

The Right to Have Children: What is the best account and how do we implement it in law and practice?

Introduction

This brief discussion piece argues that the universally accepted one-sided model of family planning, which protects parents' subjective choice to have children, should be abandoned in favor of a three-sided model that protects the objective interest of parents, future children, and the state.

Part one relates the discussion of family planning and procreative ethics to international human rights, and from that context develops the premise of the argument: That good family planning models maximize consent. Part two describes the move from the one-sided model to a three-sided model. Part three offers one way, the Having Kids model, to implement that move in law and practice, and gives specific examples of implementation.

I. The human rights context and the value of maximizing consent

Article 16 of the Universal Declaration of Human Rights ("UDHR") guarantees parents "the right to marry and found a family."¹ Article 16, and subsequent binding and non-binding instruments implementing it, have been interpreted by United Nations agencies to ensure "the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children;" those agencies recently suggested that China's family planning policies, which limit the number of children its citizens may have, conflict with this right.² The right has also been adopted in many domestic constitutional regimes as a fundamental human right, the formulation of which is simple: "Whether one person's body shall be the source of another life must be left to that person and that person alone to decide."³

This right or norm is focused exclusively on parents' subjective choice, and is what is described herein as the one-sided model of family planning. That model (often referred to in terms of parental privacy, autonomy, personal decision-making, etc.) has risen to the level of almost universal dogma, despite being deeply problematic.⁴

¹ Art 16, UDHR.

² See UNFPA release on China's policy change, at <http://www.unfpa.org/press/unfpa-hopes-policy-changes-will-lead-fulfillment-chinese-couples-rights-family-size>.

³ Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 1340 (2d ed. 1988).

⁴ Here are a few of the problems: 1) It bundles the acts of having and not having children together as deriving from autonomy, when the act of having children is more other-determining (for the children and the state, especially in terms of creating new moral and legal duties) than self-determining for the parents, and common reasons for having children are not authentic to the parent and commonly not subject to second-order reflection. 2) If instead the model is a choice-based right rather than based on parental interest in autonomy, it is easily overridden by competing interest-based rights, like rights to certain natural resources. 3) The bundled right unwittingly gives parents a property-right in their future children, contra norms against treating persons as property. 4) The interest in having children intuitively diminishes with each child one has, which implies a level of objectivity inconsistent with the notion of subjective parental choice. 5) Given certain conditions the right doesn't apply equally among generations, thereby disqualifying it as a right all people enjoy by virtue of their humanity.

Discussions of family planning and procreative ethics happen against this human rights background and model. Media surrounding China's recent change towards a two-child policy, almost all of which presumed that even the new policy violated human rights, illustrated this well. But while "rights talk" can often shut down conversations about the morality of having children, it often implies entrenched commitment to other parts of the UDHR and legal instruments derived from it which guarantee things like consensual government and child welfare.

That commitment, to valuing 1) consent to power and 2) child welfare, is key to developing a new rights-based model of family planning, one with the unique feature of overriding almost all conflicting interests.

Because the purpose of this brief discussion is to simply introduce a particular three-sided model and test its function, we start at the tail-end of the full argument for an interest-overriding family planning model,⁵ and instead assume and take as a premise one of its conclusions: That good family planning models maximize consent.⁶

II. Maximizing consent: Including future children and the state in family planning models

Assuming, as the full argument concludes, that future persons are morally relevant and can constructively consent, the requirement to maximize consent suggests that both 1) extant persons who will be influenced by future children (collectively treated here as the state) and 2) future children themselves, should be considered in family planning models, in addition to 3) the parents.⁷ Arguably the state and future children have *more* interest in family planning than parents, who can mitigate the consequences of procreation in ways the state and children cannot.

All of these problems could be explained by historical conditions, and limitations in the human psyche, that prevented scrutiny of the morality of having children, including lack of access to family planning resources, the role of religion in narratives about the birth of children, patriarchal control of the family as an institution, use of marriage as a first-order means to control procreation, state interests in population growth and lack of an international regime for collective action between states, lack of accounts of the role of early-childhood development in human development, the intentional bundling of the right to have children with the right to not have children by early family planning advocates, humans' immediacy bias, etc.

⁵ Establishing such a norm would require two arguments. First, that norms comprising the most valid theory of political obligation override conflicting norms. Second, that the consent theory is the most valid theory of political obligation, *if* it is modified to require consent to human influence rather than political authority, and temporalized to require the constructive consent of future children. To illustrate, this would change the common concept of a consensual constitution from two-dimensional, comprised of norms, to four-dimensional, comprised of norms, as well as extant and future persons.

⁶ Following the full argument, consent here implies 1) consent to human influence, and 2) that future children are capable of giving constructive consent. The full argument specifies that family planning models should maximize consent in reconstituting non-derivative political systems, but the claim here is simplified for purposes of this limited discussion.

⁷ The interests in these three categories overlap (e.g., future children have interests as members of the state, parents care about their children's well-being, etc.) but that will not be discussed in detail here.

A. Consent by the state

Extant persons who will be influenced by future children, in the form of the state, have at least two interests in family planning that make their consent relevant: governance and the environment.

First, as the UDHR (and most theories of political liberalism and democracy) make clear, the second-order power of any state ultimately derives from the first-order power of the people in it, who consent to those who have power over them.⁸ This principle suggests that for people to retain ultimate power they must first choose or consent to each other as citizens, including choosing or consenting to new persons coming into the state through birth. This basic sovereignty interest is familiar in things like immigration, though there are no good reasons to distinguish immigration from procreation from the perspective of people in a state wishing to retain ultimate power.⁹ This sovereignty interest would at least have to account for 1) the basic relationship (*ceteris paribus*) between the addition of people to a given political system, the resulting dilution of each member's share of the sovereignty of that system, and each member's subsequent attenuation from the norm-making processes of that system (the quantity problem),¹⁰ as well as 2) the nature of incoming people, in terms of their capabilities to participate in the political organization of the system (the quality problem). Any attempt to mitigate these problems by limiting the authority of the people would be contrary to the first principle, and to the political autonomy and decentralization of power it promotes. In other words, given that in a democracy lots of weak fellow citizens could be as bad as a despotic ruler, extant people have a weighty interest in the quantity and quality of the people around them. And because the quantity and quality are being constantly re-constituted through procreation, there is no way to effectively further that interest without addressing procreation. Put simply, extant persons have an interest in consenting to who comes in, and in that process, retaining their ability to consent to norms and other forms of power under which they live.

Second, an implication of people's choice to consent to *any* state's power entails an interest in being able to withdraw consent to *all* states' power, and enter a relative baseline state of nonpolity represented by the nonhuman world (for which the most analogous concepts would be wilderness and Locke's original position of a state of nature).¹¹ Nonpolity, or the nonhuman world, is colonized and degraded by procreation (more so than any other individualized human behavior), which also degrades people's ability to consent to state power because they have no

⁸ Article 21, Universal Declaration of Human Rights states that:

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(3) *The will of the people shall be the basis of the authority of government*; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. (emphasis added)

⁹ Locke, for his part, suggested this issue be dealt with by delaying emancipation until persons achieved the age of reason. That after-the-fact solution ignores the (ostensibly unconsented to) influence un-emancipated persons have on others and the state, and might create the equivalent of a state of un-emancipated persons within an existing state.

¹⁰ Jean-Jacques Rousseau, *ON THE SOCIAL CONTRACT* 50-51 (Donald A. Cress ed. & trans., Hackett 1987) (1762).

¹¹ Carter Dillard, *The Primary Right*, 29 *Pace Env'tl. L. Rev.* 860 (2012).

alternative from which to consent. Anthropogenic climate change, ocean acidification, and anthropogenic mass extinctions are examples of this colonization and degradation.

Procreation and family planning determine the less familiar borders of human power – the borders of preexistence and the nonhuman world – and with those borders the very ability of extant persons to consent to the power others have over them.

B. Consent by future children

Future children have at least two interests in family planning that make their consent relevant (in addition to overlapping interests mentioned at note 7, like being subject to the state in which they are born): entering above some minimum threshold of well-being, and with opportunities equal to other children in their generation.

The full argument for these interests is beyond the scope of this discussion, but begin with Rawlsian and other principles of political liberalism which require that all political systems start with the voluntary coming together of free and equal people,¹² principles which strongly imply things about procreation and entry into those systems by future children. These two interests are also based on the moral and legal commitments to child welfare mentioned above (reflected in things like domestic child welfare laws, the Children’s rights convention, legal regimes that protect health and safety, etc.), commitments that strongly imply minimum thresholds of well-being and equity as a prerequisite to obtaining the constructive consent of future children to enter this world.¹³ The notion that future children have an interest in constructively consenting to enter the world also matches common and strong intuitions each one of us may have about which birth conditions we would choose, both independently and relative to others in our generation, as well theories of equity among children (where complicating factors like desert are not present).

C. Consent by parents

Finally parents have at least two interests in family planning that make their consent relevant: the interest in not having children as well as the interest in having them.

Unlike the one-sided model’s version of the right to have children, discussed above, we can reject the choice-based right (either *prim facie* or because the interests above defeat it) and unbundle parents’ autonomy based interest in not having children from a separate self-replacement/continuity based interest in having them.¹⁴ Together these two rights retain parents’ traditional position in family planning modeling, but modify it by correcting for the mistakes and historical limitations that led to the bundled autonomy-based right (see note 4). While parents’ interest in not having children remains the same under this modeling, their interest in having children is presumed to be based upon the value of self-replacement/continuity of the parents’

¹² Cf., Article 1, Universal Declaration of Human Rights (“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”)

¹³ See generally Lukas Meyer, Intergenerational Justice, In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, 2010 (revised 2015).

¹⁴ See Carter Dillard, Rethinking the Procreative Right, 10 *Yale Hum. Rts. & Dev. L.J.* 1 (2007); Carter Dillard, Valuing Having Children, 12 *J.L. & Fam. Stud.* 151 (2010).

their own lives through their children (which is satisfied by parents having one or two children, depending on one's view of continuity). Self-replacement/continuity is the only self-regarding value that is sufficiently objective to ground a fundamental human right, and is the only value consistent with the best interpretation of binding sources on the legal right to have children, discussed above.

This unbundling, moving parents' interest in having children from autonomy to self-replacement/continuity (which recognizes that the interest in having children diminishes with each child that we have), is also the change that fuels the Having Kids model below. That model tries to implement the move from a one-sided focus on parents' subjective choice to a three-sided focus that incorporates the interests of the state and future children. It does so by encouraging collective decision making, and by shifting resources that would have gone into larger families (numbers of children beyond self-replacement/continuity) instead towards simultaneously satisfying all of the interests discussed above.

III. The Having Kids model and maximizing consent

The Having Kids model requires three things:

- 1) That smaller families¹⁵ plan to have their children when the conditions into which any child would be born are above a certain threshold, and in exchange, other families and the state help parents create those conditions.
- 2) That other families and the state help by first shifting resources¹⁶ that would have gone into creating larger families instead towards helping smaller families actualize their plan.
- 3) That the conditions into which any child would be born include a) a minimum level of well-being, set in part by ensuring children have fair opportunities equal to others in their generation, and b) conditions that promote children becoming capable of co-leading a democratic community bounded by the nonhuman world.

This model moves from a one-sided focus to a three-sided focus by simultaneously promoting all of the interests described in Part II above, thereby maximizing consent by the state, future children, and parents. It does so, for example, by increasing (*ceteris paribus*) extant persons' share of their sovereignty restoring the nonhuman baseline by decreasing population, and also increasing effective investments in each child in ways designed to improve the quality of their participation the political system. This investment, enabled by shifting the resources that would have gone into larger families, furthers the interests of future children and likelihood of their constructive consent by raising their minimum threshold of well-being and equality of opportunity at entry. This model also furthers the interests of parents (in addition to overlapping interests, like increasing the well-being of, and opportunities for, their children) by securing their fundamental human right to self-replacement/continuity.

¹⁵ The purely academic form of the model would refer to parents having one or two children, but the version here is more equivocal in order to create a discussion about the audiences to which the model is directed.

¹⁶ These resources can include time, money, shareable goods, co-parenting, community building, etc.

This model is specifically designed to 1) break the paradigm of subjective parental choice by creating the need for collective action around an objective best practice, 2) appeal to a variety of conflicting political ideologies (libertarian, egalitarian, environmental, etc.), and 3) avoid the pitfalls of population policies by focusing on parenting per se, and being deliberately inclusive rather than exclusive.

Here are some examples of how the model will be applied, taking into consideration literature suggesting that family planning decisions are largely the product of specific cultural narratives and role modeling.¹⁷

- Family A plans to have their first child after they have put two thousand dollars into a college fund, in exchange for Families B, C, and D collectively donating ten thousand dollars, from money that would have been spent having additional children, to Family A's fund.
- Corporation A reduces child benefits after the second child for employees making over eighty-thousand dollars a year, and the savings are used to add a family planning component to the benefit plan as well as increase overall benefits for families making less than eighty-thousand dollars a year.
- Federal and state child tax credits are eliminated after the first child for families making over one-hundred thousand dollars a year, and the savings are used to fund family planning and early childhood development programs for families in need.
- Statues authorize state courts to issue no-procreation orders in cases of parental unfitness and to revoke probation in extreme cases, in tandem with increased funding for family planning and parental fitness training programs.

Conclusion

The universally accepted one-sided model of family planning, which protects parents' subjective choice to have children, should be abandoned in favor of a three-sided rights-based model that protects the objective interests of parents, future children, and the state. The latter model better reflects the interests at stake and is more likely to maximize consent. The Having Kids model is one way to make this move.

¹⁷ See e.g. Stuart Basten, Mass media and reproductive behavior: Serial narratives, soap operas and telenovelas. The Future of Human Reproduction, Working Paper no. 7. Oxford, England: University of Oxford.