



Is there a “right” to have children? Summary and key extracts

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The OPT two-page briefing by the author is at <http://www.optimumpopulation.org/righttoprocreate.briefing.pdf>

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Summary

Few principles are as universally accepted in legal scholarship today, but based on such scant support, as the fundamental nature and broad scope of the right to procreate. What is perceived as a vague but nonetheless justified legal and moral interest to procreate freely without regard to others is, upon closer examination, based on little more than misconstrued or inapposite case precedent and blurry statements in non-binding sources of international law. By relying on this authority, conflating procreation with conceptually distinguishable behaviours, presuming its intrinsic value, and ignoring competing rights and duties, lawyers have largely overlooked procreation and its legal and normative limits.

Extracts

- Amartya Sen implies that the "private" behaviour of procreation can have disastrous results for others, but inexplicably Sen gives it priority over other rights, such that persons must actually suffer before it can be limited...Sen implies that the negative ramifications of population growth are only some potential future event.
- No right, procreation included, is limitless if it is capable of conflicting with other valid and perhaps hierarchically superior rights. Population law's failure to address this conflict by properly defining the right...ignores the fact that merely ensuring the survival of the citizenry falls well below what is required of government, the legitimacy of which is contingent on its

ability to balance competing rights...[T]he question is not how many people can live on Earth, but how many people should live on Earth, not whether unfettered procreation is sustainable, but whether it is just.

- This lack of a clear definition, however, has led to absurd results when Congress has attempted to codify the right as an abstract policy statement. In 1996, as a statement regarding China's family planning policy, Congress amended US asylum law to mandate that persons who in any way resist coercive population programmes should be considered persecuted on account of their political opinion and offered asylum. Previously such applicants were generally denied asylum based upon the important distinction between persecution (which is committed on account of one's race, religion, nationality, membership in a particular social group, or political opinion) and prosecution under facially neutral laws of general application. Courts and the Board of Immigration Appeals have since applied the provision literally, granting asylum to an applicant who resisted by siring three children in an attempt to father a male child, an applicant who was fined and terminated from work after having her fourth child, and a young couple who were threatened and subjected to physical examination when they voiced their intention to marry and have as many children as they desired...[T]he provision is unique, declaring that procreation is a meta-right, not in conflict with other fundamental rights and moreover unlimited...Ironically, Congress limited the number of persons qualifying under the new standard to 1,000 per year, unwilling to admit more than a fraction of the daunting number of qualified applicants. In one vacuous breath, Congress both condemned China's population control policy and affirmed its own.
- Taking a traditionalist view of the sources of international norms, one finds a relatively concise body of authority on the procreative right. The International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"), which implement rights guaranteed by the non-binding Universal Declaration of Human Rights ("UDHR") and with it form the "International Bill of Rights," are the primary sources. The UDHR states that "men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family." The ICCPR requires that "the right of men and women of marriageable age to marry and to found a family shall be recognised"...This formulation of the right, to simply "found a family," does not expand on the basic right Locke pronounced some three centuries earlier... Nonetheless, commentators have inflated the right, assuming the ICCPR guarantees unfettered procreative choice.
- Consider also competing rights and correlative duties. The ICCPR guarantees peoples the freedom to dispose of their natural wealth and resources for their own ends, and it guarantees individuals the right to liberty of movement and to choice of residence, and the freedom to leave one's country. The ICESCR guarantees "the continuous improvement of living conditions" and calls for steps to ensure the equitable distribution of food and a reduction of the stillbirth rate and infant mortality, for the healthy development of the child, the improvement of all aspects of environmental hygiene, the prevention of disease, the creation of conditions to assure medical attention in the event of sickness, the provision of paid leave or leave with adequate social security benefits to mothers before and after

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

- When states must reallocate wealth to care for the children of poorer parents, or provide mothers with social security at the time of childbirth, citizens are rendered less free to dispose of their natural wealth and resources for their own ends. Children's rights to a share of finite resources compete with the rights of limitless prospective children who would compete for the same. Unlimited procreation in a finite space limits liberty of movement and the freedom to choose one's residence, because no two things can occupy the same space at the same time. Population explosions and mass emigrations in one state raise immigration restrictions in another, limiting the freedom to leave one's country. Emerging international environmental rights are violated as populations skyrocket. If the right "to found a family" must be interpreted so as not to derogate from competing rights, then those competing rights necessarily limit it. Conflicts between rights may be justly resolved by limiting competing rights with correlative duties, but interpreting the procreative right as limitless destroys the requisite balance...Thus under binding international law the formulation of the procreative right is narrow - guaranteeing no more than... replacement and continuity...The right is further hemmed in by competing rights and duties, and left derogable. But perhaps the best evidence of this right's limits is the pervasiveness of a much broader formulation in non-binding international sources.
- Non-binding sources of law contain a broader, more detailed articulation of the procreative right than ... binding sources do. In 1968 the United Nations Conference on Human Rights in Tehran agreed that "parents have a basic human right to determine freely and responsibly the number and spacing of their children." One year later the formulation was reiterated by the General Assembly in its Declaration on Social Progress and Development, and in 1974 it was added to the World Population Plan of Action ("Plan of Action"), an authoritative consensus document that created no binding legal obligations. At the time, however, the right was qualified with the requirement that "the responsibility of couples and individuals in the exercise of this right takes into account the needs of their living and future children, and their responsibilities towards the community." The same formulation was reiterated in 1984 at the United Nations International Conference on Population in Mexico City, and in 1994, at the United Nations International Conference on Population and Development ("ICPD"), the most current statement of the right was declared, ensconced in a broad spectrum of reproductive rights.
- This broad and multifaceted articulation of the procreative right, implicating various negative and positive rights, is markedly different from the UDHR's mere "right to found a family." But what does it mean in practice?

- Consider, then, the formulation of the right as it appears in the ICPD, independent from the separate proscription on state coercion. The relevant language recognises the "basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children." While the verb "decide" is modified by the adverb "responsibly," couples and individuals, not the state, are the sole subjects of that verb and presumably alone decide what constitutes responsible action. Couples and individuals "should take into account the needs of their living and future children and their responsibilities toward the community," but in the end they decide "freely." While the state appears as a subject in other sections of the ICPD, there is no basis to presume that the state plays any part in the procreative decision here. Thus the right itself, as stated, is potentially limitless.
- Perhaps this is why the broad and detailed formulation of the procreative right is limited to non-binding sources, in contrast to the narrow and vague right that appears in binding sources. The presence of such a limitless right only in non-binding sources suggests that international law does not really recognise unlimited procreative choice, other than in rhetoric. Only in theory, in hortatory documents that impose no actual duties on their signatories, will the international community suggest such an expansive vision of the procreative right. In contrast, the right as stated in binding sources is narrow...
- Some have argued that the procreative right as it appears in non-binding sources of international law has nonetheless become binding as a norm of customary international law. However, the formation of customary international law requires actual compliance; where states merely assent to non-binding agreements without recognizing the norm in practice, that norm is not part of customary international law. Despite the international community's formalisation of a broad procreative right, various countries have ignored that right in practice. Throughout the 1980s, Romania pursued a highly restrictive pro-natalist policy that included workplace gynaecological check-ups to ensure that any pregnancies were not terminated. In the mid-1970s, India pursued an anti-natalist policy that promoted the widespread forcible sterilisation of Indian citizens in mass camps, with millions of people sterilised within one six-month period. Since 1979, China, by far the most populous country in the world, has maintained a strict family planning policy...The Soviet Union historically subordinated women's procreative rights to the needs of the state, which were regarded as superior to personal decisions about birth and sexuality. While Colombia included the right of couples to "decide freely and responsibly the number of their children" in its constitution, when the right was recently weighed against the constitutional right to life in a suit challenging the country's prohibition on abortion, the procreative right was deemed of lesser importance.
- Depending on one's view of what constitutes coercion, it is possible that few if any countries respect the broad formulation of the procreative right in practice. Indeed, commentators point to the subtle incentive and disincentive policies of the United States as violating procreative rights. In light of these practices, there does not appear to be any consistent behavioural regularity by the most populous countries respecting the broad...formulations of the procreative right. Nor is it evident that states

feel a sense of obligation to change their practices to come into compliance with any international norm. China has never recognised a conflict between its family-planning policy and the broad procreative right, and, in fact, it has argued that its policy is perfectly consistent with international law. It has done so not based simply on notions of state sovereignty, but upon notions of competing rights, and its obligations to protect children and society as a whole from unjustified and destructive behaviour...Because it and other "states traditionally have perceived women's reproductive function as a legitimate matter of state control," the broad formulation of the procreative right cannot be considered a norm of customary international law. There is little actual state practice respecting it, nor is the norm seen as legally obligatory.

- The narrow and vague formulation of the right in binding sources contrasted with the broad formulation of the right in non-binding sources, and the lack of state practice and *opinio juris* respecting that broader formulation, suggest an international consensus around only the narrow international right...The actual procreative right is thus far narrower (and more consistent with replacement) than commonly assumed...[W]hen the right must be applied in concrete circumstances, expansive rhetoric yields to a far more limited vision.
- [John] Locke provided the foundation for today's domestic and international conceptions of fundamental rights, and in US constitutional law, his work is the basis for the [Supreme] Court's often-cited proposition that procreation is "one of the basic civil rights of man." Clearly Locke identifies a right here, but he cautions that it is "not barely Procreation, but the continuation of the Species," which is the basis for the right. Locke sees procreation as a meaningful act only within the context of marriage and conjugal society, its ends being not procreation *per se*, but procreation for "the continuation of the species." The right, like ...that in binding sources of international law, extends only to the point of replacement and continuity. While Locke seems to contemplate parents having more than one child, a right to continue the species is not the same as an unfettered right to procreate. And while it is reason and God's order of self-preservation that lead to the rights of life, health, liberty, and property - basic rights which nonetheless become qualified by self-preservation and eventually the public good - Locke places procreation on a much lower and arguably intrinsically less valued level, comparing it to the ways of "inferior creatures" and "viviparous animals." Locke was not proposing a right to constant and limitless procreation within conjugal society, but rather a right that extended only as far as was consistent with survival (or replacement) of the species.
- Thus, where populations grow, man's mere exercise of his natural rights will prejudice and entrench upon others' rights. For Locke "these difficulties increase with the increase in population, the decrease in available resources, and the advent of economic inequality which results from the introduction of money." Locke's golden age, the state of nature, is in part defined by "a want of People."
- Because Locke perceives population growth itself as a threat to natural rights and hence to the public good, one of the few views he shared with Thomas Hobbes, his compact would be expected to address the cause of the strife (Locke's "quarrels and contentions"): "the increase of people" that

drove them into it and presumably continues to threaten it. It could not do so if the right to procreate were unqualified. In this way Locke's theory of government does not fit with notions of a procreative right beyond the reach of political society and its laws, but rather implies a more limited right.

- Parents are "procreators, not creators, only deputies and trustees for a higher authority." For Locke, parental rights are more a product of a natural duty than an independent grant of authority or "any prerogative of paternal power." Parents are "by the law of nature, under an obligation to preserve, nourish, and educate the children" for their own good, and "the power, then, that parents have over their children, arises from that duty which is incumbent on them." Consider a prospective parent who will not fulfil the duty, but who nonetheless procreates at maximum biological capacity. The duty will then go unfulfilled unless others, individually or through the state, use their resources to provide care, which in turn impinges on their property rights and liberty. In either case, the prospective parent's act violates the parent's duty and another's right (society's or the child's). As such, the act exceeds the scope of the prospective parent's right.
- This conflict is sharpened when one considers the high level and long duration of care owed to children by their parents. In the *First Treatise*, Locke opines that a parent's duty of care goes beyond providing mere subsistence, reaching to the "conveniences and comforts of Life, as far as the conditions of their Parents can afford it." Education presents an even greater challenge, lasting until that point at which the child is capable of reason and of following both natural and civil law. There is a rebuttable presumption that this ability to reason will come at a certain age under the laws of a given civil society, but if the child has demonstrated that he cannot follow the law (natural or civil), then letting the child out from under the parents' governance, regardless of the child's age, violates the parents' duty. Reason is the relevant threshold because it is then that persons can follow the law of nature, and hence can live freely in society. Before this, children, being unreasonable and incapable of following the law of nature, threaten others' natural rights and the public good. Prospective parents, who provide the future constituents of the polity, are thus bound by duties that society holds against them, and which they may never be free of. The duties of care and education, in Locke's view, are objective and substantial. It is not the parents' prerogative to define care and education, as these are not private concerns, but rather concerns that will have a bearing on society as a whole.
- [The] competing right...to a residual state of actual nature necessarily limits the right of procreation because limitless procreation populates the world so that individuals would not be able to enjoy the default condition of natural liberty Locke assures, and upon which the legitimacy of all government is based...[L]imitless procreation infringes on the right to a residual state of nature, and endangers the political societies whose legitimacy is premised upon its possibility...[T]he procreative right as Locke sees it extends no further than required to ensure continuation of the species, and it is limited by the formation and maintenance of political societies. It is especially qualified by natural duties to prospective children and, through them, duties to other members of society. Finally, it conflicts

with and is also limited by Locke's right to a residual state of nature, a physical and not merely metaphorical realm.

- Centuries later, the US Supreme Court in *Skinner v. Oklahoma* [1942] echoes this same notion of replacement and continuation as the basis for the right, a right the Court simply described as "basic to the perpetuation of a race - the right to have offspring." The modern substantive due process cases, despite their rhetoric, do not expand on this right. Instead, in practice, courts treat procreation as an interpersonal, non-autonomous act, and they limit its exercise accordingly.
- The international community follows this theme, guaranteeing only "the right to marry and found a family," and creating a set of competing rights that restrain its exercise. In contrast, more expansive formulations of the procreative right are reserved for non-legal sources, which are ignored in practice and customarily disregarded as nonobligatory. In essence, what these sources envision is the right to continue the species, the right to perpetuate the race and have offspring, and the right to simply found a family, respectively. Each merely guarantees at least an act of replacement, a specialised behaviour justified and at the same time limited by interests beyond those of the procreator, by the interests of prospective children and of society. Furthermore, the procreative right is an interest capable of being satisfied or fulfilled, not to be repeated *ad infinitum*.
- [E]ach successive act of procreation does not carry the same intrinsic value as the one before it. In other words, is there an important difference between a "right to procreate" and "a right to choose how many children to have?" The procreative right, unlike other fundamental rights, is capable of being fulfilled. The centrality to personhood, significance for personal identity and happiness, and self-fulfilment...inherent in procreation are satisfied from the perspective of both the right-holder and others after a determinable number of acts. Intuitively, a person prevented from having a second, third, or fourth child is not viewed as having suffered as severe a deprivation as a person prevented from having a first or only child. If the intrinsic value of procreating is the self-fulfilment of the procreator...then we can presume this experiential value, this fulfilment, is achieved after the first birth - and merely replicated thereafter.
- [L]et us...assume that each act of procreating is serious, and now that it carries intrinsic value that is not capable of fulfilment, but may potentially be experienced *ad infinitum*. Discussions of such a right raise another curious problem - the apparent tacit recognition that the value of procreating for persons today outweighs the value of procreating for persons in the future. According to [Amartya] Sen, "problems would have to be very severe ... in order to justify coercive intervention in private life and in reproductive decisions. None of the carefully presented scenarios indicate that things are disastrous right now, or that they will become disastrous very soon." This suggests that when the problems become severe, governments may then justly limit persons' right to procreate, according the present population a more valuable right than future ones. The right thus becomes contradictory and unintelligible. What other fundamental right ensures its own limitation only through its exercise? Arguably none, because such a feature defeats a claim of right. This is the fallacy of defining the right to procreate as intrinsically unlimited.

- If...we are willing to admit that, because the world is finite, procreation will eventually be limited, we are either admitting that there is questionable intrinsic value in an unlimited right to procreate, or we are willing to deny that value to future persons. In the same way, if we all are willing to admit that parents have duties to their children, the fulfilment of which is somewhat contingent on the parents' finite resources, and that there is thus some numerical limit on the number of children that parents may justly have, then again we must question whether what we value is the unlimited right to procreate, or something else. The real intrinsic value is not in an unfettered right to procreate, but something more limited, closer to the notion of optimised replacement and inextricably tied to the correlative duties owed to prospective children and society.
- Thus, despite the common rhetoric, procreation is not protected by privacy or autonomy interests because it is not a personal and private act. Indeed, it is difficult to think of something less personal than creating another person. It is the antithesis of the personal, changing and creating essential legal relations perhaps more than any other act, most certainly for the person or persons created...[P]rocreative rights do not follow from underlying fundamental rights to personal autonomy and bodily integrity, as privacy rights do.
- The [Supreme] Court in Roe [v Wade, 1973] ...state[s] that "as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone." Procreation creates this life or potential life; it is the genesis of the state's interest. If the life or potential life, and thus the state's interest, has its origin in the conduct of procreation, then procreation itself is subject to the state's control. Conceptually, then, there is no personal autonomy in the decision to create another, which is quintessentially interpersonal. Not procreating is personal; procreating is interpersonal.
- If each person is endowed with rights that compete with and limit others' rights, the creation of new persons in a finite space eventually results in either limiting the rights of some in favour of the rights of others, or a general limiting of each person's overall rights, as the spheres of rights begin to overlap....[I]n Lockean terms, man's mere exercise of his natural rights will prejudice and entrench upon others' rights, "these difficulties increasing with the increase in population." Luke T. Lee argues that unrestrained procreation "would result in a proliferation of children, infringing upon both the collective and future rights to privacy"...[T]he [Supreme] Court's assurance in Meyer v. Nebraska [1923], often cited in support of a broad procreative right, of the constitutionally protected liberty "to marry, establish a home and bring up children"...implies a physical as well as a legal sphere of familial privacy that separates and buffers the family from others - something of a desire for one's own plot, perhaps reflected in contemporary suburban sprawl. And yet, this interest is directly threatened by the proliferation of others seeking the same in any given finite space. The privacy and property rights thus conflict directly with the broad procreative right - one must necessarily exclude the other, like marbles in a jar. Leaving aside the argument that privacy and property rights trump unlimited procreation in the hierarchy of competing rights, if we admit the existence of the former, we must deny the latter.

- One can imagine a host of other competing rights and interests, all ranking above unfettered procreation in the hierarchy of rights, such as the right to travel, interests in certain natural resources, the interest in clean air, and political rights generally, that are so affected. This principle manifests itself today in the current debate over local no-growth regulation, as communities attempt to protect themselves from the chaotic effects of expanding populations. In support of such ordinances, Tom Pierce cites *Village of Euclid v. Ambler Realty* [1926] as recognising "the elastic relationship between population and law": "as the number of Americans increases, life becomes more 'complex,' and the scope of law necessarily 'expands.' ... With the expansion of regulation comes a concomitant contraction of rights." Put another way, the degree to which a person can exercise certain rights is inversely proportional to the number of other people exercising certain rights - again, like marbles in a jar. The [Supreme] Court, observing the constriction of constitutional rights because of growing population density, suggests that regulations "now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive."
- [E]xercising a broad right to procreate today also bears an inverse relationship to its exercise in the future; that is, reading the right broadly now means that it must be read more narrowly in the future. Procreators compete not only with others currently living in society subjected to their behaviour, but also with procreators in the future...[P]rocreation in any finite space diminishes various current and future liberties.
- [O]ne can take all of the various rights that compete with an unfettered right to procreate, both now and in the future, and simply group them into any given society's collective interest in (and perhaps collective right to) an optimal upper population range - the upper range within which any given society with finite space and resources can successfully fulfil the obligation of optimising the public good that it owes to its members, and that its legitimacy is contingent upon...[W]e arrive at the concept of procreation for optimised replacement.
- [A]ssuming the intrinsic value of an unfettered right to procreate is less than the intrinsic value of the other rights it endangers or with which it conflicts, procreation should be the behaviour primarily regulated to achieve the public good.
- The addition of each new person affects the world's environment in a certain and quantifiable way, creating a footprint, potentially infringing on the rights of others to natural resources - rights grouped under the heading of environmental rights...Locke refers to the physical world in discussing the state of nature - not some mere abstract concept or metaphor, but natural liberty in a space "free and unpossessed." Real property and the privacy it assures are physical. Each act of procreation poses a direct and obvious threat to the guarantee of natural liberty in space, beating back...to an eventual (and perhaps already actual) state of nonexistence. Nature is finite, but procreation is infinite, eventually leaving no state of nature for others to stay in or return to. A partial recognition of this interest has become codified in US statutory law intended to preserve wilderness areas, and is the basis for various international environmental conventions.

Collectively, these authorities recognise a specific interest or benefit in creating an enforceable duty of noninterference on other persons, and thus a right - one which constrains procreation.

- [S]omething parallel to [Locke's interest in a residual state of nature] underlies modern substantive due process law. Reduced to its core...it is "the right to be let alone - the most comprehensive of rights and the right most valued by civilised men." The [Supreme] Court in Casey [1992] states that "the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State"... The presence of others, regardless of the actions of the state, interferes with the right to be let alone, which is synonymous with Locke's natural liberty...
- The right to truly be let alone, to enjoy natural liberty and engage in self-realisation, competes with and limits the right to procreate. This is not to say that persons cannot achieve liberty in a populous society, but rather that all persons have the right to experience the special natural liberty outside of it if they choose. If we value this right, we must preserve it against an unlimited number of prospective children. This right, like other relational concerns, thus limits the scope of the procreative right.
- Failure to properly define the right in law is tantamount to a public consensus that no norms apply to it, resulting in little if any public direction for citizens regarding their procreative choices and the consequences for their prospective children and other members of society. To procreate is to act with substantial consequence for others, and such acts are subject to law, if only in its role as a guide.
