights*, at § 4.b, INTERNET ENCYCLOPEDIA OF PHILOSOPHY (2007), available at http://www.iep.utm.edu/h/hum-rts.htm; *see also* Jeremy Waldron, Introduction, THEORIES OF RIGHTS 14 (Jeremy Waldron ed., 1984) (referring to shared interests as the basis for human rights); John Hasnas, *From Cannibalism to Caesareans: Two Conceptions of Fundamental Rights*, 89 NW. U. L. REV. 900, 918 (1995) ("Raz views rights as 'based on the interest which figures essentially in the justification of the statement that the right exists.'") (*quoting* Joseph Raz, *On the Nature of Rights*, in THE PHILOSOPHY OF HUMAN RIGHTS 44, 47 (Morton E. Winston ed., 1989)).

[26] This is not inconsistent with positivism. *See* Hart, *supra* note 12, at 79 ("the concept of a right belongs to that branch of morality which is specifically concerned to determine when one persons' freedom maybe limited by another's and so to determine what actions may appropriately be made the subject of coercive legal rules.") (footnote omitted)

[27] DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 305 (1997), in H. Steiner and P. Alston, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 481 (2000), (emphasis added). Kennedy describes rights as objective and universal, in that they derive from values that everyone shares or ought to share. *Id.*

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> According to Raz, a person may be said to have a right if and only if some aspect of her well-being (some interest of hers) is sufficiently important in itself to justify holding some other person or persons to be under a duty. Thus, when A is said to have a *right* to free speech, part of what is claimed is that her interest in speaking out freely is sufficiently important in itself from a moral point of view to justify holding other people, particularly the government, to have duties not to place her under any restrictions or penalties in this regard.

Jeremy Waldron, *Rights in Conflict*, 99 ETHICS 503, 504 (1989) (footnote omitted). "Typically rights are established by arguments about the value of having them. . . . Thus the right that people who made promises to us shall keep them depends on the desirability, that is the value, of being able to create bonds of duty among people at will." Joseph Raz, *Human Rights Without Foundations*, University of Oxford Faculty of Law Legal Studies Research Paper Series, at 17, (2007) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999874).
(footnote omitted).

[29] JOSEPH RAZ, THE MORALITY OF FREEDOM 181 (1986).

[30] *Id.* Of course, in doing so, they might also obscure a lack of particular value underlying that which has traditionally been claimed to be a right.

Raz distinguishes between core rights and their derivatives.[31] If the right to procreate is a core right, something like one's right to contract with a midwife would be a derivative right. He also distinguishes between intrinsic and instrumental values. "Something is instrumentally valuable to the extent that it derives its value from the value of its consequences . . . . [h]aving intrinsic value is being valuable even apart from one's instrumental value."[32]

Finally, Raz identifies what he calls ultimate value, which is important for our discussion because "[a] right is a morally fundamental right if it is justified on the ground that it serves the right-holder's interest in having that right inasmuch as that interest is considered to be of ultimate value. . . . "[33] Ultimate values for Raz, are constitutive of the objective well-being of the right-holder—they are those values that "need not be explained or be justified by (their contribution to) other values."[34] It would seem then that in Raz's system of rights, a morally fundamental right must be based on at least one value that is both ultimate (in the sense of being constitutive of the well-being of the right-holder) and intrinsic (not deriving its value from its consequences).

For Raz, rights (beyond morally fundamental ones) can protect, or be based on, instrumental, intrinsic, and ultimate values, but only those whose well-being is intrinsically valuable can have rights.[35]

Raz's conception of rights will be helpful in our analysis below, but I don't believe Raz tells us how to definitively determine which specific interests or values merit rights protection.[36] And, while Raz does not "deny that there may be universal human rights which people have in virtue of their humanity alone,"[37] he does not generally derive underlying values and interests from the right-claimant's humanity. Therefore, in looking for an objective value by empathizing with the right-claimants as fellow humans, our authorities may be using an approach which differs slightly from Raz's, perhaps more like that of Jeremy Waldron, for example.[38]

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[31] *Id.* at 169 ("A right is based on the interest which figures essentially in the justification of the statement that the right exists. That interest relates directly to the core right and indirectly to its derivatives.")
[32] *Id.* at 177.
[33] *Id.* at 192.
[34] *Id.* at 178, 200-201. Raz also distinguishes between intrinsic values that are valuable irrespective of what else exists, and constituent values which are intrinsically valuable but also add value to other intrinsic values. *Id.* Raz uses the example of works of art. They are intrinsically valuable in that they can be appreciated (as opposed to being sold to get something else of value), but they also constitute part of a good life (an ultimate value), i.e a life that in part involves appreciating art. *Id.*
[35] *Id.* at 179-180.
[36] Leslie Green, *Three Themes From Raz*, 25 OXFORD J. LEGAL STUD. 503, 520 (2005) ("How exactly do we know whether a certain interest warrants holding someone duty-bound? Raz's general account of rights does not say. . . . That does mean, of course, that we are not going to be able to 'apply' Raz's general theory of rights straight out of the box, but most general theories in jurisprudence are like that.")
[37] Raz, *supra* note 28, at 16.
[38] For example (and stating it crudely for the sake of brevity) Jeremy Waldron appears to derive the general interest right to property from the interest all human share in having it. *See* JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988); *see also* Fagan, *supra* note 25, at § 4 (regarding deriving human rights from our shared morality).

Note too that this view rejects a relativist or subjectivist approach to determining rights. Under that approach it would be impossible to ground the right on some objective value because no such value exists. The view proposed here would also (at least at this initial stage in our authorities' analysis) reject a consequentialist account of rights because our authorities begin by looking at how rights derive from the values humans share, rather than the consequences (good or bad) of having a particular right. A consequentialist approach to determining procreative rights might underlie recent proposals to create tradeable procreation entitlements,[39] for example, but it would not begin with seeking some common moral value justifying the right itself.

C.2. Choice or liberty based rights

By first looking for a common value or interest underlying the conduct the right-claimants seek to protect, our authorities would also be rejecting a choice-based view of rights. That view is espoused by H.L.A. Hart and Richard Tuck (and perhaps later refuted by both)[40] during their attack on the concept of natural rights. It holds that moral rights analysis begins with the "idea of the individual's sovereignty within the relevant section of his moral world."[41] Further, "[i]t will also tend as a consequence to stress the importance of the individual's own capacity to make moral choices, that is to say, his *liberty*. If active [or choice-based] rights are paradigmatic, then to attribute rights to someone *is* to attribute some kind of liberty to them."[42]

Tuck and Hart are often lumped together as architects of choice-based rights theory,[43] but this is not entirely accurate. While Hart's theory of choice-based rights and early Tuck's initial liberty-centered view of rights were quite similar, in later years Tuck is highly critical of any rights theory, including, albeit indirectly, Hart's.[44] Hart's theory of choice-based rights begins with a minimal moral account of rights: "[I]f there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free."[45] That is the objective moral value on which all moral (again, not legal) rights are based. Under this account rights are hollow—they have no intrinsic scope or limit.

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[39] *See* De La Crois, *supra* note 3, at 2.

[40] *See* Waldron, *supra* note 38, at 100 (arguing that Hart eventually rejected much of his early choice theory). Tuck is discussed further below.

[41] Michael P. Zuckert, *Do Natural Rights Derive From Natural Law*, 20 HARV. J. L. & PUB. POL'Y 695, 699 (1997) (*quoting* RICHARD TUCK, NATURAL RIGHTS THEORIES 6-7 (1973)). Hart found that general rights to non-interference do not originate from "the character of the particular action" but is simply a "particular exemplification of the equal right to be free." H.L.A. Hart, *Are There Any Natural Rights?*, in Waldron, *supra* note 25, at 88. For Hart, the person interfering with the freedom of another has the obligation to morally justify the interference, and that interference is normally not justified based upon the character of the activities interfered with. *Id* at 89. This seems to place the burden of production on the state in our fictitious cases.

[42] Zuckert, *supra*, at 699. Zuckert, however, finds that the "Hart-Tuck theory does not, however, provide an adequate analysis of rights, even formally." *Id*. at 700.

[43] *See, e.g.,* Zuckert *supra* note 41, at 689.

[44] Tuck attributes the notion of rights as a form of small-scale sovereignty to Hart, *see* Richard Tuck, *The Dangers of Natural Rights,* 20 HARV J. L. & PUB. POL'Y 683, 688-689 (1997), before thoroughly criticizing it. *Id*. at 689-693.

[45] Hart, *supra* note 41, at 77.

> The moral justification [for the right] does not arise from the *character* of the particular action to the performance of which the claimant has a right; what justifies the claim is simply—there being no special relation between him and those who are threatening to interfere to justify that interference—that this is a particular exemplification of the equal right to be free.[46]

Hence we skip Raz's first step of looking for or finding any underlying interest in or value (what Hart calls *character* above) of the action. Presumably, for Hart, the initial burden would fall on the state to articulate its moral right to interfere with the procreator, which it would attempt to do based on the procreator's interference with others' freedom (through overcrowding and pollution, for example).

As indicated above, Tuck becomes critical of Hart's theory. In particular, he criticizes the sovereignty approach and its "minimal" account of moral rights, which is historically centered on Hobbes's subjectivist view of morality[47] and the consequent singular right of self-preservation,[48] Under this account "the ascription of a right to someone does not require us to make any estimate about the person's inner condition. . . .[this] person's inner life could be entirely inscrutable, but we have decided that in this particular area he is sovereign."[49] Tuck, on the other hand, looks for "the most detailed and confident account of the inner states" of individuals, and embraces utilitarianism.[50] The later Tuck appears to want to fill the hollow and largely procedural rights that make up the choice-based model.[51]

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[46] *Id* at 87-88 (emphasis added).
[47] *Id.* at 690.
[48] *Id.* at 687-688.
[49] *Id.* at 689-690.
[50] *Id*. at 690-691.
[51] Tuck's critique of rights is unabashedly utilitarian. He argues that "unless certain special and unusual conditions are in place, a theory of natural or human rights is more likely to lead to a weakening of civil liberties embedded in the legal system of a society." Tuck, *supra* note 44, at 684 (1997). Tuck uses the example of Britain's suspending trial by jury in terrorism cases out of concerns for national security during a period of escalating violence by the Irish Republican Army. *Id.* at 691. He argues that this flowed from the natural or human (and perhaps really moral) rights perspective in which "the prime duty of a government is to secure the lives of its innocent citizens." *Id.* According to Tuck:

> It might well be argued from a utilitarian perspective that the long-run harm of abolishing trial by jury significantly outweighs the short-run benefit of preventing the deaths of some innocent people. This is an argument that is very difficult to make in the language of rights, as the harm caused to the public by the abandonment of trial by jury may be quite hard to express in the bold terms that rights discourse seems to require.

Id. But is it really so hard to imagine how the modern human rights regime could be used to criticize suspending trial by jury? Would we really expect the best arguments to come from utilitarians? Tuck misses the point. Modern interest-based rights theorists (having moved beyond Hobbes' minimalist account) need not make an attenuated argument based on unknowable calculations of harm because the defendants' interest in fair process is itself knowable and valuable to all who can envision themselves being tried.

Regardless of the merits of choice-based rights theories, it is clear that our authorities are not going down that path when they try to empathize with the right-claimants in search of a common, objective value in having a child. If they followed Hart's and Tuck's early proposals they would be looking to the state's justification for interference with the rights-claimants' presumed sphere of free-choice (which pushes the inquiry, not surprisingly, towards positive law). They might also begin there under Ronald Dworkin's theory of rights which is based on limiting the reasons for which the state can act.[52] But they would certainly not start their determination by sifting through the right-claimants' reasons for wishing to have the particular behavior protected.

C.3. Choosing interest based rights

While we can critique the interest-based model of rights specifically, or even the use of rights as a mode of discourse more generally,[53] we can also accept, per Raz and others discussed above, that the interest-based model is at least a defensible means of determining rights. More importantly, it is the more appropriate means for our authorities to use in this case for the following reasons.

First, as we shall see, it is a view of rights adhered to by many of the theorists who discuss the values underlying procreation, and who will serve as proxies for our fictitious rights-claimants. These theorists often appeal to specific values and interests that others ought to recognize as grounds for duties of noninterference. By skipping Raz's first step of identifying an underlying interest or value (and thus carving out a hollow right, or sovereign territory of choice) we never examine the theorists, i.e. the rights-claimants, arguments. We are never given a reason for why the conduct at issue must be protected.

Secondly, there would be something presumptuous in using a choice-based model in these cases. Because our authorities are gap-filling, they are going to make some moral assessments before looking at sources of law. Hart's analytic jurisprudence approach might aptly describe property and contractual rights found in legal instruments (a right-holders choice regarding an extant legal duty). But, as he admitted, his analysis of rights does not necessarily extend to "the rights recognized in social and political morality."[54] If we have no prior legal duty on which to base the right, we have to first look for reasons to value and protect particular conduct.

John Oberdiek made a similar point in a recent article advocating for specific rights over general rights. He said that "[r]ights depend on reasons and it is those underlying reasons that are normatively fundamental. The more basic considerations upon which rights are based are justifications for rights, and as such, rights themselves are not normative

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[52] *See* Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 J. LEGAL STUD. 301, 301 (2000) ("Dworkin's theory of rights is based on a conception of limits on the kinds of reason that the state can appropriately invoke in order to justify its action. 'Rights as trumps' does not . . . protect certain key interests against any demands made in the name of the general good.")

[53] *See e.g.*, Mark Tushnet, *An Article on Rights*, 63 Texas L. Rev.1363 (1984).

[54] Jeremy Waldron, *supra* note 25, at 9 ("Hart has conceded, however, that this analysis does not offer an adequate account of all legal rights, let alone the rights recognized in social and political morality.") (citation omitted)

bedrock, practical reasons are."[55] Rights are "only as strong as their underlying justifying reasons."[56] Similarly, David Archard and Onora O'Neill have pursued something like Oberdiek's specificationism as a means of limiting the procreative right.[57]

Thus, contrary to the approach of the choice-theorists, at least when *first* determining whether there is a moral right that prevents interference with conduct (and thereby creates the protective freedom of a right), we should look for prior moral facts that justify the conduct as deserving of that protection. In this way, we do not end up basing freedom on freedom.

The approach I advocate seems to run headlong into Jeremy Waldron's defense of a moral right to do wrong, which rejects the argument that only morally permissible actions can be the subject of moral rights.[58] But there are three reasons why I think in the end my argument does not run afoul of Waldron's points. If we identify an underlying value or interest in procreating that would justify a duty of non-interference, it does not follow that all acts of procreating so protected will be morally unobjectionable or even morally permissible. The right would spring from a morally valuable interest in a certain range of conduct, within which we might still find immoral behavior. For example, a person may choose to exercise a moral right to have a child based on the moral value of creating a new relation with someone he/she will love. This would ground the moral right. However, that person may have the child and exercise his/her right knowing that he/she will not be able to give the child all the attention it deserves. Even moral rights that spring from objective values leave room for behavior which we might agree is still wrong.

Moreover, to say that our claimants have a moral right to procreate is not to say the right itself is a reason to procreate, or that they must procreate. The right does not negate their choice not to procreate, much the way speech rights do not negate the choice not to speak. Finally, we might find that procreation is different from the matters of self-

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[55] John Oberdiek, *Specifying Rights out of Necessity*, 28 OX. J. LEGAL STD. 127, 133 (2008).

[56] *Id.* Oberdiek notes that Nagel seems to reject this view of rights, but that Nagel's view can in fact be reconciled with it (and with Raz's interest-based view of rights): "Nagel seems to implicitly recognize that rights are justified by recourse to some more basic consideration and are not themselves normatively fundamental." *Id.* at 133. Oberdiek moves from this point towards specificationism by arguing that "the general conception of rights reifies rights, and erroneously invests special moral significance in an intermediate conclusion about what is permissible to do instead of in the final conclusion about what it is permissible to do." *Id.* at 134.

[57] *See* David Archard, *Wrongful Life*, 79 PHILOSOPHY 403, 415 (2004) ("An adult may exercise his or her reproductive powers to bring a child into being only if the child in question has the reasonable prospect of a minimally decent life."); *id.* at 416 ("Onora O'Neill similarly argues that 'the right to beget or rear is not unrestricted, but contingent upon begetters and bearers having or making some feasible plan for their child to be adequately reared by themselves or by willing others. Persons who beget or bear without makin any such plans cannot claim that they are exercising a right.'") (*quoting* 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).

[58] *See* Jeremy Waldron, *A Right To Do Wrong*, 92 ETHICS 21(1981); *id*. at 33 n. 13.

constitution where Waldron finds choice to be so integral,[59] in that, as will be discussed below, creating another person is uniquely interpersonal or other-constitutional.[60]

At this point, assuming that objective interests and values will be the foundation upon which our authorities will build any procreative right, we can inquire into what some have claimed about objective values and interests generally, and consider how our authorities might think about these matters.

D. Determining Objective Values

As I said above, this is a weakly descriptive method: it is plausible for actual authorities to decide cases in this way, at least at the very first stages. For example, imagine that a judge is considering a case in which the plaintiff claims the local animal cruelty code (which is vaguely written and has never been interpreted by a court before) infringes on his right to torture animals. The judge's first reaction, before ever thinking about sources of law, might be one of involuntarily empathizing with the plaintiff; or on some level the judge may automatically give consideration to the value that the plaintiff ascribes to torturing animals. Similarly, our authorities will begin by empathizing with the rights-claimants' valuation of the desired conduct. In this way, our authorities can come to understand what it would feel like to be a claimant who wants to procreate, but who is subject to a legal limitation that prevents him/her from doing so.[61]

Our authorities will need to understand why procreation should be protected conduct. They will therefore assume the rights-claimants have reasons for the conduct, and the protective right they propose,[62] because our authorities believe that "morality is based on the idea that we must justify our actions by reasons that others could accept (or that they could not reasonably reject)."[63] Following John Finnis and Joseph Raz, our authorities believe that "people reason according to what they find valuable."[64] Moreover, our

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[59] *Id.* at 34-35.
[60] *See infra* notes 165-167.
[61] Jeremy Waldron describes something similar in contrasting his methodology from that of Ronald Dworkin in interpreting standards of law prohibiting cruel, inhuman, and degrading treatment. Waldron refers to a "shared conscience" or "a more-or-less shared sense among us of how one person responds as a human to another human." Jeremy Waldron, *Cruel, Inhuman, and Degrading Treatment: The Words Themselves*, at 42-43, (August 30, 2008), *available at* http://ssrn.com/abstract=1278604. However, as may become clear in the discussion that follows, I believe the process I describe is closer to what Waldron calls "asking an objective moral question at the level or critical morality" (and which he has reservations about) than his "positive morality" or "common conscience" approach. *Id.*
[62] "Raz argues that if you often cannot understand the reasons that cause you to believe or act, you cannot understand yourself – you lose the ability to control your life, and, indeed, cease to be yourself." Cheryl Misak, *Review Article: Engaging Reason: On the Theory of Value and Action by Joseph Raz*, 51 UNIV. OF TORONTO L. J. 63, 65 (2001).
[63] Joseph Singer, *Normative Methods for Lawyers*, Harvard Public Law Working Paper No. 08-05, at 82, 2008), *available at* http://ssrn.com/abstract=1093338.
[64] Leora Batnitzky, *Seamless Web? John Finnis and Joseph Raz on Practical Reason and the Obligation to Obey the Law*, 15 OX. J. LEGAL STD. 156, 167 (1995) (attributing this view to Raz and Finnis, and noting that Raz draws in part on Thomas Nagel for this view).

authorities take the view that "basic values can only be grasped in intellectual acts in which one sees the point of doing something for its own sake."[65]

In his article *Normative Methods for Lawyers*, Joseph Singer argues that lawyers (and presumably our rights-claimants) "have no alternative but to make arguments that elaborate fundamental human values,"[66] which he calls evaluative assertion.[67] "When we raise some interests to the level of fundamental values we should be able to justify this."[68] And while the scope of the right can be narrowed both by the competing interests of others (depending on the relative weights of competing interests and their resulting priority) as well as by situations in which it is necessary to derogate from the right, the right first arises from the objective values it protects.

If they apply the methodology I suggest, our authorities will not simply substitute their *own* values and interests, or their subjective feelings, for those of the claimants. Rather they will be looking for some objective, higher-level, or generalized value that exists between the authorities' subjective view of the value of procreating, and that asserted by the claimants. Many, including Raz, have argued that there are objective values, distinguishable from subjective preferences or desires.[69] Likewise, Ronald Dworkin has argued that moral claims can be objectively true.[70]

How will our authorities know what the value of procreating is, or whether it is true that procreating in our rights-claimants' circumstances ought to be a right? Thomas Nagel, in *The View From Nowhere*,[71] described a method of determining objective values,[72] which would suffice in this case (though Nagel does not apply it to determine rights per se):[73] "A view or form of thought is more objective than another if it relies less on the specifics

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[65] *Id*. at 162 (discussing John Finnis' method of practical reasoning). Batnitsky later compares this method to Raz's practical reasoning. *Id*. at 166.
[66] Singer, *supra* note 63, at 5.
[67] *Id*. at 54.
[68] *Id*. at 30.
[69] *See* Misak, *supra* note 62, at 71("[Raz's] aim is to make it plausible that evaluative thought is objective."; *id*. at 63 ("Raz thinks that value judgements are indeed objective or truth-apt; they are indeed judgements for which it is appropriate to give reasons."); *id*. ("Values control reasons, in that I have a reason to do *A* only if doing *A* is likely to promote something I take to be good."); *see also* Raz, *supra* note 4, at 31 (1999) (referring to values as reasons underlying norms like "there is a reason to respect persons."); id. at 34 (distinguishing between subjective values, or what he calls "desires and interests," and objective values).
[70] *See* Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996). That is, moral claims can be true regardless of whether anyone believes the claims to be true, which is much the way that 1 + 1 = 2 regardless of whether anyone believes that to be the case. We have considered how our authorities might look at the cases before them in terms of value but we can also frame the question in terms of truth. Thinking in this way our authorities could ask: Is it wrong to have children under certain circumstances? Or more appropriately for the case at hand, is it true that what the right-claimants want to do is not valuable, or not sufficiently valuable to be deemed a right?
[71] Nagel, *supra* note 4, at 138.
[72] Raz has both explained and posed questions for Nagel's approach. Joseph Raz, *Notes on Value and Objectivity*, in BRAIN LEITER, ED., OBJECTIVITY IN LAW AND MORALS 206 (2001).
[73] Another account which might be used is Andrei Marmor's. Marmor defends the objectivity of values against subjectivist accounts though he avoids saying that values are metaphysically real. *See supra* note 21, at 160-183.

of the individual's makeup and position in the world, or on the character of the particular type of creature he is."[74] The thinker must "step back" as Nagel often refers to it, and survey the matter outside of herself. But, at the same time, Nagel warns that a complete view of the world is also relative; it must also take into account the subjective perspective. It must include "oneself, and one's former [subjective] conception, within its scope."[75] This method looks at value from a removed but inclusive perspective, such that the thinker sees her former valuations amid a world of other valuations. Note that Nagel is not referring to objective values in any sense of an eternal Platonic form, but rather from the "stepped-back" view of our authorities when they look for value.

For example, parties negotiating a contract for the right to use one another's property, may at times begin to accede to one another's wishes. This is not necessarily because of some bargained-for exchange. Rather, it may be that they have begun to see commonalities between what each one wants, and they now genuinely and mutually appreciate the value of what the other wants.

The question for Nagel is: "What is there reason to do or want, considered from the impersonal standpoint?"[76] The relevant data for consideration "include the appearance of value to individuals with particular perspectives, including oneself."[77] This is a process—referred to by Nagel as "generalization"—of looking for commonalities among multiple subjective ascriptions of value, thereby enabling disparate views to become compatible.[78] "[I]f I have a reason to take aspirin for a headache or to avoid hot stoves, it is not because of something specific about those pains but because they are examples of pain, suffering, or discomfort."[79] In other words, we step back to appreciate the values we share with others and generalize those values as objective values.

As an example of this method Nagel uses T.M. Scanlon's point that we have more reason to help someone get enough to eat than to build a monument to his God, even if that person is willing to forgo the food for the monument.[80] In ignoring that person's preferences, "[w]e are thinking from no particular point of view about how to regard a world which contains points of view."[81] In other words, values become objective as we consider them outside of ourselves.

Importantly, from the standpoint of our authorities and even more so of the rights-claimants, "[t]he opposition between objective reasons and subjective inclinations may be severe, and may require us to change our lives."[82] Thus, regarding procreation, it may be that the objective value of having children differs from the subjective value each of us

[74] Nagel, *supra* note 4, at 5.
[75] *Id.*
[76] *Id.* at 140.
[77] *Id.* at 147 .
[78] *Id.* at 150.
[79] *Id.* at 158.
[80] *Id,* at 172.
[81] *Id.* at 161.
[82] *Id.* at 163.

attaches to the act,and that we will each have to amend our perspective when looking for the value on which to base a fundamental right.

One obvious difficulty is the question of how one chooses the level of generality at which to state the particular objective value that might underlie procreation. That decision will be driven by values.[83] In this case, as will be discussed, our authorities will prioritize the value of certitude.[84] They value being able to identify the relevant value, know it, and be certain of it. Laurence Tribe and Michael Dorf ask whether "the Court in *Griswold v. Connecticut* recognizes the narrow right to use contraception or the broader right to make a variety of procreative decisions?"[85] Because they want to be certain of the value of non-interference in the particular act of procreation—as opposed to of being free with regard to other reproduction-related behaviors, our authorities will choose the most specific or narrowest description of the value. . . If they had to defend their own desire to procreate, what reasons would they give that are unique to that act? The whole point of the inquiry is to understand that there is some conduct that must be protected: procreation, without interference. It cannot be the freedom to procreate or not procreate because that does not answer the question of what we value in procreating. It merely exemplifies what we value in freedom.

II. The Values of Procreating

There are many ways to describe those values that might underlie our right-claimants' particular claims of a right to procreate, but they cannot be comprehensively discussed in this short article. However, the following discussion addresses many of the values one could recognize, or at least those that theorists inquiring into the nature of the procreative right have found,[86] and suffices to set up our discussion in the next Part.

Before discussing these values, it will help to note a few aspects of some of the theorists' approaches in general, which weaken their usefulness in applying the method discussed. Some of the values or interests described by several theorists derive almost empirically from the values that those theorists believe are held by a majority of society. For example, John Robertson argues that the value of procreative autonomy derives from "widespread notions about the importance of procreative decisions, generally, to individuals and their life plans." But, in so doing he intertwines his moral account with his reading of constitutional precedent discussing the value of the right,[87] which is

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[83] *See* Laurence H. Tribe and Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U CHI. L. REV. 1057, 1058 (1990). Nagel identifies this as an open question when thinking objectively, but he does not specify how to choose a particular level of generality. *Id.* at 152.

[84] John Finnis argues that knowledge is a basic good, in that it is derived from nothing, cannot be demonstrated, but at the same time needs no demonstration. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 63-75 (1980). Anyone engaged in truly academic work would be demonstrating Finnis' point just be doing what they are doing. Presumably, certitude is another way of describing the good of knowledge in that we want to be certain of what we know.

[85] Tribe, *supra* note 83, at 1058 (citation omitted).

[86] Medical ethicists it seems, rather than lawyers, have done most of the rigorous and focused inquiring.

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> But I am not offering a general moral or legal theory for determining which personally significant choices deserve special protection. Rather, I am drawing on widespread

precisely the type of law-morals infection I warn against above.[88] Also, some theorists conflate procreating with not procreating, treating the decision itself as the subject of the right,[89] while others focus on procreating as an act distinct from not procreating.[90] Finally, almost all of the theorists work within the context of a debate about using Assisted Reproductive Technologies (ARTs). Unlike the matters before our authorities, ARTs have spawned most of the debates over reproductive freedom. The centrality of ARTs in these debates is both odd in that are used in a miniscule fraction of pregnancies worldwide, and indicative of our resistance to thinking critically about procreation until prodded by the advent of something that puts it in an entirely new (and perhaps frightening) light.

Nevertheless, many of the claims made by these right-to-procreation theorists about values can assist our authorities. While some theorists may start by surveying the opinions of majorities (and perhaps just mirroring or parroting widespread cultural pro-natalism), they *all* eventually stray into (seemingly pure) normative arguments about what objective values or reasons exist to support the right.[91] Also, even those theorists who conflate having children with not having children believe that the values in question are sufficient to support a negative claim-right of non-interference to protect only the act of procreating. Finally, it is not problematic that the debate spawns from the context of ARTs because in general theorists first establish those values that might support the right to procreate in the traditional way, and only then question whether ART-enabled procreation should or should not receive the same protection.[92] For these reasons, we can use these theorists work to assist our authorities.

> notions about the importance of procreative decisions generally to individuals and their life plans, which is reflected widely in our practices and considered intuitions, in order to show their implications for a variety of issues that had not previously been considered.

Robertson, *supra* note 7, at 236 (footnote omitted); *see also* CARSON STRONG, ETHICS IN REPRODUCTIVE AND PERINATAL MEDICINE 16 (1997) (citing to empirical studies that show the desire to have genetic offspring runs deep and is widespread).

[88] *See supra* note 9, and accompanying text.

[89] Robertson refers to "a negative right against state interference with choices to procreate or to avoid procreation." Robertson, *supra* note 22, at 23. Incidentally, while reproductive rights (in terms of the right to use contraception and abortion in order not to procreate) are largely seen as part of a social movement, their advent was conveniently timed to slow a devastating explosion in world population. *See e.g.*, PAIGE WHALEY EAGER, GLOBAL POPULATION POLICY: FROM POPULATION CONTROL TO REPRODUCTIVE RIGHTS (2004) (studying the shift from population control to reproductive rights that occurred in the 1960's, as the dangers of population growth became known). What relative good it did, in terms of reducing the ills caused by overpopulation, remains to be seen.

[90] *See* Strong, *supra* note 87, at 12 (differentiating between the two and analyzing the values underlying a right to each separately).

[91] For example, Robertson refers to his "strong normative commitment" to procreative liberty, Robertson, *supra* note 22, at 18, and claims that liberty is "an important moral right" and a "prima facie moral right." *Id.*, at 30, 234.

[92] *See e.g.*, Emily Jackson, *Conception and the Irrelevance of the Welfare Principle*, 65 MOD. L. REV. 176, 182 (2002) (premising her argument on values that she views as supporting a broad coital procreative right, and that should extend to ART-based procreation).

Theories that explain the values that might underlie a right to procreate can be loosely divided into those that (1) base the right on the value of autonomy itself, and (2) those that actually explain (or give reasons for) why we value procreation as an act, including (a) relational reasons (deriving from the new relationships procreation creates) and (b) self-regarding values, or values from the perspective of the procreator, such as the perpetuation of one's genetic lineage.

A.1. Procreative autonomy and liberty

John Robertson, who is perhaps one of the earliest and most prolific writers championing a broad right to procreate, argued in his 1994 book *Children of Choice,* that " *procreative liberty* be given presumptive priority in all conflicts . . . . Procreative liberty deserves presumptive respect because of its *central importance to individual meaning, dignity, and identity*."[93] It is important to note that in this statement Robertson grounds the right in the liberty itself; *liberty* is what is important or valuable. In defending his work, he states:

> I believe that reproductive decisions have such great significance for personal identity and happiness that an important area of freedom and human dignity would be lost if one lacked self-determination in procreation. Indeed, to deny the importance of procreative liberty would be to grant the state repressive power over our intimate lives in a most fundamental way, as recent experiences in China and Romania have shown.[94]

Much like Hart's and Tuck's early approaches, this is tantamount to carving out a broad swath of sovereign territory, or a large category of possible actions that one is free to take regardless of one's underlying reasons. The importance of freedom *qua* freedom grounds the specific right. Here I take the concept of autonomy to be materially indistinguishable from self-determination

It is worth noting that, in addition to freedom generally, Robertson also invokes specific reasons (discussed further below) for why procreating is valuable, which he refers to as "procreative interests" as opposed to "procreative liberty."[95]

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[93] Robertson, *supra* note 22, at 16 (emphasis added); *see also id*., at 24, 30. Robertson explicitly claims to be analyzing the values and interests that justify procreative freedom's protection. *Id.* at 17. Robertson repeats this "centrality" mantra throughout the book. *See* Robertson, *supra* note 7, at 235 (1995) ("In the book I argue that procreative liberty deserves primacy because it is an important aspect of self-determination and well-being."); *id*. at 236 ("I doubt very much that the commentators would find that most procreation - for example, coital reproduction by a married couple - is not prima facie important and deserving of special respect precisely because of its role in defining our identity, dignity, and humanity . . . .")

[94] *Id.*

[95] Robertson, *supra* note 22, at 30; *see* Gilbert Meilaender, *Products of the Will: Robertson's Children of Choice*, 52 WASH. & LEE L. REV. 173, 177 (1995) (Meilaender finds that Robertson's appeal to interests after prioritizing liberty is "a last-ditch attempt to find limits to a freedom that no longer presupposes any natural substratum and fails to pour meaning back into a concept that has become entirely the impoverished creature of human will.")

For example, he speaks of procreation as an act by which one can "define" oneself,[96] and as "an experience that is central to individual identity and meaning in life."[97] He has also stressed the value of birthing and rearing as "central to reproductive meaning."[98] And in more recent work he has suggested that the right to procreate might be "internally constrained" by one's commitment to the well-being of one's future child.[99] He has also argued that the desire to have a child is itself valuable,[100] and though Marsha Garrison argues that he has been inconsistent on this point,[101] I believe Robertson has consistently stressed immediate genetic lineage as a specific interest justifying the right. He states, that: "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."[102]

But, regardless of his references to procreative interests to support his claim, Robertson is considered a leading proponent of procreative liberty or autonomy because of his claims about freedom and self-determination.

Others have followed his liberty-based approach to even more purist extremes. Nicolette Priaulx appears to be echoing Robertson's "procreative interests" when she argues that the value of reproductive autonomy "lies in its instrumentality in fostering basic human needs and one's sense of self," and that "all basic reproductive desires are central to one's sense of self."[103] For Priaulx, "our reproductive plans not only determine the shape of

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[96] Robertson, *supra* note 22, at 18.
[97] *Id*. at 24.
[98] *Id*. at 73 ("A person who reproduces but has no contact with offspring may have a lesser interest in reproduction than a person which reproduces with the intent to rear children."); John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027, 1045, 1064 (1994) (referring to directive for posthumous reproduction he argues that "[n]or will it provide the birthing and rearing experiences that are usually so central to reproductive meaning. . . . It is not enough to say that a person has an interest in acting autonomously; the dispositive question is whether the particular autonomous act deserves protection.")
[99] *See* John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J.L. & MED. 7, 21 (2004) ("One can ask whether parents who are willing to use ARTs [Assisted Reproductive Technologies] that risk leading to children with a greatly reduced quality of life are pursuing reproductive needs as commonly valued and understood, thus qualifying them for the special protection usually accorded to reproductive choice."). Robertson refers to the internal constraints on procreative liberty, rather than the conflicting rights of prospective children, because he has consistently relied on a version (and in my opinion misapplication) of Parfit's nonidentity problem to almost completely discount the interests of prospective children. *See id.* at 13-19; *see also* MAURA A. RYAN, THE ETHICS AND ECONOMICS OF ASSISTED REPRODUCTION 102-103 (2001). His only choice now is to narrow procreative liberty from within.
[100] Marsha Garrison , La*w Making for Baby Making: An Interpretive Approach To The Determination of Legal Parentage*, 113 HARV. L. REV. 835, n. 105 (2000).
[101] *Id.*
[102] John A. Robertson, *Procreative Liberty in the Era of Genomics*, 29 AM. J.L. & MED. 439, 450 (2003); *see* Robertson, *supra* note 22, at 24 (while arguing for the priority of the right Robertson quickly notes that "the transmission of genes through reproduction is an animal or species urge closely linked to the sex drive.").
[103] Nicolette Priaulx, *Rethinking Progenitive Conflict: Why Reproductive Autonomy Matters*, 16 MED. L. REV. 169, 173 (2008)

our lives but go to the heart of *who we are."*[104] However, she concludes that "under a coherent account of reproductive autonomy all *decisions* to reproduce and avoid reproduction are of equal value given our recognition of its instrumental value to one's selfhood."[105] . Judith Daar argues that:

> As human beings, in the main we have a natural inclination to reproduce and to value the products of our reproductive efforts. Ask virtually any parent about the relative value of his or her life experiences and you will hear, 'The most significant and meaningful thing I have done in my life is parent my child(ren).' Because of the central importance of parenthood to the human experience, denial of the opportunity to procreate . . . strikes at the core of how one sees oneself and one's place in the world.[106]

Amartya Sen refers to the "importance that a family attaches to the *decision* about how many children to have"[107] or the "importance of reproductive rights" more generally, which he argues are themselves valuable.[108] For Sen, it is the choice, or freedom to make that choice, which is valuable. Similarly, Emily Jackson grounds a broad procreative right upon "reproductive autonomy," which she views as allowing one to form one's own values and to have them respected; it is the value of a self-authored life that grounds the right.[109] "I would argue that reproductive freedom is sufficiently integral to a satisfying life that it should be recognized as a critical 'conviction about what helps to make a life good.'"[110]

Note that it is the procreative autonomy that is valued and would ground the freedom, or moral and eventually legal rights. Why the rights-claimants before our authorities wish to have children is not at issue.

Ronald Dworkin might also be read as endorsing a broad right to procreate, or the principle that he calls "the right of procreative autonomy."[111] However, it would oversimplify Dworkin to say that he simply endorses autonomy as the value underlying claims of a right to procreate. In his discussion on this point, he primarily targets state limitations on the use of contraceptives and abortion, which are based on the state's view of the intrinsic value of life.[112] Dworkin considers this issue to be essentially religious, and therefore argues that it cannot serve as a legitimate basis for state coercion in the United States.[113] While his principle might prevent a state from limiting (or more to the point requiring) procreation on religious grounds, it may or may not prevent our

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[104] *Id*. at 175.
[105] *Id.* at 178 (emphasis added).
[106] Judith Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 29 (2008).
[107] Amartya Sen, *Fertility and Coercion*, 63 U. CHI. L. REV. 1035, 1039 (1996) (emphasis added).
[108] *Id.* at 1041, 1051, 1061.
[109] EMILY JACKSON, REGULATING REPRODUCTION 6- 7 (2001).
[110] *Id.* at 7, (*quoting* DWORKIN, *supra* note 7, at 202 (1993)).
[111] Dworkin, *supra* note 7, at 101.
[112] *Id.* 101-110.
[113] *Id.* at 103.

authorities' particular inquiry. The view that there might be some objective, intrinsic value underlying procreation need not involve essentially religious beliefs about the sanctity of life.[114] As an aside, Dworkin's point certainly would not prevent secular limitations meant to serve the interests of say, prospective children or society at large.

Dan Brock offers one of the most sophisticated defenses of the procreative right. Brock's argument is consistent with Robertson's procreative liberty approach,[115] but is perhaps more nuanced and contingent upon the circumstances of each case in which the right is claimed.[116] Brock explicitly identifies three moral bases for reproductive freedom, which "are each widely accepted as of fundamental importance to individuals in constructing and securing for themselves a valuable life according to their own conception of such a life."[117] The first and most important is personal or individual autonomy, or persons' "interest[s] in making significant decisions about their lives for themselves and according to their own values or conception[s] of a good life, carrying out those choices without interference from others, and being free to revise their plans of life or conception[s] of the good over time."[118] The second basis is individual well-being or good, and Brock argues that the decision to have children contributes to such well-being, whether it is defined in terms of conscious pleasure, preference satisfaction, or objective good.[119] The third is equality, "in particular equality of opportunity and expectations between the sexes."[120]

In all, despite Robertson's parallel reliance on specific interests and values inherent in the act of procreating, these theorists (and Brock, at least in his first basis referring to the value of choice) tend to focus on choice itself, or liberty simpliciter, as the pedestal upon which the right is based. The freedom to make choices that relate to procreating is itself valuable to people, regardless of the reasons or values underlying the specific choices they actually make.

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[114] In fact, I reject that sort of evaluation, *see infra* notes 171-174 and accompanying text, in favor of the secular value of self-replacement. *See infra* Parts II.A & B

[115]

> If we are to place high value on individual self-determination, as both liberalism and Robertson do, then the defining and deep impact on a person's life of the decision whether to procreate implies a strong presumption that that decision must be left to the individual in question and protected from interference by others.

Dan W. Brock, *Review: Children of Choice: Freedom and the New Reproductive Technologies*, 74 TEX. L. REV. 187, 189 (1995).

[116]

> It would be a mistake to think that the right to reproductive freedom is unitary in content or moral importance, a mistake that would lead to failure to balance appropriately particular aspects of reproductive freedom arising in specific contexts when they come into conflict with other broader societal interests in the nature of its citizenry.

Dan W. Brock, *Shaping Future Children: Parental Rights and Societal Interests*, 13 J. POL. PHIL. 377, 380 (2005).

[117] *Id*.

[118] *Id*.

[119] *See id.* at 381-382.

[120] *Id*. at 382.

Again the metaphor of a hollow right is fitting: We identify a boundary by the fact that the acts in question relate to procreation, after which no inquiry is possible.

A.2. Relational interests

In contrast to procreative autonomy theorists, Maura Ryan exemplifies what might be thought of as a second approach to valuing procreation. She rejects the autonomy-based analysis altogether, including the underlying value of self-replication,[121] which she calls an "impoverished view of reproduction."[122] In Ryan's model, "[i]ndividual rights, therefore, are relative (modified by commitments to the common life) and reciprocal (they *arise* in a social field involving correlative duties and counterclaims)."[123] Rights are oriented towards the common good (tied to the collective well-being), and cannot be understood in isolation—especially when thinking about the act of creating another person.

For Ryan, "parenthood is not so much the undertaking of a project as it is the establishment of a relationship."[124] "In this sense, 'having children' is phenomenologically equivalent to 'being a parent,' much as having true friends is experienced as being a friend, or having a lover involves loving."[125] Ryan argues, "Robertson's account illustrates what is wrong with the liberal conception of reproductive rights."[126] "The concepts of right and entitlement used by Robertson correspond to the values preserved in traditional notions of patriarchal fathering—that is, proprietary control and ownership over wives and children—rather than those of care and responsibility associated with mothering."[127] "At some point a constitutive notion of why reproduction is important has to inform the debate . . . . But that is exactly what is missing from Robertson's account . . . ."[128] For Ryan, the "constitutive notion" is partially that the value derives from the new relationships procreation creates, and from its inherently social nature.[129]

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[121] *See* Maura Ryan, *The Argument for Unlimited Procreative Liberty: A Feminist Critique*, 20 HASTINGS CTR. REP. 6, 11 (1990) ("Interest in a genetically related children cannot be seen as an independent end, the value of which automatically discounts concerns . . . for the place of the experience of reproduction in our collective value system.")
[122] Ryan, *supra* note 99, at 96.
[123] *Id*. at 109 (emphasis added).
[124] *Id.*
[125] *Id.*
[126] *Id.* at 93.
[127] *Id.* at 100.
[128] *Id*, at 103. Ryan is well aware that, in addition to liberty simpliciter, Robertson makes use of specific procreative interests and values throughout the body of his work. However, she criticizes him for constantly shifting from one value to another, *id.* at 105, and would reject the genetic lineage basis altogether. *Id.* at 106.
[129] See *id.* at 97, 106, and 114; *see also* Leslie Cannold, *Do We Need a Normative Account of the Decision to Parent*, Working Paper of the Center for Applied Philosophy and Public Ethics, Melbourne, at 54, (2004), *available at, http://www.cappe.edu.au/docs/pdf/ResPublicavol102.pdf* (endorsing the desire to nurture, or share with, or give to a child, as a good or value which would support the decision to procreate).

In Ryan's account, "the promotion of individual procreative liberty can never be an abstract end,"[130] rather, we "desire our children for their own sake."[131] "Reproduction is inherently relational, 'other-regarding,' not just in a physical sense but a moral sense."[132] This relational account of rights rejects an atomistic version of personal autonomy and bases the value of procreation in the relations it creates.

Frances Kamm discusses another type of relational interest: "It is, of course, possible that the ideal number ["ideal number" needs some explanation] for reproduction is the number who are emotionally involved with each other. Then the desire is for producing a genetically related fusion of emotionally bonded individuals, not just having a strong biological connection."[133] This would also be an other-regarding value, not just with respect to the child created, but also towards the person with whom you create the child. It also reflects the type of value discussed by another loose grouping of theorists.

A.3. Self-regarding values

A third category of theorists operates within a liberal or rights-based framework, but does not attempt to base the right on a pedestal of choice *per se*. Daniel Statman puts it this way: "But if there is a grain of truth in the idea of a universal right for parenthood, then—as with all human rights—there must be some core interest in parenthood shared by all human beings, regardless of the distinctive features of their culture."[134] For Statman, "[t]he interest we have is not in procreation itself, namely, in merely replicating our genes, but in rearing children that are genetically connected to us, or, at least, in rearing children with whom we can enjoy a significant relationship." However, while he appears to be dealing with parenthood and not procreation, Statman focuses on the interests of the procreator. He includes as values underlying the procreative right: immortality through descendants, living vicariously through one's children, getting a "second chance," intimate relations with one's offspring, satisfaction of the longing for a home or nest with close relations and belonging, and the interest of couples to found a family.[135] Statman, however, argues that the right can be satisfied even when the genetic connection is not present.[136]

Robertson's procreative interests, discussed above, are also part of this category. These include the value of defining oneself, the value of birthing and rearing, the value of commitment to the well-being of one's future child, and the value of immediate genetic lineage.

David Archard concedes that "human beings do have a fundamental interest in the creation of their own offspring and that it is proper not to seek to frustrate the enjoyment

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[130] Ryan, *supra* note 121, at 11.
[131] Ryan, *supra* note 99, at 104.
[132] *Id.* at 111.
[133] Kamm, *supra* note 6, at 75.
[134] Daniel Statman, *The Right to Parenthood: An Argument for a Narrow Interpretation*, 10 ETHICAL PERSP. 224, 226 (2003)
[135] *Id.*
[136] *Id.*

of this basic interest."[137] However, he argues that interest is internally constrained in that a person has the right to procreate only if the prospective child has the reasonable prospect of a minimally decent life.[138] Archard's approach is, in my view, more akin to Oberdiek's specificationism than a full re-assessment of the value or interest underlying procreation. But note that Archard has specified an interest: the creation of offspring.

Mary Warnock argues:

> But the most obvious basis for the longing to have children is, perhaps, a kind of insatiable curiosity: what will the random mixture of genes produce? What will be familiar, what will be unfamiliar? The amazing pleasure of each child is that he or she is new, a totally unique being that has never existed in the world before, seeing things with his own eyes, saying things that are his own inventions.[139]

Warnock identifies the specific objective value underlying procreation. However, she makes clear that it is not compelling enough to justify a positive moral right to procreate—that is, enough to require assistance from others. "The judgement of what is or is not an intolerable way of life, the yardstick for the measurement of basic need, is manifestly a judgement about values, though one about which at any one time there is probably a good deal of agreement."[140] "It seems obvious, therefore, that procreation is not a basic need such as to generate an obligation to satisfy that same need in the same way as nutrition."[141] Here Warnock makes a crucial point – while there is an objective value in procreating, it does not rise to the compelling level of a need so as to create a moral right.

Admittedly, Warnock is focused on the positive right to procreate, and she even suggests that there may well be negative legal right in international human rights instruments.[142] But I would argue that her underlying argument says something vital about valuing procreation in general. It may well be more of a subjective desire or preference, than a compelling objective value that must be protected or promoted. Regardless, her statements distinguish her from our autonomy-minded theorists above.

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[137] David Archard, *Wrongful Life*, 79 PHIL. 403, 418 (2004). In earlier work, however, Archard suggests that the interest in creation alone might not justify a right as such. Archard argues that "[m]oreover, the having of children need not serve interests which are obviously valuable," but he is referring to bad reasons people actually have for having children (creating an object to dote upon, providing a soldier for the state, to prove it can de done, etc.), rather than good reasons that might be valuable. *See* David Archard, *What's blood Got to Do with It? The Significance of Natural Parenthood*, 1 RES PUBLICA 91, 97 (1995). Nonetheless, he finds that "[i]t is the wish to have a child that is important, not that the wish is actualized by biological means." *Id*. at 98; *see also id*. at 106 (saying that the right found a family is grounded in the right to rear rather than the right to procreate itself).

[138] Archard, *supra*, at 414.

[139] MARY WARNOCK, MAKING BABIES: IS THERE A RIGHT TO HAVE CHILDREN? 41 (2002)

[140] *Id*. at 25.

[141] *Id*. at 27.

[142] *See id.* at 28-29.

Carson Strong may be the theorist who has focused most intensely on the reasons or values that justify regarding procreation as a right. His book, *Ethics in Reproductive and Perinatal Medicine*, develops an ethical framework for addressing a wide range of reproductive issues.[143] Strong asks whether it is freedom in general we value or procreative freedom *per se*. He finds it is the latter, because we need to specify values in order to solve conflicts,[144] and because procreation contributes to self-identity and self-fulfillment in very specific ways.[145]

It is important to note that Strong separates the value of procreating (which he defines as begetting, gestating, and rearing) from *not* procreating,[146] and focuses on finding an objective moral value in procreating. Strong rejects bad reasons, which presumably the theorists who base the right on personal autonomy could not even begin to question, such as having children to demonstrate one's virility, and to "save" a shaky marriage[147] "[I]n exploring whether it is reasonable to value begetting, the important issue is not whether people are conditioned to value it, but whether reasons can be given to justify valuing it."[148]

> There are at least six reasons that can be given to justify the reasonableness of a desire to procreate in the ordinary situation. Briefly, they are as follows: (1) procreation involves participation in the creation of a person; (2) it can be an affirmation of mutual love; (3) it can contribute to sexual intimacy; (4) it can provide a link to future persons; (5) it can involve experiences associated with pregnancy and childbirth; and (6) it can involve experiences of child rearing. . . . These reasons suggest that procreation can be valuable to an individual, in part because it can contribute to one's self-identify.[149]

Strong elaborates that we value creating others because it involves participation in "the mystery of the creation of self-consciousness;"[150] that children common to their parents affirm and strengthen the love between those parents;[151] and also that making love "in a

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[143] Strong, *supra* note 87.
[144] *See id.* at 4.
[145] *See* Carson Strong, *Cloning and Adoption: A Reply to Levy and Lotz*, 22 BIOETHICS 130, 131 (2008).
[146] *See* Strong, *supra* note 87, at 6, 12; Carson Strong, *Ethical and Legal Aspects of Sperm Retrieval After Death or Persistent Vegetative State*, 27 J. L. MED. & ETHICS 347, 348 (1999) ("I have argued elsewhere that the term 'procreation' covers the following activities: begetting; gestating; and rearing a child one has begotten or gestated.")
[147] Strong, *supra* note 87, at 18.
[148] *Id.* at 17; *see also id.* at 22 ("Also I do not mean to imply that one *ought* to desire genetic offspring, but only that the desire can be justified.") Strong believes that there is a prima-facie moral right to procreate that can, and in some case should, be overridden. *Id*. at 25-26, 103-105.
[149] Strong , *supra* note 146, at 349. For a discussion of similar values underlying procreation see Lori B. Andrews and Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 626-627 (1991) (referring to a sense of immortality, a sense that having a child is an expression of the procreators themselves or their love, the value of childbearing or childrearing as a life experience, the desire for the love of a child, and the desire to give love to a child).
[150] Strong, *supra* note 87, at 18.
[151] *Id*. at 19.

manner that is open to procreation" heightens the intimacy of the act.[152] Regarding the fourth reason, Strong downplays the value because he regards it as a modest link in that the lineage may be cut off, and because "by the fifth generation, only one-sixteenth of the originator's genes remain, and in time the percentage becomes minute."[153] Finally, he argues that the experience of pregnancy and childbirth is itself inherently valuable,[154] as is rearing one's genetic offspring.[155] For Strong, "[t]hese considerations help to explain why *freedom* to procreate in the ordinary context should be valued; namely, because procreation can be important to persons in the ways identified, including contributing to self-fulfillment and self-identity."[156]

Unlike theorists who start from the point of freedom, Strong, Statman, and the others arrive at freedom having started at other specific reasons or objective moral values. This seems inevitable. Even champions of procreative liberty like Robertson and Brock find it necessary to eventually evaluate the conduct or behavior itself rather than the mere value of the liberty to engage in it.[157]

Regardless, we now have at least three relatively distinct categories of values or interests that our authorities can use to understand why procreating is valuable, or why our rights-claimants are demanding it as a right.

B. Sifting Through the Values and Interests

Keep in mind that our authorities are in the very initial stages of determining the moral and eventually legal right to procreate. In sifting through all of the theorists' values for something they can recognize, our authorities search for objective values – values that can be seen from Nagel's "stepped-back" or generalized perspective (objectivity), basic values that, in Singer's method of evaluative assertion, can be justified to others because others share them. This examination is not an intuitive sampling of extant social conventions, but a search for objective values that exist, as Dworkin says, regardless of whether others believe they exist. In Strong's terms, the authorities will seek values for which reasons justify valuing them and not values that people are merely conditioned to

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[152] *Id.*

[153] *Id*. at 20. Strong cites Plato as arguing that, in terms of creating immortality, having children pales in comparison to great deeds and authorship.

[154] *Id.* at 21.

[155] *Id.* at 21-22. Archard also discusses this value. He finds that shared heredity creates similarities in appearance, skill, and intelligence that facilitates self-identification and bonding, but in the end he downplays this value as largely conventional. *See* Archard, *supra* note137 at 100-101.

[156] Strong, *supra* note 146, at 349; *see also* Strong, *supra* note 87, at 22.

[157] *See, e.g., supra* notes 95-102. Brock notes that

> [i]t would be a mistake to think that the right to reproductive freedom is unitary in content or moral importance, a mistake that would lead to failure to balance appropriately particular aspects of reproductive freedom arising in specific contexts when they come into conflict with other broader societal interests in the nature of its citizenry.

Brock, *supra* note116, at 381.

value. Taking Raz's view of rights, the values must be sufficient eventually to support duties of non-interference and hence a right to procreate.

B.1. Freedom as the bedrock value

Starting with the value of autonomy, as articulated by our theorists (and here again I take the concept of autonomy to be materially indistinguishable from self-determination), the essential question is whether the freedom to procreate has an objective value that can ground the right. There are at least three objections to finding that it does.

The first might be called a structural objection that, initially, could apply to all choice-based rights, but which especially applies to the notion of a moral right to procreate. Taking Raz's conception of a fundamental moral right, we are looking for some interest or "ultimate value" relative to the claimant's well-being that is sufficiently important in itself to justify holding some other person to be under a duty. In other words, we are looking for an ultimate value upon which to base the freedom or autonomy that a duty of noninterference assures. But if we start with procreative liberty as the value, notice that we have we skipped an entire step in the process. Rather than saying that "having a genetically related child is valuable, hence you ought to be under a duty to allow me to have that child, and thus I have a right to procreate," the claim simply becomes "I value your duty of noninterference, irrespective of what I feel about procreating per se."[158] Much like a tradeable procreation entitlement, we are never told why the claimant values it (or why we needed to give people entitlements at all), just that they do. They do because they do; freedom itself justifies non-interference.

This is the reasoning behind autonomy-based claims to a right to procreate, and it explains why words like "important" and "central" are so often used in the theorists' arguments above. They cover what is lacking: a specific reason, like Strong's argument that it contributes to sexual intimacy, that explains why we value procreating. We can make a fair analogy here. Using Nagel's and Scanlon's example of our being more likely to help a man find food than build a temple to his God, we can see autonomy-based claimants as asking for some room on which to either grow some food or build a temple, though we are not allowed to know which. It might be something that we can view from the stepped-back perspective of objectivity (like the need for food), or it might be something so subjective (comparable to the need for a religious temple) that others cannot appreciate it. It might be like the value of demonstrating one's virility through having a large family, or of the chance to save a marriage gone bad, or of having an infant to dote upon (at least for a while), or of having a boy as opposed to a girl. For the autonomy-minded these matters are beside the point.

When Priaulx argues that "under a coherent account of reproductive autonomy *all* decisions to reproduce and avoid reproduction are of equal value given our recognition of

[158] *C.f* Hart, *supra* note 41, at 87-88 ("The moral justification [for the right] does not arise from the *character* of the particular action to the performance of which the claimant has a right . . . .") (emphasis added).

its instrumental value to one's selfhood,"[159] the values that might underlie those decisions remain veiled from all those but the prospective parent because there are no objectively bad reasons. The autonomy-based approach places the word reproductive before the word freedomand thinks it has made something altogether new, something other than what one critic of procreative freedom per se called "the impoverished creature of human will."[160]

The second objection to these theories, and one which I think applies to all claims to a right to autonomy generally, is that freedom itself is not a sufficient value on which to base the right. This objection is based on Raz's re-conception of autonomy in *The Morality of Freedom.* Raz rejects what he terms the "presumption of liberty and the simple principle" which create a presumption in favor of protecting all conduct as equally valuable, that is without regard to underlying values. He refuses to treat freedom as the thing itself to be pursued (i.e., the freedom to vote, the freedom to kick children, the freedom to bear child laborers, etc.).[161] Raz's notion of autonomy is complex, but it is not an individual right to be free from coercion and to have the capacity to act on any given subjective value:[162] "to the extent autonomy is important, what is important is achieved autonomy, not a mere capacity."[163] If our autonomy-based theories fail to specify an objective underlying value, they also fail in trying to base the right on freedom simpliciter.

What we really value is not the capacity to decide whether to have children, but actually doing so or not doing so in a way that achieves autonomy. A teenager having children that neither she nor the state can care for is having and exercising procreative liberty, but it is not an enhancement (or achievement) of her actual autonomy rather something that may retard it. This example makes sense of Singer's claim that, assuming there were laws discouraging teen pregnancy, "[w]e enlarge our liberty by laws that limit our liberty."[164]

The third and final objection is that while it might make sense to speak of voting, or writing, or praying, as autonomous acts, speaking about procreating in this way is incoherent.[165] The concept of reproductive autonomy is incoherent because it is the act

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[159] Priaulx, *supra* note 103, at 178 (emphasis added).
[160] Meilaender, *supra* note 95, at 177.
[161] Raz, *supra* note 4, at 11-18.
[162] *Id.* at 206-207.
[163] Regan, *supra* note 2 at 1076 (1989) (Regan refers to this point as Raz's most powerful argument against people who want to base moral or political theory on rights to autonomy).
[164] Singer, *supra* note 63, at 7.
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> Onora O'Neill's recent observations about autonomy and reproduction might be recalled here. O'Neill observes that abortion concerns the avoidance of the birth of another; by contrast, in reproduction the creation of another is at stake. For this reason it would not be appropriate to construe the autonomy at stake in the latter context 'primarily' as a form of 'self-expression'.

Rosamund Scott, *Choosing Between Possible Lives: Legal and Ethical Issues in Preimplantation Genetic Diagnosis*, 26 OXFORD J. LEGAL STUD. 153, 168 (2006) (*quoting* O. O'NEILL, AUTONOMY AND

of creating another. S.L. Floyd and D. Pomerantz have argued that one cannot base a right to have children on either autonomy or self-determination,[166] because these concepts do not describe the act of bringing someone into existence. To expand on this a bit, we could say that one cannot be making a choice about one's own life when that choice is to create another whose entire quantum of interests is at stake. Rather, one is making a decision about the child's life. If, as Sen and others claim, we must defer to the procreator because procreation is important or central to one's identity, then we should defer to the interests of the prospective child, to whom it is all important.[167]

In raising these objections I do not want to say that procreative autonomy or freedom, embodied as Raz's "intermediate conclusion" which creates a duty on all others not to interfere with one's having a child, is not objectively valuable. These objections are raised to say that we must go a step farther back and identify some objective intrinsic value or interest (not subjective, in that others like our authorities cannot see it) in procreating that "serves the right-holder's interest in having that right inasmuch as that interest is considered to be of ultimate value," or constitutive of the right-holder's well-being. Autonomy fails because, as in the critique of choice-based rights generally, we are never given a reason why our rights-claimants want to procreate, or how doing so will serve their interests. We are only told they value the free choice itself, i.e. the right. It bases freedom on freedom, not freedom on value.

B.2. The value of new relations, and of life per se

Moving to our second category of underlying values, or the notion of relational-rights that Maura Ryan exemplifies, there is an obvious and immediate problem. Ryan's whole project involves rejecting individualized and atomizing rights, and so it would not be fair to even try to base the type of traditional or conventional right our claimants are pursuing on the relational values that Ryan identifies. However, another objection remains if we construe their claims to be for a relational right to procreate, one in which we "desire our children for their own sake."

This is not an obvious objection. Unlike the autonomy category, this approach seems to offer a fundamental value, namely the new relationship that will contribute or be of intrinsic constituent value to the ultimate value or well-being of the right-holder. In other words, life with the child will be better for the person that begets him or her. Moreover, if I am reading Ryan correctly, ideally it will (or perhaps must) also contribute, or be of

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TRUST IN BIOETHICS 61 (2002)); *see also generally* 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). Strong focuses his discussion of autonomy and self-determination on the right not to procreate, Strong, *supra* note 87, at 32-35, rather than on the right to procreate.

[166] *See* S.L. Floyd & D. Pomerantz, *Is There a Natural Right to Have Children?*, in SHOULD PARENTS BE LICENSED? 230 (Peg Tittle ed., 2004).

[167] It might seem that we are straying into others' interests here rather than sticking narrowly to the interests of the claimants. However, we need not now take into account any specific competing interests – we must only note that procreation will inevitably involve them.

intrinsic constituent value, to the ultimate value or well-being of whatever child is born. The value of the new relation goes both ways so to speak, and I see no reason why this would not be a valid thing or interest upon which to base a moral right. From a stepped-back perspective which nonetheless includes our subjective point of view, or looking at it "from no particular point of view about how to regard a world which contains points of view," we ought to be able to appreciate the value of such relationships.

Thus the objection is not that the relation is not sufficiently fundamental or objectively valuable to suffice. The objection is that this value would ground a right *to parent*, rather than a right to procreate. Parenting is a separate value, very little of which has to be based on the act of creating one's children.[168] Moreover, procreation is creating the person, but creating and enjoying the relationship with that person is altogether something else, something that requires a great deal more time, skill, and effort. I would argue that procreation, as defined above,[169] is neither a necessary nor a sufficient condition for having new, loving, and nurturing relations, even with children. A right to procreate could protect the instrumental value of creating the other person one needs in order to establish the relationship, but, at least in Raz's formulation, this would not be a morally fundamental right.

To move from an ultimate value to a duty of noninterference that protects a certain behavior, we need a value that cannot be fully promoted by other behaviors. A right to establish loving relationships might not take our rights-claimants very far in this regard. If they want to parent, or otherwise nurture the needy, they need not have right to procreate to do so.

If we are looking for the intrinsic value of an "other-regarding" relationship that constitutes part of our ultimate well being, it might be even more other-regarding for us to build nurturing and loving relationships with those whom we did not create.[170] If we limit our care-giving to those we create we are largely missing the value or interest that I believe Ryan (and to a lesser extent Kamm) is getting at. The whole point of the relational value is to be other-regarding; making self-replication a necessary condition turns the act into something less other-regarding. Mother Teresa is perhaps a better model of other-regarding love and nurture than most parents. It seems that the value of

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> People may be parents even if no biological connection exists because the essential goods of parenthood do not include the biological component. . . . [t]he biological or genetic connections may be important to us because they constitute an important part of begetting and rearing a child, but the most important components of parenthood are its social, moral, and relational aspects.

Michael W. Austin, *The Failure of Biological Accounts of Parenthood*, 38 J. VALUE INQUIRY (2004) 499, 509.

169 *See supra* note 6 and accompanying text.

170 I do not take up here the utilitarians' challenge that creating valuable relationships with existing persons, as opposed to one's you create, misses an opportunity to increase total utility. *See, e.g.,* Jesper Ryberg, *The Repugnant Conclusion*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2006), *available at* http://plato.stanford.edu/entries/repugnant-conclusion/.

the relations she created would be sufficient to ground a particular right and duty of noninterference on others, but it does not seem to ground a right to procreate.

A related value or interest that Ryan does not cover in her narrow critique of the individualized and autonomy-based approach, but one that our rights-claimants could propose, is the value of the creation of human life per se. Here, again, we have to return to Raz's conception of rights, and of a morally fundamental right as that which serves the right-holder's interest in having that right inasmuch as that interest is considered to be of ultimate value, that is, contributing to the well-being of the right-holder. In the case of the creation of human life per se, we are not contributing to the well-being of any particular right-holder or claimant. Rather what is claimed is that the value should be promoted because it is valuable, not because it contributes to the well-being of the claimant. For that very reason it fails:

> For Raz, 'life' is not an intrinsic value. Life is not part of the good, but a precondition of the good. Raz points out that to speak of life as a good outside of society is to say that no social or personal context is required to grasp this good. Survival would be an impersonal value. But how could survival be impersonal?[171]

Ronald Dworkin criticizes the value of simply producing more human lives, from a different angle. In exploring the claim that human life is intrinsically valuable Dworkin asks: "Why does it not follow, for example, that there should be as much human life as possible? Most of us certainly do not believe that. On the contrary, it would be better, at least in many parts of the world, if there were less human life rather than more."[172] How is this possible if human life is intrinsically valuable? Dworkin finds that human life, while intrinsically valuable, is not incrementally valuable. While we might value knowledge as incrementally valuable in that we want more of it no matter how much we already have, we value human life non-incrementally: we value it once it exists, but do not value simply having more it.[173] Frances Kamm calls Dworkin's concept intrinsic, non-incremental, objective value: value that is not a reason to produce more of it, but is a reason to treat what exists of it properly.[174] The point here is simple: mere production of human life is not objectively valuable.

Moreover, another objection to the value of creating life per se, much like with our example of Mother Teresa, is that it is possible to take a view of *creation* that pertains to the ultimate value or well-being of others, but does not hinge on procreation per se. This is the creation value inherent in nurturing others, regardless of whether we bore them. In other words, "the adoptive couple can create a person even without the biological component, because the moral, social, and relational aspects of parenthood are essential

[171] Batnitzky, *supra* note 64, at 171.
[172] Dworkin, *supra* note 2, at 70.
[173] *Id.* 73-74.
[174] Frances M. Kamm, Review: Abortion and the Value of Life: A Discussion of Life's Dominion, 95 Colum. L. Rev. 160, 164 (1995).

to its creative value."[175] This is the nurturing aspect of parenting, but again like Ryan's relational account of rights, it would ground a right to parent or nurture, rather than a right *to procreate* per se.

Rather than autonomy, new relations, or life itself, we need some objective value related or intrinsic to procreation, which our authorities can recognize as deserving of protection so as to ground the right our claimants seek. Our final category of interests or values relates specifically to procreation, and is not based on the relationship that procreation might create, nor on the value of autonomy.

B.3 The value of self-replacement

Again, our authorities want to isolate the conduct of procreating and determine why it is valuable, and to understand why our claimants can justify their claim to it as a right, because that is the behavior which the laws—both the no-procreation order and the PRC's family planning quotas—threaten. The laws do not prohibit parenting, nor do they prohibit *not* procreating through the use of contraceptives.

As described in detail above, our authorities have to assess the claimants' and theorists' procreation-specific interests or values to see whether they are of ultimate value, or constitutive of the claimants' well-being. To do that, to realize shared or objective values, they engage in Nagel's objectivity by relying "less on the specifics of the individual's makeup and position in the world, or on the character of the particular type of creature he is,"[176] and generalize to "value to individuals with particular perspectives, including oneself."[177] From this perspective the subjective pain of a pinprick becomes an example of pain generally; we can realize the value of food, but perhaps not of particular types of food. Among the various values or interests, what is the generalized value of procreating?

Kamm suggests that "the desire is for producing a genetically related fusion of emotionally bonded individuals," which suggests that at least part of what we value is the act of creating another.[178] Robertson, when focusing on procreative interest as opposed to liberty, refers to the act as "defining" oneself,[179] and full of meaning because it "produces a new individual from [one's] haploid chromosomes."[180] Brock also focuses in his second basis on the act of having children per se as contributing to well-being.[181] And while Statman's eventual focus on parenting might take him a bit out of the category, he also values interests like immortality, vicarious living, getting a "second

[175] Austin, *supra* note 168 at 509.
[176] Nagel, *supra* note 4, at 5.
[177] *Id.* at 147 .
[178] Kamm, *supra* note 6, at 75.
[179] *Id.* at 18.
[180] Robertson, *supra* note 102, at 450; *but see* Julian Savulescu, *Should Doctors Intentionally Do Less Than the Best?*, 25 J. MED. ETHICS 121, 124 (1999) (finding that "[w]hile genetic relatedness may have some instrumental value, it has very little intrinsic value.")
[181] *See* Brock, *supra* note 116, at 381-382.

chance," and creating a family.[182] Likewise, Archard finds that "human beings do have a fundamental interest in the creation of their own offspring," [183] and Warnock, while not viewing it as a need, finds that the "amazing pleasure of each child is that he or she is new, a totally unique being that has never existed in the world before."[184] Finally, while Strong includes "other" or separate intrinsic or instrumental objective values like mutual love and sexual intimacy between prospective parents, as well as the separate value of rearing children (and he shows these are separate values because he says procreation can *contribute to* them),[185] his first unconditional value is the creation of a person.[186]

Taking all of these theorists' values into account, and generalizing from the subjective perspective to the objective, we might say that procreation is an example of the general value of self-replication or self-replacement, which is an intrinsic value and ultimate value constitutive of the well-being of the claimant, who feels deeply compelled - as members of any species often do - to replicate himself or herself before dieing. The generalized value of procreating is the unique and incommensurable value we find in the very act of creating another person. Nothing else is comparable, and the act is of intrinsic and ultimate value constitutive of the well-being of the right-holder because it allows him or her to replace what they uniquely value but are in the process of losing, a human life.

This value, so generalized, is not the subjective instrumental value of having children to labor on one's farm, of having a fourth child in the hopes of having a boy, of having something adorable to dote upon, or of demonstrating ones virility, but rather the objective value of engaging in the unique act of replicating before death. Counter to the command to "be fruitful and multiply" with which Robertson begins his book,[187] we might compare procreation in this sense to God's creation of Adam (though with some obvious differences). Procreation is not simply creation, it is self re-creation.

Having stepped back to Nagel's partially impersonal perspective, our authorities might hear a generalized claim that the claimant must be allowed to procreate or he or she may not otherwise contribute to the future in this uniquely valuable way. The claimant might die without leaving something of unique and comparable substance behind.

C. Procreation as a Satiable Value

One issue arises immediately upon stating the value in this way: When, if at all, does the value of procreating becomes sated? "Satiable principles are marked by one feature: the demands the principles impose can be completely met. When they are completely met then whatever may happen and whatever might have happened the principles cannot be, nor could they have been, satisfied to a higher degree."[188] For example, well-being is

[182] Statman, *supra* note 134.
[183] Archard, *supra* note 137, at 418.
[184] Warnock, *supra* note 139, at 41.
[185] Strong, *supra* note 87, at 349. In his second through sixth values Strong qualifies each claim by noting that procreation "can" contribute to these other values. *Id.*
[186] *Id.*
[187] Robertson, *supra* note 22, at v.
[188] Raz, *supra* note 29, at 235.

"for Raz, a diminishing and satiable value."[189] This seems intuitive: we ordinarily can satisfy ourselves of the things we value. Ian Carter finds that a satiable good is "a good the conditions for the existence of which can be wholly satisfied. The most obvious examples are physiological needs, such as the relief of hunger."[190]

Note that when thinking about satiation, it would be easy to drift away from concern for the procreator's interests and into the territory of conflicting interests. I believe that theorists like O'Neill, Archard (and to some degree Ryan) make procreation seem inherently satiable by defining the right as limited by duties to one's offspring based on one's finite resources. But this is not the approach I want to take here. Rather I want to suggest that as our authorities step back from subjective and instrumental values (like having many children to provide for one in one's later years), towards the objective and intrinsic value of generalized self-replication, there may also be an objective point at which the value of procreating, from the perspective of the procreator, is sated.

This is not a novel proposition. Even the most autonomy-minded theorists discussed above anticipate it. Robertson finds that "[n]or would already having reproduced negate a person's interest in reproducing again, though at a certain point the marginal value to a person of additional offspring diminishes."[191] Robertson, however, makes clear that the low marginal value would not occur until the person has had "a large number of children."[192]

Brock is more explicit about the matter:

> Since for most parents this is a central, if not the central, project in their lives, the decision about whether to have children at all is of fundamental importance to them. On the other hand, whether to have, for example, 3 or 4 children typically is of less importance because it has less far reaching effects on their lives. This means that typically the component of whether to procreate at all has more moral importance than the component of how many children to have.[193]

Statman is perhaps the most straightforward, arguing that the fundamental interest in procreating can be satisfied. "In terms of any of the considerations just mentioned, two or three children should definitely suffice."[194] Others also refer to the right to procreate as distinct from the right to choose how many children to have, implying that the right is satiable.[195]

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[189] Regan, *supra* note 2, at 1045.
[190] IAN CARTER, A MEASURE OF FREEDOM 75 (1999).
[191] Robertson, *supra* note 22, at 31, 74.
[192] *Id.* at 239, n. 33.
[193] Brock, *supra* note 116, at 380.
[194] Statman, supra note 134, at 225-226.
[195] *See* Note, *Legal Analysis and Population Control: The Problem of Coercion*, 84 HARV. L. REV. 1856, 1871, 1891, and 1893 (1971). Ryan's account of rights does not work with an account of individual satiable interests, *see notes* 121-133 *supra* and accompanying text, but she finds that "we can imagine a moral constraint on individual choices to reproduce under conditions, for example, where population

While I agree that the underlying objective value of self-replication can be sated, these formulations of when it is sated are morally arbitrary. Instead, the objective intrinsic value of self-replication is met upon self-replication. That is, we change from a being who has not replicated to a being who has upon procreating, and all other things being equal, we cannot achieve, meet, or satisfy that particular value again.

Replacement relates to, or corresponds to, the procreator as an individual being. The moment that being has self-replicated and established lineage, they have contributed to the future and (all other things being equal) left something of substance behind. This is not mere associative thinking, i.e. relating from one being to another subsequent being. In thinking objectively about the intrinsic value of procreating, in stepping back to view it as an example of self-replication which is good, we might see it much the way we see food as good once we step back from the various types of food we subjectively do and do not like.

From that stepped-back perspective we properly lose sight of other subjective and instrumental values procreating may simply relate to, like producing labor, ensuring a large family, having a child of a particular sex, bearing soldiers for the state, and demonstrating virility. We may instead see something altogether intrinsically valuable in the act itself, much the way all food is objectively good to humans even when certain types of food subjectively are not. What matters in this uniquely valuable act is that we replicate, and create lineage, projecting something of our existence into the future. That is done, and the conditions for the existence of the good are satisfied, the moment we create a child, our "first born." Numbers beyond lineage are subjective and instrumental, and in terms of the intrinsic moral value of procreating, arbitrary, because they correspond to no equivalent value.

Replacement gives us a rational baseline, and is the only norm that, from the perspective of state policymaking (which will become more and more crucial as the legal right is formed), is neither inherently pro-natal nor anti-natal. It is rational because it is logically related to the procreator as an individual ("being to being" so to speak), and meets the objective value persons attach to being assured that they may contribute to the future. They are assured that they may leave something of unique substance behind: a human life like theirs, to replace and continue the valuable process of living.[196]

This point can be made in a different way. Recall Ronald Dworkin's argument against the value of simply producing more human lives (incremental value), but

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pressures undermine social, economic, ad ecological stability or where reproduction for some can only be accompanied by denying others access to some basic good, such as health care." Ryan, *supra* note 99, at 114. However, she has grave doubts about the state's role in enforcing such constraints. *Id.* By basing the value of procreating in self-replication I may be falling prey to Ryan's criticisms regarding inevitably reducing the resulting child to the status of property, *id.*, at 96-101, though perhaps procreators are less likely to see their replacements as objects per se.

[196] While this article has focused on the negative claim right to noninterference, if persons have such an interest in self-replacement, that interest may also justify some positive right to assistance from others to satisfy it.

in favor of the intrinsic value of human life,[197] what Kamm calls non-incremental, objective value: value that is not a reason to produce more of it, but is a reason to treats what exists of it properly. If what we value is the life that already exists, that is, our own life, we will seek to replace or replicate that life, or to treat it properly by having another continue the valuable process of living, rather than to simply produce as much of it as we can. What we value is our individual life and its continuity through another, not the multiplication of lives per se.[198]

There is also an argument from a more consequentialist view of rights, not addressed here, that satiable replacement ought to be the underlying value, and thus a limit on the scope of the right to procreate. This is based primarily on the simple fact that each human can provide only so many resources—including time, affection, and instruction—for their offspring.[199] We could posit a rule of replacement based upon the negative consequences of persons and generations having more offspring than they can provide for, which would require parity from one generation to the next.

Regardless, our authorities can begin to define or understand the right to procreate from the rational baseline of self-replacement as an objective, intrinsic value. This would have the merit of giving reasons for or justifying what our rights-claimants wish to do, and coinciding with values that our authorities and others share and also wish to protect.

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[197] *See supra* notes 172-174, and accompanying text.

[198] One can argue that Dworkin would reject this way of grounding an eventual rights claim. See Kamm, *supra* note 174, at 166 (noting that Dworkin suggests this type of value, or what he calls the sacred or inviolable, falls outside of the realm of moral and political rights). But I am not relying on Dworkin's theory of rights here as much as I am relying on his theory of value.

[199] One could get at the value of replacement (and replacement in terms of population size as opposed to genetic lineage) from a consequentialist approach to rights, because reducing to replacement level fertility can (and likely does) lead to economic and social development that eliminates poverty, illness, and environmental degradation. *See, e.g.*, David Bloom, David Canning, Jaypee Sevilla, The Demographic Dividend: A New Perspective on the Economic Consequences of Population Change (2003) (arguing that reducing high fertility can create opportunities for economic growth when combined with specific educational, health, and labor-market policies). The dividend rests largely on the ratio of productive adults to dependent children, and depends on key variables such as education and public health.
Even autonomy proponents like Sen laud the good "the drop from over-frequent childbirth" would bring, especially for the "hundreds of millions of women [that] have to lead lives of much drudgery and little freedom because of incessant child bearing and rearing." Sen, *supra* note 107, at 1051-52, 1060-61. But Sen's approach is nothing like what I have proposed here. Sen would rely on various social and economic influences that seemingly *allow* people, voluntarily, to reduce the number of children they have. *Id*., at 1060-1061. This deifies procreative autonomy. The question remains though that if, given the right economic and social conditions, prospective parents will voluntarily reduce fertility towards replacement, is replacement not then the objective value underlying procreation? Is that what people are striving for? If that is the case, it might serve as the basis for the development of the right. Or rather, if procreative choice is merely a seesaw subject to preference shaping by external economic influences, why not enshrine replacement as the content of the right for the consequences that doing so would bring? Access to reproductive health services to prevent high fertility is only relevant if there are reasons to use those services.

Conclusion

The purpose of this article has not been to determine how our authorities should eventually decide the cases before them, or even how they will determine the legal right to procreate once they begin to interpret sources of law. Rather, it has been to argue that they can approach the cases in a certain way (perhaps as authorities in the real world do), by first critically examining the moral values or interests that might underlie the claims of a right to procreate.

Of course, our discussion does suggest how the cases might eventually be disposed of: Proceeding from autonomy might ensure that our rights-claimants eventually succeed, whereas a relational rights approach might go either way, though on the limited facts given, what our claimants want to do might not be sufficiently other-regarding. The final approach of looking at values specific to procreation might ensure that their claims are denied, at least if one takes the view that the underlying value is sated at self-replacement. That approach, may, at the very least, create the most stable right possible, one derived from an objective value that we all can appreciate and defend, albeit one that has limits.