Antecedent Law: The Law of People Making

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INTRODUCTION: THE GREAT ASSUMPTION

The term “law,” at least as it is used in the social sciences, is not easy to define. Modern legal theorists, like H.L.A. Hart, have spent a lot of time showing that.1 But, while the sufficient conditions for law to obtain are debated, in most cases, there are at least two necessary conditions: there must first exist some group of persons, amongst whom the law can exist, and law must influence the relations of those persons, most often their behavior towards one another.2 Certainly older understandings of law, such as John Austin’s notion of norm-subjects under orders enforced by threats from the sovereign,3 paint a mental picture of people whose behavior is also susceptible to influence. And, although more nuanced, modern concepts of law like

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1 See H.L.A. Hart, THE CONCEPT OF LAW 5, 16 (2d ed. 1994).

2 See, e.g., THOMAS AQUINAS, The Treatise On Law Q. 90: The Essence of Law, in ST. THOMAS AQUINAS ON POLITICS AND ETHICS 44 (Sigmund ed. & trans., 1988) (describing law as “a rule or measure of action by which one is led to action or restrained from action”); Sir William Blackstone, Commentaries on the Laws of England 39 (Garland 1978) (defining law as rules of human conduct or action); E. Adamson Hoebel, The Law of Primitive Man 275 (1954) (describing law’s primary function in its universal aspect as setting up limitations on rights, duties, powers, etc.); HERMANN KANTOROWICZ, THE DEFINITION OF LAW 12 (1958) (describing law as “a body of rules aiming at the prevention or the orderly settlement of conflicts”); HANS Kelsen, Pure Theory of Law 31 (Max Knight trans., 1967) (identifying law as regarding human behavior); Andrei Marmor, The Nature of Law, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2010), available at http://plato.stanford.edu/entries/lawphil-nature/ (noting that law “purports to guide human behavior, giving rise to reasons for action”). Even this simple description does not fully capture all instances of law, i.e., law between nations, or law between humans and animals, but we can say that it captures most instances of law.

3 See HART, supra note 1, at 16.
Hart’s central set of elements, or Ronald Dworkin’s treatment of law as an interpretive concept, also suggest this image of people who are susceptible to law’s influence as they relate to one another.\footnote{See Hart, supra note 1, at 79-123, 155; Ronald Dworkin, Law’s Empire 86 (1986); see also John Finnis, Natural Law and Natural Rights 260, 276 (2000); Joseph Raz, Practical Reason and Norms 144 (1999); Persons being susceptible to laws, as is discussed in notes 36-46 infra and the accompanying text, means more than something as simple as one’s body being susceptible to arrest, or even merely being responsive to physical sanction. See, e.g., Jeremy Waldron, All We Like Sheep, 12 CAN. J.L. & JURIS. 169, 176 (1999) (“If they abide by them only to the extent (say) that cats and dogs do—i.e., only to the extent that their physical behavior is actually forced into conformity by leashes, chains, muzzles, kicks, etc.—then they may not be regarded as a part of the population among whom the legal system in question exists.”). Susceptibility might be thought of as a spectrum that starts with something like a “disposition” to obey the law, which runs towards becoming the “angels” that Raz refers to as the requisite norm-subjects for a sanctionless legal system. See Finnis, supra at 267; Raz, supra at 159.} Thus, in our common understanding of law, the bare minimum that emerges is a mental picture of people standing in relation to and influenced in their relation towards one another.

But this bare concept of law fails to account for exactly how the people entered the picture, i.e., the particular system of laws that facilitate entry into the polity. Nor does it explain why these people are all susceptible to the influence of the thing we call law. It is as if the persons to whom law is addressed have simply appeared, carrying with them whatever attributes or qualities they need to respond to law. In our mental picture, they exist \textit{ex ante}. It is as if the law has simply arrived at a party with the guests already assembled, each well prepared, or having the necessary attributes, to assume whatever role the law gives them.

However, while as a historic matter people probably did pre-date law, as a conceptual matter they need not. Any system of laws or norms will also determine, whether by prescription or omission, the circumstances in which persons enter that system, and will thereby play a role in creating them. For example, when states decide to give a tax credit to promote childbearing or charge a fee to discourage it, to legalize or ban abortion, to promote or prevent certain forms of immigration, or to do nothing at all with regard to immigration, states make choices that determine the presence of persons within their borders.
And, when a state determines the circumstances in which persons enter the polity, it is also inevitably determining something about how those persons will relate to the polity’s laws, or what may be called his or her susceptibility to law. If a given polity has a written, as opposed to an oral, system of laws, but does nothing to ensure those entering it know how to read, the polity—in “creating” its new members—is determining something about how those persons will relate to its laws.

There is thus a body or form of law that exists before, or antecedent to, our most bare concept of law. But, we do not now divide between the antecedent law that creates (or makes present) persons qua norm-subjects and the law that then directs them as such. It is as if law is a key that we presume fits the lock, i.e., the person qua norm-subject. But we do not notice that the law plays a special antecedent role in creating the locks and in shaping them as such.

Perhaps we can explain the omission in this way: it could be that our bare concept of law leaves the creation of persons qua norm-subjects to other disciplines and instead focuses on those persons’ subsequent arrangement and constraint. Certainly political (as opposed to legal) philosophers have been more explicit about the importance of focusing not just on extant members of the polity, but also on those entering it. Addressing the creation of new members in a polity, Rousseau said:

> Again, attention must be given to the greater or lesser fertility of women, to what the country can offer that is more or less favorable to the population, to the number of people the legislator can hope to bring together through his institutions. Thus, the legislator should not base his judgment on what he sees but on what he Foresees. And he should dwell less upon the present state of the population as upon the state it should naturally attain.\(^5\)

Perhaps people-making is a matter best left to politics, or economics, rather than law. But, admittedly, Hart does briefly touch upon the issue, though unlike Rousseau he focuses more

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on the susceptibility side of the coin. He said in *The Concept of Law*:

Thus, the still young sciences of psychology and sociology may discover or may even have discovered that, unless certain physical, psychological, or economic conditions are satisfied, e.g. unless young children are fed and nurtured in certain ways within the family, no system of laws or code of morals can be established, or that only those laws can function successfully which conform to a certain type.6

Could it be that looking at these matters from a legal perspective, as opposed to a political or economic one, leads to different results? Should law account for the creation and susceptibility of people, or leave that matter to other disciplines, so that the law simply takes whatever people political and economic systems produce? It may be that the most basic notion of law itself will lead us to think different things about people-making, about the creation of persons in our basic mental picture of the legal system, than our basic notions of power or of economics would. That is, making norm-subjects may be a different matter than making economic-subjects or power-subjects. Legal systems may demand special types of persons; persons different than those required for political or economic systems. The various conceptions of law that exist may all tell us something in common about what we need to do to make norm-subjects, perhaps something more than the unsurprising point that the law ought to make people that are responsive to it.

We might even go so far as to say that a system made up of economic-subjects and/or power-subjects, as opposed to norm-subjects (or what we may all legal-subjects), that is, a system whose members are responsive to political and/or economic stimuli rather than norms, is not a legal system at all. Citizens in a legal system would be legal persons, primarily or exclusively responsive to the stimuli of the norms alone, rather than political or economic persons responsive to the coercive stimulus of the stick (power) or the incentivizing and disincentivizing stimulus of the carrot (economics), so to speak. The dispositive test

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6 See HART, supra note 1, at 189.
for such a system would literally be compliance with the legal norms without any associated coercive sanctions, or economic costs or benefits.

But it could also be that our bare concept of law leaves the creation of subjects aside, to other disciplines, because there is something heretical in seeing the law in this way. The law does not create people and give them attributes. Only a divine creator can do that. The creator makes people and gives each his/her qualities and the law must simply take these people and their qualities as it finds them.

In contrast with that view, and with the view that people-making is to be left to other disciplines like politics or economics, this Article is directly concerned with law as it creates members of a legal system, with the law that first sets the irreversible stage on which our traditional concept of law then acts. This “antecedent law” is simply a body, or form, of law. It is law that meets the necessary and sufficient condition of determining the entry of new persons into the polity, and through that, the susceptibility of those persons to law itself.

The form of antecedent law is new. But it works by grouping together existing forms of law, like laws determining procreation, immigration, and education, based on their shared role in determining persons’ susceptibility to law through their entry into the polity.

Much like contract or tort law, antecedent law is itself not a conception of law, nor is it a descriptive theory of law’s normal-

7 The notion of antecedent law may be in tension with some views of liberal government that see the state and its laws as having no role in creating citizens, though that point is not addressed here. See, e.g., Note, Regulating Eugenics, 121 HARV. L. REV. 1578, 1587 (2008) (“Liberalism assumes that the citizens exist prior to the state, whether in fact or by hypothesis, and that they create the state to advance their own interests.”).

8 For a discussion of the role of education law in people-making, see infra Part I.

9 Antecedent law is not a candidate for changing the essential concept of law described here because it uses the more basic concepts of humans and behavior. Rather, it is a candidate for a form of law. Antecedent law is related, but not identical, to the concept of biopolitics. See, e.g., Jedediah Purdy, The New Biopolitics: Autonomy, Demography, and Nationhood, 2006 BYU L. REV. 889, 894 (“Biopolitics comprises the relationship between individuals' control over their bodies and the power the political community may exercise over them: both the demands it may make (that they bear children, that they fight and die) and the prohibitions it may impose (no abortions, no second children).”).
tivity.\textsuperscript{10} It is much cruder than these things. It simply groups many existing forms of law together, making them sub-forms, much like the way immigration law groups together sub-forms like naturalization law and asylum law. Antecedent law focuses our attention on the processes that create the most basic state of legal affairs: people within a given legal system,\textsuperscript{11} with their varying degrees of susceptibility to its laws.

The argument involves three steps: the first step, Part I of this Article, defines antecedent law and describes what the form does that our existing forms of law do not. Part II is more prescriptive, advocating for a particular content for the form, or substantive antecedent law norms. Specifically, Part II identifies a state interest in “valuable autonomy” (hereinafter “autonomy”), which, following Joseph Raz, may be understood as the presence and active pursuit of morally valuable options in life.\textsuperscript{12}

\textsuperscript{10} This article distinguishes antecedent law from the influential and empirically based behavioral theories of the law, which focus on \textit{how} the law influences (if at all) our beliefs and behaviors. They range from a material incentive based law and economics approach to highly nuanced theories that explain how law shapes societal norms or accounts for cultural and moral cognition. \textit{See}, e.g., Kenworthy Bilz & Janice Nadler, \textit{Law, Psychology, and Morality, in 50 The Psychology of Learning and Motivation: Moral Judgment and Decision Making} 101 (Daniel Bartels et al. eds., 2009). In contrast, antecedent law focuses on \textit{whatever it is about the law} that creates (makes present) persons in particular circumstances, and persons \textit{qua} the subjects of law—the lock into which the key of law is inserted. \textit{See supra} note 6 and accompanying text. Put simply, behavioral theories determine how the law influences behavior, but antecedent law is only concerned with how the law influences the very specific behaviors that constitute people-making.

\textsuperscript{11} This brief introductory article will not discuss the role federalism plays in antecedent law, though how antecedent law applies in overlapping polities is an obvious question at this point.

\textsuperscript{12} The term “valuable autonomy” is taken from Raz and his perfectionist view of liberalism. Raz finds that “[a]utonomy is valuable only if exercised in pursuit of the good.” \textit{Joseph Raz, The Morality of Freedom} 381 (1986). This article understands the concept as freedom to make and act on one’s subjective choices, but within the bounds of some objective morality. Do we find equal value in one’s freedom to feed a starving animal as we find in one’s freedom to kick that same animal down the street? Arguably we do not. Raz’s autonomy is also a kind of positive freedom, where the state does not make its citizens free by simply ignoring them, but must provide a range of morally valuable options (i.e., the option to become a doctor, but not an alcoholic; to be literate, but not illiterate; to care for animals, but not abuse them) and ensure that each citizen has the “deliberative and volitional capacities” (or civic qualities) to make use of the choices. \textit{See} Leslie Green, \textit{Un-American Liberalism: Raz’s ‘Morality of Freedom’}, 38 U. TORONTO L.J. 317, 324-25 (1988). This paternalistic view of freedom rejects moral relativism and subjectivism and finds that we value freedom only once we have certain capacities, and then only because it lets us do things that are good, things we objectively value.
It then argues that antecedent law can enable a state to maximize autonomy by regulating the creation and susceptibility to law (or what might be called civic quality) of its citizens, rather than focusing merely on those citizens’ subsequent arrangement and constraint. Lastly, Part III explores three counterarguments that are likely to be made against antecedent law and the content proposed in this article.

What is the value of such a reductive approach, of dividing law in this simple way, between law and pre-law? How does this add to the existing literature? It adds to the literature in four ways:

First, there is a logical distinction, not made before, between the law that creates persons, and in doing so makes them subject to its influence, and the law that subsequently directs them. The notion of antecedent law, or law before law, seeks to account for this distinction. It seeks to fill a gap in our discipline that makes it more static than it has to be by addressing the behavior that determines whether persons will exist and whether they need to be, or can be, subject to coordination and constraint.13

Second, antecedent law may add to the concept of the rule of law, and even become part of the desiderata for it.14 It seems inconceivable that a state can establish a legal system consistent with the rule of law without taking special regard of the actual creation of the persons within it, both of the number created as well as their susceptibility to its laws. Is the system simply the set of laws themselves, irrespective of the quantity and civic quality of the people to whom they are addressed?

Third, antecedent law, as a form of law, may help distinguish law from other disciplines like economics and politics. As will be discussed more fully below, a legal system—one that uses norms to guide behavior—may call for a different constituency, both in number and in kind, than a system that is merely

13 This article does not use “static” in the sense that Hart uses the term, to refer to the slow evolution of primary rules. See HART, supra note 1, at 92. Rather, it refers to the meaning Rousseau suggests. See supra note 5 and accompanying text.
14 See FINNIS, supra note 4, at 270.
economic or political, i.e., one that uses material incentives and disincentives, or coercion, rather than norms, to guide behavior.

Finally, in a less theoretical and much more doctrinal sense, antecedent law may also help us explain what is arguably a very specialized level of state interest, speaking in purely U.S. constitutional law parlance. The Supreme Court uses extreme rhetoric when referring to the state’s compelling interest in laws and policies that will determine the nature of future citizens, often using superlatives across a range of cases.15 Scholars like Erwin Chemerinsky cite the state’s interest in child welfare, along with national security, as clear examples of things in which the state has a compelling interest.16 By grouping together laws around this shared characteristic, or their role in shaping the future constituency of the polity, we might prioritize it as a category, beyond the rhetoric.17 In other words, we might more clearly discuss, determine, and understand what common, and perhaps unique, level of constitutional interest a state has in things like procreation, immigration, and education. We might distinguish between the state’s interest in law that creates persons and law that then directs them.

The abortion debate in the United States today is emblematic of the law and antecedent law distinction. The opposing points of the debate arise from conflicting interests in liberty, equality, and in protecting the sanctity of life. The traditional


17 Antecedent law appears in perhaps its most crystallized form in the no-growth ordinances of small polities (where the affects of both the number and the civic qualities of each citizen are more keenly felt). For a discussion of what those ordinances protect and why, see generally Tom Pierce, Comment, A Constitutionally Valid Justification for the Enactment of No-Growth Ordinances: Integrating Concepts of Population Stabilization and Sustainability, 19 U. HAW. L. REV. 93 (1997).
view of law is focused on regulating the competing interests of existing persons in the polity, focused on the mental picture of people who now exist in it. But abortion, from an antecedent law perspective, is perhaps most interesting for how it determines the conditions in which prospective citizens will or will not enter the polity.\textsuperscript{18} It literally involves the physical remaking of the polity debating it. Could our shared and overriding interest in that issue push these other interests into the background and also provide common ground for compromise, perhaps because there are widely-shared and objective standards for the conditions under which persons should and should not enter the polity?

Similarly, constitutional law today focuses on the meaning of a specific document—the Constitution. But, from an antecedent law perspective, the Constitution, in regulating abortion for example, re-determines the \textit{constituents} of the polity. Could it also be seen as \textit{constitutional} in that sense? And could seeing it as such lead us to understand it and the controversies it mediates in different ways?

Focusing on the law’s role in these matters and giving that focus a rubric drags into the open something that is otherwise left out of view by the traditional concept of law. Antecedent law is like a mill that, without being named and examined, operates quietly in the background, generating the constituent elements of law. Naming it allows us to avoid focusing myopically on the law itself rather than the growing number of persons it pertains to, and upon whose susceptibility to norms that law is based.

This Article will not systematically discuss how determining the entry of new members into the polity, and as such the polity’s size, relates to susceptibility, though some themes may emerge. First, because the state must expend certain resources to ensure new persons will be susceptible to its laws, and resources are scarce, there may be a tension between growth and susceptibility. Second, because the total resources of any polity

\textsuperscript{18} See, e.g., Roe v. Wade, 410 U.S. 113, 153 (1973) (White, J., concurring) (“There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.”).
are scarce, the number of new entrants may have to be limited to avoid the type of excessive resource competition that leads to chaos, or the converse of susceptibility to law. Third, because each new entrant will dilute the role all other members play in creating the norms (e.g., through their vote), there may also be a tension between adding new members and ensuring susceptibility.

These themes aside, antecedent law deserves to be named as such and examined. Our day-to-day lives are largely defined by the people around us and their civic qualities, rather than by the sea of words—unknown and unknowable to most—that gather dust in law libraries. And yet the law played a role in ensuring the presence of those around us and their susceptibility to it, as it will in the case of future generations. It is that role which this article examines.

I. DESCRIBING ANTECEDENT LAW AND ITS FUNCTIONS

Antecedent law is law that, whether by proscription, permission (such as a broad constitutional right to procreate), obligation, or omission, determines the creation or presence of people in a given legal system, and through the act of making them present, the attributes or qualities (or civic qualities) they need to be susceptible to law.  

Antecedent law is best conceived of as a sphere with a clearly defined center. In the center are the clearest cases of civic quality-making through creation, as with the laws determining procreation, immigration, and education. It is vital to keep in mind that antecedent law regards civic quality-making through the process of making people present—through dictating the circumstances under which a person enters the legal system

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19 It is to be distinguished from the field of philosophical inquiry currently known as population ethics, which is dominated by utilitarians and largely focuses on how population and welfare relate. See Jesper Ryberg, The Repugnant Conclusion, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2006), available at http://plato.stanford.edu/entries/repugnant-conclusion.

Population ethics will partly determine what the substantive content of antecedent law should be, but this brief discussion of the virtues of the form of law raises legal and political questions beyond population ethics—in fact it opens the door to policies based on them.

20 The ways in which education relates to antecedent law are discussed below. See infra notes 30-33 and accompanying text.
(the circumstances in which a child is born, or the prerequisites for immigration, for example).

Of course, there are areas of overlap with less antecedent laws as one moves from the center of the sphere. Laws regulating surrogacy contracts, no-growth residential zoning, and parental liability laws involve traditional forms like contract and property law, but they may also play a lesser role in determining procreation. Thus, whether a form of law is antecedent depends on the degree to which it determines the creation or presence of persons in the system, and through that, the attributes they need to be susceptible to law.

Note too that antecedent law, as defined here, is not particularly concerned with people exiting the polity, as are laws regulating emigration, genocide, assisted-suicide, and the death penalty, for example.

The notion of someone becoming present within a given polity through immigration or procreation seems fairly straightforward. But what does it mean to be susceptible to law, or to have certain civic qualities necessary to be susceptible to law? This brief article cannot even begin to really address this issue, so the following discussion will be more in the nature of creating a placeholder and laying out a few basic principles around it.

First, civic quality need not be an all or nothing matter, but may be more like a spectrum, reflecting various degrees of susceptibility. According to some theorists, the minimum for one to be considered a member of a legal system is something just above constant physical coercion. It could begin with something as simple (and base) as “fear, or compliance for the sake of some pathetic scrap of reward, or compliance based on habit, prejudice, ideology, or false consciousness. . . . ‘[A] general habit of obedience.’”

The civic quality spectrum might move from that minimum towards something like Stephen Macedo’s “capacities and dispo-

21 See supra note 4.
sitions conducive to thoughtful participation in the activities of modern politics and civil society,”23 or Rawls’s minimum degree of “moral personality” or “political virtues” to engage in social cooperation.24

At the far end of the spectrum “we can imagine other rational beings who may be subject to law, who have, and who would acknowledge that they have, more than enough reasons to obey the law regardless of sanctions. Perhaps even human beings may be transformed to become such creatures.”25 Such beings would use the law in a given legal system to guide their behavior in the absence of any coercion, and in the absence of any material incentives or disincentives, associated with the law.26 That is, citizens would adhere to the law without its imposing any of the coercive sanctions typical of either power-based (political) or material incentive/disincentive (economic) systems.27 The citizens would be legal persons, responsive to the stimuli of the norms alone, rather than political or economic persons responsive to the coercive stimulus of the stick or the incentivizing stimulus of the carrot, so to speak. The test for such a system, one comprised of persons possessing this highest degree of civic quality, would literally be compliance with the


24 See JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 18, 20, 142 (Erin Kelly ed., 2001). For example, such a person would not think their being wealthy is a good reason to accept a system that favors the wealthy. See id. at 18.

25 RAZ, supra note 4, at 159. Raz expresses some doubt that humans can reach this point. See id. at 160-61.

26 See FINNIS, supra note 4, at 247 (“[T]he motives or reasons which people have for complying with and acting upon stipulations presented to them as authoritative (and for being willing to do so should occasion arise) vary widely.”). Antecedent law’s civic quality-making aspect would concern creating such motives and reasons in persons, moving in the direction of allowing them to accede to valid laws in the absence of coercion. Finnis refers to the elementary distinction between the directive and coercive forces of law; that law allows for the latter “is not the same as saying that one cannot conceive of law without coercion.” Id. at 254.

27 For a related sociological discussion regarding the different ways in which prisons, business firms, and universities achieve norm compliance, see generally AMITAI ETZIONI, A COMPARATIVE ANALYSIS OF COMPLEX ORGANIZATIONS (1961).
legal norms without any associated coercive sanctions, or economic costs or benefits.

Perhaps this civic quality is simply what Richard Posner refers to as altruism, or dutiful altruism. “When defined broadly, as helping behavior not motivated by the promise of reward or the threat of punishment, altruism is something that can be and often is motivated by love, or by some dilute form of it such as compassion or sympathy.” 28 Persons motivated by this quality to act in accordance with certain norms—norms that exist to benefit others—are doing so for a very different reasons than when they comply with those same norms because of political or economic stimuli. If law, politics, and economics are distinct disciplines, then we would say that a system of motivation without (or with less) coercive sanction (power), or economic costs or benefit (economics), is more legal.

This higher degree of civic quality would differ from the autonomous neo-liberal subjects that might be the subjects of a Rawlsian state. If we take Rawls’s difference principle as an example, 29 a self-interested person possessed of sufficient reason, in the original position, would accede to the principle knowing that they themselves might occupy the least advantaged socio-economic positions of society. But we can imagine persons so empathetic as to accede because they can internalize the perspective of others who might occupy those positions. 30 Such persons—our human angels—might promote a difference principle in law without fear of sanction or the need for material benefit.

Conceived of in this way, the entire spectrum of civic quality may be little more than degrees of both education and empa-

29 See RAWLS, supra note 24, at 99. The principle, stated crudely, allows inequalities in the distribution of goods in a given society only if the inequalities benefit the members of that society who are worst off.
30 Thomas Nagle refers to altruistic motivation as the “recognition of the desires and interests of others, and requires no desires in the agent except those that are motivated by that recognition.” THOMAS NAGLE, THE VIEW FROM NOWHERE 151 (1986) (citation omitted). “[P]ain, though it comes attached to a person and his individual perspective, is just as clearly hateful to the objective self as to the subjective individual. . . . The pain can be detached in thought from the fact that it is mine without losing any of its dreadfulness.” Id. at 160.
thy. Law exists between persons, and susceptibility to it may be a matter of mentally positioning oneself to experience others' understandings and interests. While we may assume that any legal system must be made up of rules backed by coercion or material benefit and deprivation because that is the way it is today, empathy (a phenomenon that exists to "expand understanding of others") remains a distinct and prominent part of legality.\textsuperscript{31} As a normative, and not descriptive, proposition, we can say that whatever the role of power and economics in legal systems today, we \textit{ought} to create systems in the future—by creating the people that comprise them—which are more legal than political or economic, because they are systems of persons that comply with norms without any associated coercive sanctions, or economic costs or benefits.

But the key point of all of this, for purposes of describing antecedent law, is that for law to exist, the people present must have at least some minimum civic qualities such that they are made susceptible to it.\textsuperscript{32} The law needs people to be made in certain ways.

Civic quality, so understood, like presence in the polity, can be determined by law. As we begin to move up the spectrum, education law plays an obvious role. "These qualities do not simply arise in citizens spontaneously, but require nurture,"\textsuperscript{33}

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\item \textsuperscript{31} Lynne N. Henderson, \textit{Legality and Empathy}, 85 Mich. L. Rev. 1574, 1576, 1578 (1987) ("This article rejects the assumption that legality—by which I mean the dominant belief system about the Rule and role of Law—and empathy are mutually exclusive concepts.").
\item \textsuperscript{32} See, e.g., Finnis, \textit{supra} note 4, at 262 (referring to the "need of almost every member of society to be taught what the requirements of the law—the common path for pursuing the common good—actually are"); Hart, \textit{supra} note 1, at 189 ("unless certain physical, psychological, or economic conditions are satisfied . . . no system of laws or code of morals can be established"); Thomas Hobbes, \textit{Leviathan} 220 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1651) (noting that it is against the duty of the sovereign "to let the people be ignorant, or misinformed of the grounds, and reasons of those his essential rights . . . . [A law] is not (as a civil law) any obligation but by virtue only of the law of nature, that forbiddeth the violation of faith; which natural obligation if men know not, they cannot know the right of any law the sovereign maketh. And for the punishment, they take it but for an act of hostility . . . ." (emphasis added)). Rawls, referring to the reasonable, free, and equal people that comprise his ideal polity, says that "basic institutions must educate them to this conception of themselves." Rawls, \textit{supra} note 24, at 56.
\item \textsuperscript{33} Eichner, \textit{supra} note 23, at 1341; see also id. at 1340 n.8 (referring to the need for people of "sufficiently high quality" in democracies (quoting Joseph Schumpeter, \textit{Capitalism, Socialism, and Democracy} 290 (1950))).
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though the educational process by which they are instilled (what might be called a nurture-based form of social engineering) is hotly contested as a matter of political theory and constitutional law. Education law plays a central role in antecedent law because, while it normally does not determine whether persons enter the polity, it can determine the circumstances (relative to susceptibility to law) in which they enter. Imagine, for example, a state with a written system of laws that vigorously promotes childbearing, and the result of applying those policies in communities in which the children are never taught to read. Had the state used education law to alter those communities’ educational systems, the persons born into them would relate to that state’s laws in a different way than had the state not done so.

But there is another role education, and education law, plays with regard to the notion of antecedent law. The existence of education law, or the legal requirement that persons be educated during that phase between incomplete personhood (the age of minority) and complete personhood, proves the existence antecedent law today. Education law “makes” people because they are not fully admitted into, or present in, the polity until they have gone through the phase—minority—during which we presume they are being educated. If this phase were not required, we would admit minors as complete members of the polity, to vote, serve in the military, hold office, etc. But instead we require that they go through a phase in which they are presumed to be educated. This is a drawn-out period of entrance into the polity, in which education law makes the person who will be admitted. Age here is only an indicator that the person lacks some requisite quality to be permitted to fully join the pol-

34 See generally Eichner, supra note 23 (developing a framework to balance the needs of the particular state, parents, children and liberal democracies generally in controlling students’ education in the public schools and the development of the “civic virtues”).

35 Compare Locke’s focus on children actually obtaining reason prior to joining society, see JOHN LOCKE, THE TWO TREATISES OF GOVERNMENT 309 (Peter Laslett ed., Cambridge Univ. Press 2003) (1690) (using the term “may” when discussing whether, with age, children will have sufficient reason), and id. (referring to care “as long as they should need to be under it”), with the more simplistic and presumptuous focus on student’s age in Wisconsin v. Yoder, 406 U.S. 205 (1972).
ity. For Locke, persons that were not actually educated were not necessarily ever made full members of the polity.\(^{36}\)

In addition to education law, laws that can determine procreation or immigration can also determine some form of civic quality by determining the circumstances into which we are born,\(^{37}\) or the civic qualities that one must have when he or she is allowed to immigrate.\(^{38}\) Consider cases in which courts have chosen to issue no-procreation probation orders, rather than no-custody probation orders, to recidivist neglectful and/or abusive parents who are adjudged, usually by family courts, to be legally unfit as parents.\(^{39}\) No-custody orders usually mean that any future child is born into state custody, and as such, he or she will be more likely to commit crimes than the average child. Children in foster care are sixty-seven times more likely to be arrested than children outside of foster care.\(^{40}\)

\(^{36}\) Id.

\(^{37}\) Rawls refers to the family’s role in “the orderly production and reproduction of society” of “raising and caring for children, ensuring their moral development and education into the wider culture.” \textit{Rawls, supra} note 24, at 162-63. Families must “fulfill these tasks effectively.” \textit{Id.} at 163; see also \textit{Gary Stanley Becker, A Treatise on the Family} 147 (2d ed. 1991) (“[T]he interaction between quantity and quality explains why the education of children, for instance, depends closely on the number of children . . . .”); Susan J. G. Alexander, \textit{A Fairer Hand: Why Courts Must Recognize the Value of a Child’s Companionship}, 8 \textit{T.M. Cooley L. Rev.} 273, 302 (1991) (“[W]hen people have fewer children, the value of each individual child increases enormously. Parents are willing to spend more on each child, e.g., by investing more in each child’s training.”).


\(^{40}\) See id. at 374 n.21; Santosky v. Kramer, 455 U.S. 745, 789 (Rhenquist J., dissenting) (“It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens. The same can be said of children who, though not physically or emotionally abused, are passed from one foster home to another with no constancy of love, trust, or discipline.”). Consider John Stuart Mill’s take on the circumstances one is born into:

\begin{quote}
Capacity for other nobler feelings is in most natures a very tender plant, easily killed, not only by hostile influences, but by mere want of sustenance; and in the majority of young persons it speedily dies away if the occupations to which their position in life has devoted them, and the society into which it has thrown them, are not favorable to keeping that higher capacity in exercise.
\end{quote}
Matters that seem to be about education may also be seen as matters of procreation. In Wisconsin v. Yoder\(^{41}\) the Court held that Amish children could not be placed under compulsory education past the eighth grade, focusing on the minimum education one needs to participate as a citizen of the United States. But that issue arose only because the children at issue were first born into the Amish community; that is, born under the legal permission of a broad constitutional right to procreate.

Note that there may also be some relation between the number of citizens antecedent law creates and the civic quality they will possess; that is, the number of citizens a given state with limited resources can produce while maintaining a certain level of civic quality in them. Using the distinction above, between legal persons on the one hand and political and economic persons on the other, we can imagine that a state might have to spend different levels of resources on a given citizen to make him or her merely responsive to coercion or material incentives—the stick and carrot so to speak—than the state would have to spend to create citizens disposed to comply with legal norms without any associated coercive sanctions, or economic costs or benefits. These latter “angels,” as Raz calls them,\(^{42}\) may require significantly more resources, and as such the state would be able to make far less of them in a given generation. In other words, there may well be an inverse relation—as there is in making many things—between quality and quantity.

As an interesting aside, we might view criminal law, with its use of incarceration and subsequent disenfranchisement (altering one’s presence in the polity),\(^{43}\) as well as its rehabilitation

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\(^{41}\) 406 U.S. 205 (1972).

\(^{42}\) RAZ, supra note 4, at 159.

\(^{43}\) See Ekow N. Yankah, Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment, 25 CARDOZO L. REV. 1019, 1028 (2004) (“The creation of a criminal caste leads to permanent ostracization. Modern penal law is often purposefully used as a method of stigmatizing and separating offenders.”). Professor Yankah objects to the political ostracization of criminals based on assessments of their character, arguing that political equality precedes moral merit and proposing a purely act-based theory instead. See id. at 1043-63. Antecedent law would make assessments before a prospective child, or intending immigrant “arrives” in the
motive (rehabilitating towards some level of civic quality), as a failing attempt to impose antecedent law post hoc. We temporarily, or in the case of the death penalty, permanently, exclude persons from the polity who lack the minimum civic qualities presence requires. It is a failing attempt because the harm done from the crime committed may be irreparable.

A. Antecedent Law Already at Work

Antecedent law is not as strange as it might seem. Every polity has law which deeply influences the procreation of its members (behavior that, per Posner, determines “the size and quality of the population.”) The state’s influence in these matters is especially visible in the Peoples Republic of China, for example, where the complex, and often misunderstood, family planning policies have dramatically changed its population’s “quantity (slowing growth and limiting size) and its ‘quality’ (enhancing not only health and education but also social morality and political commitment).” In these policies state regul-
tion of people-making is explicit, and concern for quality limits quantity in part because educational resources are finite.\textsuperscript{47}

State regulation may be less obvious in the United States, but it is still present. In \textit{Meyer v. Nebraska},\textsuperscript{48} the Court said that “the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally.”\textsuperscript{49} Later, in upholding limits on public assistance to families, the Court found that classification based on “family size” “neither impinged upon a fundamental constitutional right nor employed an inherently suspect criterion.”\textsuperscript{50} Justice Powell once opined that some “intentional governmental effort[s] to ‘penalize’ childbearing” are constitutional.\textsuperscript{51} Recently state courts have successfully issued no-procreation orders to abusive and neglectful parents.\textsuperscript{52} Consider that, at the same time, when liberal states recognize and protect a broad procreative right they are also creating the persons among whom the law will exist.

Thus, when states decide to give a tax credit to promote childbearing or charge a fee to discourage it, legalize or ban abortion, promote or prevent certain forms of immigration, provide funding for higher education or leave the whole matter to parents, they make a choice that can determine the presence, number, and susceptibility to law (or civic quality) of persons within their borders—and those of generations to come.\textsuperscript{53} And, it seems that legal scholars and courts—perhaps limited by a con-

\textsuperscript{47} See supra note 46; see also BECKER, supra note 37 at 147 (“[T]he interaction between quantity and quality explains why the education of children, for instance, depends closely on the number of children . . . .”).

\textsuperscript{48} 262 U.S. 390 (1923).

\textsuperscript{49} Id. at 401. \textit{Meyer} has been called a foundation case “for an entire constitutional theory of family.” Barbara Bennett Woodhouse, \textit{“Who Owns the Child?”: Meyer and Pierce and the Child as Property}, 33 WM. & MARY L. REV. 995, 997 (1992).

\textsuperscript{50} Graham v. Richardson, 403 U.S. 365, 376 (1971) (citing \textit{Dandridge} v. Williams, 397 U.S. 471 (1970)).

\textsuperscript{51} Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651-52 (1974) (Powell, J., concurring) (citing \textit{Dandridge}, 397 U.S. 471). John Rawls argued that “principles of justice . . . impose constraints on the family on behalf of children who are society’s future citizens and have claims as such.” RAWLS, supra note 24, at 165.

\textsuperscript{52} See Dillard, supra note 39 and accompanying text.

\textsuperscript{53} How, and to what degree, recent public policies have affected things like fertility and educational attainment is far from certain, see infra note 80, and some scholars doubt the ability of law to significantly change these things. See Larry D. Barnett, \textit{The Regulation of Mutual Fund Boards of Directors: Financial Protection or Social Productivity?}, 16 J.L. & POL’Y 489, 529 (2008).
cept of law that seems to ignore the role law plays in the creation and quality of those it seeks to regulate—have largely overlooked this fact.54

B. Advantages of Antecedent Law

Thinking about our existing forms of law as divided into law and antecedent law has practical advantages. First, if we ignore the role law plays in determining how people come to be present in a polity, and through determining the circumstances of their entry, also whether they possess civic quality, we take much for granted and consequently miss an important part of how law operates. For example, a lawyer asked to devise a policy to curb anthropogenic greenhouse gas emissions might present options for polity members to alter their behavior in certain ways. But she might not consider whether the legal system fostered population growth in a way that contributed to the problem,55 and whether the legal system is busy making people who are not likely to alter their behavior when limits are enacted. She might not consider whether the law played a role in creating the existing basic state of legal affairs (people causing problems and their level of willingness to alter their behavior), and whether the law can create a different basic state of legal affairs at some point in the future.56

Likewise, a lawyer or legislator faced with growing civil strife over the price of fossil fuels might look for ways to change the law in order to increase supply. But she might not question the ever-growing number of users who are creating the demand (quantity), or consider that some users—born or immigrating

54 See, e.g., Pierce, supra note 17, at 109 (“[C]ourts speak of the ‘naturalness’ or ‘inevitability’ of population growth in the same way one might speak of the naturalness or inevitability of death.”) There are of course exceptions. See generally 1 POPULATION AND LAW (Luke T. Lee & Arthur Larson eds., 1971).

55 See, e.g., Arnold W. Reitze, Jr., Air Quality Protection Using State Implementation Plans -- Thirty-Seven Years of Increasing Complexity, 15 ENVTL. L.J. 209, 359-60 (2004) (attributing the failure of states to attain the goals of the Clean Air Act in large part to population increases, which nullified “much of the progress made under the Clean Air Act”).

under particular circumstances—might have already begun voluntarily reducing their personal demand in the interest of the polity as a whole (quality).  

A second advantage is that crystallizing antecedent law as a type of law allows us to separate its form from its possible content—including odious content (like eugenics), which could otherwise be confused with the form and might lead us (and may have led us historically) to reject the form entirely. A state can regulate the quality and size of its population without practicing eugenics. Any analysis that makes separating form and content difficult, or leads states to ignore the quality and size of its population altogether, has serious flaws. It overlooks a critical perspective on the seemingly private issues, like procreation and the education of our children, which will determine the polity for us and for future generations.

For example, Part II of this article argues for a substantive antecedent law that seeks to promote civic quality and an optimal population range as a means of maximizing autonomy. Rejecting all of antecedent law, because we conflate it with eugenics or for any other reason, leads us to avoid ever experimenting with such an approach.

Another advantage in grouping existing areas of law, like population or immigration law, under one form is that these areas of law tend to share a particular breed of heated controversy that concerns the legal status of those to whom they pertain, i.e. whether a fetus is a person or an undocumented worker is “illegal.” A form of law focused on the creation or presence of people and their susceptibility to law may help reframe the debates around the common, and perhaps most compelling, interest: determining with whom we are in the polity.

Having described the form antecedent law, seen that it exists in the forms of law it groups together, and noted some of its advantages, we can now distinguish it from other forms of law. But it will help to first make two observations.

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57 As discussed in Part III.C., each polity has sub-groups which benefit from avoiding antecedent law approaches.

58 Note that education law does not seem to raise this particular controversy, but that is probably because we do not view students as outside of the polity. However, there is no reason why that must be the case. See supra note 33 and accompanying text.
It is possible that people will find something objectionable about the form itself; something less easily articulated than the specific counter-arguments discussed in Part III. It could be that we tend to resist aggregating individual acts of procreation or immigration and thereby obscure their public nature, such that it is difficult to see beyond the wants and desires of any one particular prospective parent or intending immigrant. It could be that the relatively recent history of eugenics and social engineering by totalitarian regimes casts its shadow so broadly as to preclude viewing other persons, and thereby the law, as playing a role in determining our existence and basic qualities. It could also be that we view the new presence of any human life as valuable in and of itself, regardless of civic quality. Unlike murder, the average act of procreation was probably (though perhaps no longer is) beneficial to our species’ domination. Moreover, for lawyers resistant to the idea of antecedent law, it could be difficult to consider that the greatest influence we can exert on the world is not through the coordination and constraint of extant persons, but by replacing the persons in our polity.

That said, it is worth noting, and a bit ironic, that this discourse (like virtually all focused discourses involving legal and political theory) occurs in a world shaped primarily by something like antecedent law: academia. Academia is, after all, based on a process of determining presence through admission and exclusion along a baseline very much like the baseline of civic quality described above.

Academic discourse occurs only after a common core competency has been established and maintained among a limited population, optimal in number (the number of students admitted), which is achieved by employing the antecedent law model. And, “university law” is not just about admission of persons capable of reasoning along the upper ranges of the spectrum, it also seeks to exclude students with disciplinary records, or those incapable of composing themselves in a manner conducive to the beginnings of a well ordered society, much the like the one

59 Hobbes notes that “the Universities are the fountains of civil, and moral doctrine.” HOBBS, supra note 32, at 496; see also id. at 225.
Rawls describes. Arguably, university law tracks the civic quality spectrum described above, from the requirement that all conform their behavior to the basic code of conduct, to promoting more selfless, empathetic, and altruistic behavior to benefit the community (for example, by requiring pro bono service as a prerequisite to graduation).

Arguably the focused political and legal discourse did not retreat to the universities because they are voluntary associations in Rawlsian sense, but because the minimum level of education and civic quality necessary to sustain it does not exist in society at large. Should we apply the non-antecedent law model to the universities and hope to achieve the same goals, or apply the academic model to society? If the former, law professors may wish to open their classes to the general public—who as we know are presumed to know the law regardless and are at serious risk if they do not.60

C. Antecedent Law’s Unique Role for the Polity

With these points in mind, we can identify antecedent law’s unique role for the polity by heuristically using four concepts: the social contract, legal realism, the dissolution of civil society, and a particular empirical view of any given polity.

1. The Social Contract

Stated crudely, social contract theory views the polity from the perspective of people who have (or would) come together to form a contract or agreement, consenting to being made subject to the power of others in exchange for certain benefits. But, as in our account of law, there may be something missing. How does this picture account for the birth of persons within the polity, that is, how does it account for extant parties consenting to the addition of these new parties to the contract? Certainly something like Locke’s tacit consent, i.e., choosing to remain in

a polity, explains how they, the new members, come to agree, but the concept does not immediately capture how the extant members agree to these new members joining, or becoming present. While the ethical or political concept of a social contract is something quite different from the concept of a modern juridical contract, it makes little sense to use the concept at all if we are going suggest that it is irrelevant who is allowed to join as a party, or how many new members are allowed to become parties.

Regulating who is or becomes a party to the social contract may be more important than the terms of that contract. The terms are of little value if the other parties cannot or will not comply, or be held accountable for failing to do so. Certainly, an individual’s willingness to enter a contract is determined not only by its terms, but also depends significantly on with whom exactly the individual is contracting and the likelihood that the second person will follow through or compensate the first for their failure to do so. In this way, a concept of law and of a social contract that pays no special attention to the addition of new parties—to who they are or their civic quality—seems incomplete, especially in a democracy. Under Hobbes’s absolute sovereign, we might care very little about other parties because our fate will be primarily in the hands of the sovereign, not the other parties. But under a participatory government, we are likely to care significantly more about regulating the parties, since we are subject to our fellow contractors and their failings.

Of course, while granting individual consent to each new member would be impossible, granting consent using agreed-upon standards for admission would not. Such standards already comprise the substance of antecedent law, as in the case

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61 For a discussion on the lack of consent by prospective children to their birth, see Seana Valentine Shiffrin, Wrongful Life, Procreative Responsibility, and the Significance of Harm, 5 LEGAL THEORY 117, 123-24 (1999).

62 Of course, some scholars have taken the perspective of current members and their willingness to admit and enter into contract with others, in some case with those who may be disabled or of another species. See, e.g., MARTHA C. NUSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP (2006). But what if the prospective members are not disabled or of another species, but will simply lack some sort of minimum civic quality?
of immigration laws. But again, traditional forms of law and social contract theory take no special notice of this, or of the role procreation plays here—special, that is—in terms of treating the matter as of antecedently unique importance to members of the polity.

The social contract construct also accentuates the importance of the actual number of new contract parties. Given the increasing global concern over the environment, it is no surprise that contemporary political scientists display renewed concern with issues of “world ownership,” that is, the claim each person has to a share of the world’s natural resources. This renewed concern emphasizes the importance of access to resources, a matter which has long been considered by social theorists. Both Hobbes and Locke viewed increasing population and the resulting competition for scarce resources, or as Locke put it, the “quarrels and contentions,” as the reason that persons felt the need for government.

Contrast this with the constructive consent of the new parties themselves. See, e.g., John Lawrence Hill, What Does It Mean to Be a “Parent”? The Claims of Biology as the Basis for Parental Rights, 66 N.Y.U. L. Rev. 353, 384 (1991) (“[T]he procreative right arguably is contingent upon the constructive consent of the resulting child.”).

Though it is beyond the scope of this article, one natural result of the law not focusing specifically on that which determines the creation of persons, and their civic quality, or on providing a vehicle of consent, would be that it leads society to treat the new entrants as less than full members of the polity. For example, if a person refuses to agree to a political relationship with another, the second is stranger to the first than if the first had agreed. The second has forced himself on the first.

For a thorough examination of the competing perspectives see, for example, LEFT-LIBERTARIANISM AND ITS CRITICS: THE CONTEMPORARY DEBATE (Peter Vallentyne & Hillel Steiner eds., 2000); MICHAEL OTSUKa, LIBERTARIANISM WITHOUT INEQUALITY (2003).

For Locke natural liberty is first challenged by the growing presence of others, as before that growth “there could be then little room for quarrels or contentions about property so established. . . . Nor was this appropriation . . . any prejudice to any other Man, since there was still enough, and as good left; and more than the yet unprovided could use.” LOCKE, supra note 35, at 290. For Hobbes, the first of the “three principle causes of quarrels” is “competition” which is the natural state of “men in multitudes.” HOBBS, supra note 32, at 76, 99; see also HART, supra note 1, at 96.

Society can improve resources to partially compensate for the problem, but this is not a complete solution. Hume refers to the possessions one can acquire, but explains that “there is not a sufficient quantity of them to supply every one’s desires and necessities. As the improvement, therefore, of these goods is the chief advantage of society, so the instability of their possession, along with their scarcity, is the chief impediment.” DAVID HUME, MORAL PHILOSOPHY 89 (Geoffrey Sayre-McCord ed., Hackett 2006). And
stability in the future. If we apply the social contract construct to these issues, then arguably each contractor competes for scarce resources according to the terms of the contract. In this system, new competitors are necessarily of concern, perhaps of compelling interest, to existing (and future) competitors. At the very least, the addition of each new competitor may well reduce the share of resources each existing competitors can claim.

To some extent this simple fact is at the heart of the debate today over negative and positive rights—especially for those who think that rights are essentially about property. Many positive-rights theories are grounded on the moral claim that each new person needs (has a claim to) a certain bare minimum of property in order to survive, and that this claim defeats others’ competing claims to continued ownership of the relevant property through labor and acquisition. How is it possible to ignore the role played by the addition of new claimants to the picture?

so, “tis only from the selfishness and confin’d generosity of men, along with the scanty provision nature has made for his wants, that justice derives its origin.” Id. at 84.

The multitude of poor (and yet strong) people still increasing, they are to be transplanted into countries not sufficiently inhabited; where nevertheless they are not to exterminate those they find there; but constrain them to inhabit closer together, and not range a great deal of ground to snatch what they find, but to court each little plot with art and labour, to give them their sustenance in due season. And when all the world is overcharged with inhabitants, then the last remedy of all is war, which provideth for every man, by victory or death.

It is worth considering whether some sort of provisional antecedent natural law which ensured few people with high pre-civic qualities (peaceful and reasonable as opposed to violent and unreasonable) would have prevented the need for a social contract. That law might simply be something like practical reasonableness. See FINNIS, supra note 4, at 251; HOBBES, supra note 32, at 174 (“The law of nature and the civil law contain each other, and are of equal extent.”)

Of course there is an economic counterargument that additional members can actually increase (improve) the value of the society’s resources. That argument will not be addressed here, but suffice it to say that it generally presumes a lot about relative value, does not account for claims to unappropriated resources (and resources not subject to appropriation), and does not account for the fact that the type of claims each person has (as opposed to their relative value) would be altered by the addition of new competitors.

See, e.g., HILLEL STEINER, AN ESSAY ON RIGHTS 93 (1994).

For an influential account of such a right, see JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988).
When modern contract theorists like Rawls abstract from Hobbes and Locke, they push into the background the role that nature—and the scarcity of natural resources caused by human proliferation and increased competition\(^71\)—played in the formation of the social contract construct.

2. Legal Realism

One of the most significant contributions legal realism (and later, Critical Legal Studies) makes to the concept of law\(^72\) is the suggestion that for judges, rules are not the primary determinant of legal outcomes.\(^73\) If this is so, then it seems logical to assume that formal law or rules may play little or no role in the day-to-day decisions (whether to steal, pollute, etc.) of the average person, who, unlike a judge, has no legal training and very limited knowledge of the law that might apply to his/her conduct.\(^74\) Therefore, we should probably care more about who joins our contract (at least with regard to the civic qualities higher on the spectrum) and according to what law that is determined, than we care about the contract’s formal rules of conduct, which,

\(^{71}\) See James Tully, An Approach to Political Philosophy: Locke in Contexts 35 (1993) (discussing population as a factor in the formation of society).

\(^{72}\) For a well-known critique of legal realism, see Hart, supra note 1, at 143-147, and Dworkin, supra note 4, at 36-37.

\(^{73}\) See, e.g., Brian Leiter, Rethinking Legal Realism: Toward a Naturalized Jurisprudence, 56 Tex. L. Rev. 267 (1997).

\(^{74}\) See, e.g., Scott Burris et al., Do Criminal Laws Influence HIV Risk Behavior? An Empirical Trial, 39 Ariz. St. L.J. 467, 468 (2007) (“We failed to refute the null hypothesis that criminal law has no influence on sexual risk behavior.”); Edward K. Cheng, Structural Laws and the Puzzle of Regulating Behavior, 100 Nw. U. L. Rev. 655, 656 n.5 (“[I]n many contexts, proliferation of rules means proliferation of lawlessness; the rules may be too numerous and complex for normal people to master.”) (quoting Stephen Williams, The More Law, the Less Rule of Law, 2 Green Bag 2d 403, 405 (1999))). “In the Robinson and Darley study, respondents were asked about their knowledge of various legal rules, such as the duty to report a crime, etc. Interestingly, the distribution of responses was unaffected by the actual rule in the respondents’ home state.” Id. at 259 n.11 (citing Paul H. Robinson & John M. Darley, Does Criminal Law Deter?: A Behavioral Science Investigation, 24 Oxford J. Legal Stud. 173 (2004)). Note too that “it is important not to take the mere fact that the population by and large conforms to the law as evidence that it accepts it and guides its behavior by it.” Raz, supra note 4, at 125. Raz notes that people may coincidentally conform their behavior to the law while being totally unaware of it, or even being opposed to it. See id. He focuses on law enforcing institutions as a test for what norms are part of a legal system and whether a system is in force, which raises the image of a populace largely ignorant of the law until it is too late.
according to legal realism, have only limited impact. Antecedent law becomes more relevant as the efficacy of traditional, or formal, law declines.

Even Hart, legal realism’s harshest critic, notes the importance of susceptibility to law and the nuances of what law in this context might mean. This is clear, for example, in his discussion of the “rational connection between natural facts and the content of legal and moral rules,”75 his reference to “certain physical, psychological, or economic conditions” that must be satisfied before any “system of laws or code of morals can be established;”76 and his recognition that only those laws that conform to a certain type can function successfully. Advances in social sciences since Hart wrote in the 1950s have more firmly established this point. Scholars like Donald Braman, Dan Kahan, and Larry Barnett have empirically demonstrated that formal law plays a smaller role among citizens than their individual qualities and attributes,77 many of which are determined by the circumstances in which those citizens enter the polity.

Thus, to the extent formal law does not guide behavior, that aspect of law which creates citizens and determines their civic quality will fill the gap. Just as antecedent law focuses on the civic qualities of immigrants78 (rather than simply relying on the effect of non-antecedent laws once the person arrives), it also determines presence and civic quality by regulating educa-

75 Hart, supra note 1, at 193.
76 Id. at 193-94.
77 See, e.g., Larry D. Barnett, Legal Construct, Social Concept: A Macrosociobiological Perspective on Law (1993) (demonstrating that law is not the dominant cause of social change, but is primarily reactive to it); Barnett, supra note 53, at 528-31; Donald Braman & Dan M. Kahan, Legal Realism as Psychological and Cultural (Not Political) Realism, in How Law Knows 93, 93-115 (Austin Sarat et al. eds., 2007) (laying “the groundwork for a mode of political and legal analysis that is cognizant of the influence of cultural cognition”); Dan M. Kahan, The Cognitively Illiberal State, 60 Stan. L. Rev. 115 (2007) (challenging the notion that citizens in a liberal state can cognize secular, harm-based laws without wrongfully imputing certain consequences based on their cultural biases); Dan M. Kahan & Donald Braman, Cultural Cognition and Public Policy, 24 Yale L. & Pol'y Rev. 149 (2006) (finding epistemic origins for political conflict in citizens’ cultural cognition, or tendency to filter legal and political perceptions through pre-existing cultural values). But see Bilz, supra note 10, at 102 (“[I]t is possible, even likely, that the forces operating between law and morality are bidirectional. Still, it is worth thinking about whether, and when, the causation will run as an initial matter in one direction versus the other.”).
78 See supra notes 21 & 53 and accompanying text.
tion and by encouraging or discouraging procreation—with substantial consequence for others.79 This does not require empirical evidence and inductive reasoning to understand. Indeed Hart seems to deduce at least a minimum set of requisite conditions in the quote above.

It may seem that legal realism undercuts not only formal law, but also antecedent law: Why would antecedent law be any more effective than formal law in guiding behavior?80 However,

79 See generally Dillard, supra note 39; James J. Heckman & Dimitriy V. Masterov, The Productivity Argument for Investing in Young Children, 29 REV. AGRIC. ECON. 446 (2007); Lance Lochner & Enrico Moretti, The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-reports, 94 AMER. ECON. REV. 155 (2004). For example, “[i]t is now well established that education reduces crime.” Heckman, supra at 454. “Poorly educated teenage mothers in low-income families are much more likely to produce children who participate in crime.” Id. at 455. “Some of the most convincing estimates of the impact of adverse early environments on participation in crime come from interventions designed to remedy those environments.” Id. at 456. Also,

most scholars recognize that absence of a father, low levels of financial resources, low parental education and ability, a lack of cognitive and emotional stimulation, and poor parenting skills are characteristics of adverse environments. Determining the relative importance of these factors is an ongoing debate. Each seems to play a factor in affecting child outcomes.

Id. at 460. “The growth of adverse childhood environments explains a substantial part of the problems of schools, skills and crime in American society.” Id. at 466. “Ability formed in the early years is also important in explaining crime, teenage pregnancy, and a variety of social pathologies.” Id. at 469. “The social science literature establishes that both cognitive and noncognitive abilities affect schooling attainment, participation in welfare, teenage pregnancy, and crime . . . . More able and engaged parents produce more able children.” Id. “Redirecting funds toward the early years is a sound investment in the productivity and safety of American society, and also removes a powerful source of inequality.” Id. at 488.

80 Indeed, consistent with Barnett’s view of the law, there is a dearth of empirical evidence that policies to date have influenced procreation, or even educational attainment levels. See, e.g., Barnett, supra note 53, at 529 (“As an example of government regulation directed at activity that is largely social in nature, state statutes requiring minors to attend school until they reach a specified age have generally not had a material impact on the school enrollment rates of minors.”); Anne H. Gauthier, The Impact of Family Policies on Fertility in Industrialized Countries: A Review of the Literature, 26 POPULATION RESOURCES & POLICY REV. 323, 342 (2007) (though reviewing a narrow range of policies intended to affect fertility, Gauthier found “the impact tends to be small and also to vary highly depending on the type of data used and on the type of policies.”). But see Gu Baocchang et al., China’s Local and National Fertility Policies at the End of the Twentieth Century, 33 POPULATION & DEV. REV. 129, 145 (2007) (finding that “government mandated fertility and achieved fertility have converged in China”). But this article does not try to inductively establish a particular influence, or level of influence, law has on the subjects of antecedent law as much as it deductively treats those subjects as conceptually distinguishable from other forms of law and involving specialized state interests. The initial hurdle for antecedent law is not empirical evi-
legal realism undercuts only those antecedent laws that are formalistic in nature. In contrast, there could be antecedent laws that determine the circumstances under which people become present in a given legal system by creating effective social norms, e.g., when it is the “right” time to have a child. Perhaps this is the type of antecedent law that would have to be pursued. Indeed, “[i]t is useful to distinguish between the law’s ability to shape behavior through simple reward and punishment (the skeptical view), and its ability to use indirect, subtle, and sophisticated techniques to shape, not only behaviors, but also normative commitments.”

3. The Dissolution of Civil Society

Both Hobbes and Locke contemplated that a society formed by social contract could possibly dissolve back into the individual, but taboo. Indeed, the tendency of traditional forms to shuttle antecedent law into the background may explain why we have not studied it and made it more effective.

81 This would be especially relevant to procreation. For example, Jean Cohen has argued for a reflexive law approach when regulating conduct perceived to be intimate. See Jean L. Cohen, Regulating Intimacy: New Legal Paradigm (2002). Dan Kahan has noted the problem of “sticky norms.” Dan M. Kahan, Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem, 67 U. CHI. L. REV. 607, 607-09 (2000) (“My concern in this Article is with the ‘sticky norms problem.’ This problem occurs when the prevalence of a social norm makes decisionmakers reluctant to carry out a law intended to change that norm. . . . Some might conclude from the ‘sticky norms problem’ that the law is a relatively ineffective instrument for changing norms. . . . In short, norms stick when lawmakers try to change them with ‘hard shoves’ but yield when lawmakers apply ‘gentle nudges.’”). See also Henry J. Steiner et al., International Human Rights in Context: Law, Politics, Morals 732 (3d ed. 2008) (“Under the acculturation approach, power is understood as productive, cultural, and diffuse—not merely prohibitory, material and centralized.” (quoting Ryan Goodman & Derek Jinks, How to Influence States: Socialization and International Human Rights Law, 54 DUKE L.J. 621, 695 (2004))). Bilz, supra note 10, at 118 (“The lesson from the Prohibition era appears to be that the law can backfire if it extends its reach too far into activities that are perceived as morally acceptable.”); Cass R. Sunstein, On the Expressive Function of Law, 144 U. PA. L. REV. 2021, 2025 (1996) (“I also argue that the expressive function of law makes most sense in connection with efforts to change norms . . . .”). All of this points to the fact that a no-procreation order of the sort discussed in the text accompanying note 108, infra, may be more influential as an expression to the community than as an basis for punishment.

82 Bilz, supra note 10, at 104. Professor Barnett proposes a very specific view of how law benefits society irrespective of its influence on the incidence of the targeted behavior, namely law’s ability to act as a symbol which increases societal cohesiveness. See Barnett supra note 53, at 531, 534-37.
als that were formerly its constituents, leaving “every man at liberty to protect himself by such courses as his own discretion shall suggest unto him.” In such a scenario—or even in a state of only relative anarchy, such as during a natural disaster—civic quality and our historic antecedent law (that which in the past determined who is now in the polity) become especially relevant. The ability to reestablish a government, or even to maintain a Lockean civil society, would seemingly depend on the civic qualities of the persons around us—much as those qualities (or lack thereof) were relevant in our emergence from the state of nature. Similarly, the number of fellow contractors might also be of concern, as it affects competition for scarce resources and the ability of people to coordinate their efforts among themselves. One can imagine the difference between renegotiating terms of a contract to divide scarce resources as between a few hundred, or a few million, people.

4. Our Empirical View of the Polity

As discussed above, our traditional concept of law regulates extant people, taking their presence and civic quality as givens. Such a perspective of law engenders a view of the polity as an undifferentiated whole. Indeed, practically speaking, law is by nature general: the tort law of a given state is not expected to account for every citizen’s idiosyncratic proclivities for negligent behavior. As lawyers, we focus on the rules and not the relevant capabilities of the ruled, which explains why antecedent law is generally overlooked. Although “the American people” figure

83 HOBES, supra note 32, at 77 (referring to degeneration into civil war); id. at 210-19 (referring to the causes of the dissolution of commonwealth); see also LOCKE, supra note 35, at 211.

84 HOBES, supra note 32, at 219; LOCKE, supra note 35, at 211 (“[S]o every one return to the state he was in before, with a liberty to shift for himself, and provide for his own safety as he thinks fit in some other society.”); cf. Joby Warrick, CIA Chief Sees Unrest Rising With Population, WASH. POST, May 1, 2008, at A15 (Referring to world population growth, Hayden said that “[m]ost of that growth will occur in countries least able to sustain it, a situation that will likely fuel instability and extremism, both in those countries and beyond.”)

85 This discussion suggests that the dissolution of society takes place at a specific moment in time. But there is no reason why it could not be a slow process that ebbs and flows in every state, moving from one relative state of dissolution to another.
frequently in legal and political discussions, little consideration is given to the number or quality of the individuals who comprise this people. Rather, “the American people” is a gestalt image of a unitary mass whose quantity or quality, in terms of specific attributes, is largely passed over.86

Because legal theory embraces such an undifferentiated view, it tends incorrectly to institutionalize and thereby distort our perception of the polity. In a very real sense, a polity is the collection of its individual, constituent members,87 the state and its laws being merely a useful social construct. As such, it is not static, but rather constantly evolving in tandem with the individuals within it. The proliferation and civic interaction of these individuals, and the law that can influence those processes must be of a particular interest. Yet, these issues are hardly central to our concept and practice of law.

86 We could, for example, evaluate any polity in the world simply by assessing the civic quality of its constituents, which would be very different from assessing polities based on military might or gross domestic product. See infra Part III.C. In that assessment the United States may not fare well at all. See Eichner, supra note 23, at 1364 (citing evidence that Americans lack the knowledge and critical ability to perpetuate institutions like free press, separation of church and state, and the rule of law). “Throughout most of the twentieth century, voting rates in the United States were much lower than in almost all other advanced democracies.” Steven L. Winter, When Self-Governance is a Game, 67 BROOK. L. REV. 1171, 1202 (2003) (quoting DERK C. BOK, THE TROUBLE WITH GOVERNMENT 387 (2001)). The average American reads at just below the eighth-grade level, see Anita Bernstein, Keep it Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss, 48 ARIZ. L. REV. 773, 779 (2006), and there is strong empirical evidence that Americans cannot understand the law even when it is presented to them. See generally Nancy S. Marder, Bringing Jury Instructions into the Twenty-First Century, 81 NOTRE DAME L. REV. 449 (2006). Complying with the law is a whole other matter. “The United States incarcerates more offenders per capita than any industrialized nation in the world: three times more than Israel, five times more than England, six times more than Australia and Canada, eight times more than France, and over twelve times more than Japan.” Adam M. Gershowitz, An Informational Approach to the Mass Imprisonment Problem, 40 ARIZ. ST. L.J. 47, 52 (2008) (footnote omitted).

87 This truism largely underlies the emergence of the human rights movement.

[T]he acknowledgement of the worth of human personality as the ultimate unit of all law . . . brings to mind the fact that, in international law as in the municipal sphere, the collective good is conditioned by the good of the individual human beings who comprise the collectivity. It denies, by cogent implication, that the corporate entity of the State is of a higher order than its component parts . . . .

Steiner et al., supra note 81, at 144 (quoting Hersch Lauterpacht, International Law and Human Rights 61 (1950)).
II. One Value Antecedent Law Can Promote: Autonomy

It is one thing to differentiate antecedent law from the more traditional forms of law in terms of its role for the polity. But why would members of a polity, and by extention the state, especially care about that which determines the presence and civic qualities of its members? What reasons would a state have for using antecedent law?

A. Narrowing the State’s Interest

These questions raise the issue of what particular interest (and level of interest) a state has in antecedent law, and what “rarified values” might underlie particular antecedent laws. Once articulated, these values could then be weighed against the values that might underlie rights, like the right to procreate, with which antecedent laws interfere. For example, the state’s interest in or valuing of child welfare has been weighed against a parent’s interest in exercising freedom of religion in the context of child rearing. Note at the outset that the question of whether the state has any interest in antecedent law is itself controversial.

When considering the particular interest a state has in the creation of new citizens, it will be vital to characterize the particular behaviors at issue correctly. For example, one way to articulate the state’s interest would be to break antecedent law into its components, examining procreation for example, and to simply look at it in the way many courts have. For procreation, this would mean looking at the state’s interest in the creation of human life per se, that is, exclusive of the state’s interest in civic quality. Looking to laws that regulate contraception, abortion, fetal protection, and same-sex marriage, we would find that courts have identified compelling state interests in potential life

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89 See Prince v. Massachusetts, 321 U.S. 158, 165 (1944) (“It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.”).
90 See, e.g., Regulating Eugenics, supra note 7.
and in vague notions of responsible procreation. Done this way we would say that the state has an interest in ensuring that new members enter the polity.

But that interest does not adequately consider the context and circumstances into which a child is born, that is, the determinants of civic quality. It is dubious that the state has an interest in acontextual people-making—creating people irrespective of the circumstances in which they are born.

A state’s interest in antecedent law might be different from its interest in antecedent law’s individualized components, at least as courts have traditionally seen them. Focusing narrowly on the components of antecedent law in this way to find the underlying values misses the point of the form. The form interests us only to the extent that it captures how law contributes to civic quality through the creation of those around us—that is, by determining the circumstances in which others become present. A state’s stripped down interest in potential life per se—irrespective of the circumstances in which that life enters the polity—does not fully address how that life will affect our own.

B. Promoting Autonomy

Focusing then on that which determines the circumstances in which others become present in the polity, one value which antecedent law can promote is autonomy. This is not to say


92 Though admittedly, states can be interested in the number of new entrants irrespective of their civic quality. For example, though the PRC family policy focuses on improving the quality of the population, the original focus was on the number of new entrants regardless of the circumstances into which each arrived. See GREENHALGH, supra note 46, at 217. Likewise, though U.S. immigration system bars admission based on what it perceives to be civic quality, i.e. as in an applicant having committed certain crimes, it seems unlikely it would do away with annual quota-based limits even if all potential applicants were ideal.

93 Again, this article borrows the concept of autonomy from Raz. See RAZ, supra note 12; see also id., at 390-95. There are many ways to determine an optimal population range for a given polity.
that current laws in the United States or elsewhere that might fall under the antecedent law rubric do this. In fact it may be quite the opposite. My point is that antecedent law can promote autonomy. More specifically, antecedent law that seeks to promote civic quality and an optimal population range tends to promote autonomy, perhaps more than traditional forms of law ever can.

However, before the argument is assessed, it will help to lay out a conceptual framework regarding autonomy as a value, and its relation to the legitimacy of law—primarily as it has been developed in Joseph Raz’s theory of perfectionism. The point of this is to establish autonomy as a legitimate value that the state can pursue, before then basing the value of antecedent law on autonomy.

Raz has famously rejected the notion that a state need be neutral among visions of the good life, arguing instead that it should promote objectively valuable autonomy, ensuring citizens valuable options in life and taking steps to eliminate worthless ones: autonomy “permits and even requires governments to create morally valuable opportunities, and to eliminate repugnant ones.” Raz defends a version of John Stuart Mill’s harm principle (crudely stated, the state may use coercion only to prevent harm to others) that is seemingly premised on maximizing a morally valuable and objectively defensible version of autonomy. A full examination of Raz’s argument is not necessary here, but suffice it to say that he goes very far towards establishing a liberal legitimization of extensive state action to promote autonomy.

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94 See, e.g., Alan Carter, Moral Theory and Global Population, 99 Proc. Aristotelian Soc’y 289, 289 (1999) (“[T]he question of what the optimum human population should be is a pressing one.”). Carter proposes a principle based on a plurality of moral values which combines utilitarianism, Kantianism, Aristotelianism, and Rawlsianism, id. at 307, the upshot of which requires a significant reduction from the current world population. Id. at 312-13.

95 Rousseau suggested that two conditions necessary for democracy are a small state and public virtue. ROUSSEAU, supra note 5, at 56.

96 See RAZ, supra note 12, at 401-24 (1986).

97 Id. at 417.

98 For a thorough discussion and critique of Raz’s theory see Jeremy Waldron, Autonomy and Perfectionism in Raz’s Morality of Freedom, 62 S. Cal. L. Rev. 1097 (1989);
Although Raz claims that coercion can only be employed to prevent harm to oneself or others, scholars have questioned whether the logical conclusion of his work is in fact that coercion can justifiably be used to ensure autonomy. 99 For example, John Stanton-Ife has proposed that “[a] moral theory which values autonomy highly can justify restricting the autonomy of one person for the sake of the greater autonomy of others or even of that person himself in the future.” 100 Stanton-Ife uses the example of gambling: if the state permits people to gamble rather than seeking to eliminate the behavior, it may seem as though the state is promoting autonomy by allowing people to do what they wish. But to the extent the presence of gambling makes people less autonomous, less free to pursue morally valuable activities, this may not be the case. “Could it not be that the availability of some repugnant options does detract from the autonomy of some people? The image of the tree surgeon comes to mind. Some branches are lopped off by the tree surgeon for the health of the tree.” 101 Professor Waldron finds that in Raz’s theory “to say that coercion may be used only to prevent harm is to say that the autonomy of one person may be threatened only where it is necessary to avoid some unacceptable diminution of the autonomy of another. And Raz subscribes to this view.” 102

The point of bringing in Raz’s work is not to suggest that antecedent law should employ coercive methods in pursuit of autonomy (though, of course, antecedent law will often address behavior that causes harm). 103 In fact, coercion may not be the best means of ensuring compliance with antecedent laws, 104 assuming we can even distinguish coercion from non-coercion. 105 Rather, Raz’s work is illuminating for its assertion that a state that values autonomy will have a compelling interest in promoting it, justifying even coercive laws as morally legitimate exer-

see also John Stanton-Ife, The Limits of Law, § 4, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY, supra note 2.

99 See Stanton-Ife, supra note 98, § 4; Waldron, supra note 98, at 1140-41.
100 Stanton-Ife supra note 98, § 4 (quoting RAZ, supra note 12, at 418).
101 Id.
102 Waldron, supra note 98, at 1140.
103 See supra note 16 and accompanying text.
104 See supra note 79 and accompanying text.
105 See Waldron, supra note 99, at 1141-52.
cises of political power. And, it follows that, if we accept Raz’s argument, and if a specific body of normative antecedent law can effectively promote autonomy, then the polity will have a similar interest in it.

If successful, the claim that antecedent law can promote autonomy would help to defend the legitimacy and desirability of policies ranging from the type of no-procreation orders mentioned above,\textsuperscript{106} to restrictive immigration, parental liability, and compulsory education laws. It would lead us to reject social norms that urge all citizens to procreate to maximum biological capacity (and laws that promote those norms such as public financial incentives), in favor of norms that ensure we choose to create children only in circumstances which will promote their civic quality. For example, it might standardize and enforce parental obligations to instill civic quality in their children—both as a direct and traditional law means of promoting the child’s citizenship and thereby the autonomy of others in the polity, and as an indirect and antecedent law means of checking procreation by burdening the act with substantial and enforceable duties.

\textit{C. Antecedent Law as Promoting Autonomy}

With this goal of promoting autonomy in mind, we can begin to assess the claim that antecedent law that seeks to promote civic quality and an optimal population range tends to promote autonomy,\textsuperscript{107} perhaps more so than traditional forms of law. But first it might help to identify some of the abstract reasoning behind the claim, or three sub-hypotheses and two premises, revealed in the discussion below.

The first sub-hypothesis is that antecedent law can avoid autonomy-reducing incidents of both the violation of law and coerced compliance with it, as well as the costs (in terms of re-

\textsuperscript{106} See Dillard, \textit{supra} note 39.

\textsuperscript{107} It is uncertain whether the promotion of autonomy, as a reason for official action, would be prohibited by the type of rights theory proposed by Ronald Dworkin, and explained succinctly by Jeremy Waldron in \textit{Jeremy Waldron, Pildes on Dworkin’s Theory of Rights}, 29 J. LEGAL STUD. 301 (2000), but to the extent it is distinguishable from things like racial or religious prejudices, it should not be.
ducing autonomy) of having to expend resources caring for others. The most concrete demonstrations of this claim are those cases in which courts have issued no-procreation orders, rather than no-custody orders, to neglectful and abusive parents who are adjudged unfit. 108 No-custody orders usually mean that any future child is born into state custody, and as such, he or she will be more likely to commit crimes than the average child. 109 No-procreation orders temporarily enjoin the prospective parent from having children (usually until they are fit), and therefore avoid a situation in which others must care for the child or be threatened by him, and in which he or she themselves are more likely to lose autonomy as a result of violating the law.

The second sub-hypothesis is that antecedent laws (no-growth ordinances, for example) 110 can reduce specific losses of autonomy that inevitably arise when there are new entrants to the polity. 111 For example, introducing others into a polity di-

108 See generally Dillard, supra note 39.
109 See supra note 40 and accompanying text.
110 See Pierce, supra note 17, at 143:
Sustainable no-growth regulations, along with other necessary population stabilization measures, can turn the elastic relationship between population and law upside down. Sustainable no-growth controls, along with other affirmative population measures have the potential to reverse the currently expanding population. If they do reverse the trend, the need for more powerful regulations will subside. This contraction of regulation will allow individual rights to expand once again—a notion that every American can appreciate.

See also Dennis J. Herman, Sometimes There’s Nothing Left to Give: The Justification for Denying Water Service to New Consumers to Control Growth, 44 STAN. L. REV. 429 (1992).

111 “[T]wo thousand years of democratic theory either explicitly or implicitly presupposed that democracy could only work on a very local level.” Nick Robinson, Citizens Not Subjects: U.S. Foreign Relations Law and the Decentralization of Foreign Policy, 40 AARON L. REV. 647, 676 (2007) (citing ROBERT A. DAHL & EDWARD R. TUFTE, SIZE AND DEMOCRACY 55 (1973). Hart argued that simple systems of unofficial rules could only obtain in small communities. See HART, supra note 1, at 92. For a discussion of how an increasing population threatens various rights and liberties, see Carter J. Dillard, Re-thinking the Procreative Right, 10 YALE HUM. RTS. & DEV. L.J. 1, 56-59 (2007). A loss of autonomy here is indicated by a loss of say in public decisions that can constrain one’s choices. That is not to say that population increases in a given polity cannot increase certain choices, even valuable choices, that one is given through the opportunities others create. See, e.g., Claude S. Fischer, The Subcultural Theory of Urbanism: A Twentieth-Year Assessment, 101 AM. J. SOCIOLOGY 543, 568 (1995) (“Urbanism probably promotes the emergence of numerous and diverse subcultures within a community.”); Thomas C. Wilson, Community Population Size and Social Heterogeneity: An Empirical Test, 91 AM. J. SOCIOLOGY 1154 (1986) (determining that an increase in community size can
lutes the value of one’s vote, which reduces one’s say in political matters, in turn reducing the degree of control one has over one’s life.\textsuperscript{112} Vote dilution may mean something very different in a legal system, as opposed to a political or economic system (discussed above), but this is beyond the scope of this article.

The third sub-hypothesis is that persons’ ability to coordinate their actions among one another and thereby gain autonomy from successful coordination of activities is related to the number of people attempting to coordinate their actions and their respective levels of civic quality. Consider John Finnis and Joseph Raz’s discussion of people coordinating their behavior to use, but not pollute, a river.\textsuperscript{113} Do their chances of reaching increase social heterogeneity, specifically political and sexual attitudes). That said, these additional choices may not reflect additional autonomy in the sense of maintaining one’s say against vote dilution, or otherwise. See Henry David Thoreau, \textit{Walking, in The Portable Thoreau} 592, 592 (1964) (“I wish to speak a word for Nature, for absolute Freedom and Wildness, as contrasted with a freedom and Culture merely civil.”). And to the extent urbanization increases crime, it reduces the autonomy laws were made to promote.

\textsuperscript{112} \textit{See} Rousseau, \textit{supra} note 5, at 50-51:

\begin{quote}
Suppose the State is composed of ten thousand citizens. The Sovereign can only be considered collectively and as a body; but each member, as being a subject, is regarded as an individual: thus the Sovereign is to the subject as ten thousand to one, i.e., each member of the State has as his share only a ten-thousandth part of the sovereign authority, although he is wholly under its control. If the people numbers a hundred thousand, the condition of the subject undergoes no change, and each equally is under the whole authority of the laws, while his vote, being reduced to one hundred-thousandth part, has ten times less influence in drawing them up. The subject therefore remaining always a unit, the relation between him and the Sovereign increases with the number of the citizens. From \textit{this it follows that, the larger the State, the less the liberty.}
\end{quote}

\begin{quote}
Now the less relationship there is between private wills and the general will, that is, between mores and the laws, the more repressive force ought to increase. Therefore, in order to be good, the government must be relatively stronger in proportion as the populace is more numerous.
\end{quote}

(emphasis added); \textit{see also} id. at 55 (“[D]emocratic government is suited to small states .

\textsuperscript{113} \textit{See} Leora Batnitzky, \textit{A Seamless Web? John Finnis and Joseph Raz on Practical Reason and the Obligation to Obey the Law}, 15 \textit{Oxford J. of Legal Stud.} 153, 155 (1995) (“[T]he law is instrumental in setting up and maintaining schemes to motivate those who would not otherwise contribute their shares (first legal technique) but also through designating in an open and public way what the scheme is and what each has to do as his contribution to it (second legal technique), thus enabling those who are motivated by the appropriate reasons to take part in the co-operative enterprise.”).
agreement fall as more persons compete for access to the river?\textsuperscript{114} What if, moreover, each additional person is unreasonable (the antithesis of Raz's angel)\textsuperscript{115} and unlikely to cooperate?

Along with these sub-hypotheses it will help to keep two specific premises in mind, both of which may be counterintuitive. The first is that antecedent law can promote autonomy even for the subjects whose behavior it seeks to control through a form of morally defensible paternalism. This is so because it also promotes those subjects' civic quality and, in Raz's terms, eliminates morally repugnant opportunities. For example, a prospective parent subject to a no-procreation order, a teen who would become a parent but for laws discouraging teen pregnancy, or a minor subject to compulsory education arguably gains autonomy in this process.\textsuperscript{116} The second premise is that autonomy is measured only with regard to members of a polity. That is, to the extent antecedent law reduces the autonomy of (or opportunities for autonomy for) those outside of the polity, the reduction is not considered, though one could consider law that

\textsuperscript{114} See HUME, supra note 66, at 97 (referring to the evident benefit of rules to deal with the selfishness and confined generosity of men, Hume notes: “But when society has become numerous, and has encroach’d to a tribe or nation, this interest is more remote; nor do men so readily perceive, that disorder and confusion follow upon every beach of these rules, as in a more narrow and contracted society.”); ROUSSEAU, supra note 5, at 43 (he refers to the limits of polities “so as not to be too large to be capable of being well governed, nor too small to be capable of preserving itself on its own. . . . [t]he more the social bond extends the looser it becomes, and in general a small state is proportionately stronger than a large one. A thousand reasons prove this maxim.”).

\textsuperscript{115} See RAZ, supra note 4, at 159 (discussing angels’ “universal and deep-rooted respect towards their legal institutions,” which allows for a sanctionless legal system).

\textsuperscript{116} Less extreme cases of how autonomy might be promoted by antecedent law are usually too common to notice. In 2008, residents of New Orleans evacuated the city as hurricane Gustav approached, but the evacuation was curtailed despite the dangers of returning because residents could not afford to stay out.

'It was just expensive, the whole hotel deal,' said Trevor Chase, a waiter at the Creole restaurant Dooky Chase, as he stood next to his car on Painters Street in the Gentilly section. 'We'd rather be without power.' Chase had been in Baton Rouge, Louisiana, for four days with his three children. 'We can't afford to be out like that,' he said, adding that the financial strain had 'caused a little stress on the family.'

enhances the autonomy of those entering the polity (a child or immigrant entering in autonomy ensuring circumstances). 117

With all of this in mind, we can return to our heuristic concepts above, using a fictitious polity to intuitively test the claim. Let us assume that persons have already left the state of nature, threatened by increasing competition for resources and a growing lack of compliance with natural law (e.g., persons murdering one another) and have come together to form Fredonia. Its citizens seek to promote autonomy, which they value highly and take as a compelling state interest, and they are fully able to enact both antecedent and more traditional forms of law to pursue that interest. They might seek to promote autonomy by constitutionalizing norms that, for example, prohibit and punish any act of violence within Fredonia, and laws that preserve vast tracks of wilderness. In passing these laws, the Fredonians will focus on constraining the behavior of all persons present in Fredonia. They will not focus on who or how many actually become present, and they will assume that all such persons are by nature—irrespective of the actual circumstances in which they are born—equally susceptible to the laws. The Fredonians are focused on the terms of the social contract, so to speak, and not on its parties.

They may think that the laws have, themselves, solved the problems of violence and threats to wilderness caused by the competition for scarce resources, even though nothing in the laws has altered the civic quality (disposition towards violence) of the citizenry or the ratio of citizens to natural resources. Much as we assume that the law, exclusively, guides judges’ behavior, the Fredonians assume that, once proclaimed, the laws will determine citizens’ behavior. They do not consider people’s dispositions to actually follow the laws, or the increas-

117 See Regulating Eugenics, supra note 7, at 1582 (referring to genetic interventions “reasonably calculated to add to the possible set of life choices that the child will have or augment the child’s ability to pursue her preferred life path.”). The content proposed here seeks to promote a similar autonomy, albeit without genetic intervention and one more objectively valuable in Raz’s terms. For a thorough discussion of promoting the autonomy of prospective children, see Dena S. Davis, Genetic Dilemmas and the Child’s Right to an Open Future, 28 Rutgers L.J. 549, 592 (1997) (“The concept of the child’s right to an open future offers a new way to resolve these issues by focusing on the autonomy of the child (present or future) as a limit on the autonomy of the parents.”).
ing pressure created as the number of resource claimants slowly grows. Like most polities, the Fredonians are neither particularly fixated on the dissolution of their society, nor on the role of their fellow citizens’ civic qualities and number in that event. They have a static and gestalt view of the “Fredonian people” as a unitary mass, rather than an atomistic view of each Fredonian (as well as prospective Fredonians) and his or her civic quality.

But, because of this limited approach and the resultant gaps in the law, there are people in Fredonia who lack even a minimum civic quality, are not susceptible to the laws, and, therefore, act violently toward others and destroy the wilderness that was set aside. The problems worsen as more persons of low civic quality become present—the law taking no particular view of their arrival. The Fredonians respond by punishing violators with increasing severity in an effort to counteract the trend—moving away from the sanctionless system imagined by Raz. But, in doing so, they reduce the autonomy of those punished and, in acting after the fact, they have failed to protect the autonomy of the victims of the crimes. Moreover, the need to punish violators, and care for and perhaps compensate the victims imposes an opportunity cost that further reduces Fredonians’ autonomy. Additionally, because they are unsure whether others will respect the wilderness, law-abiding Fredonians will now compete for access, thereby undermining autonomy that was gained by passing the law in the first place. Fredonia may even choose to provisionally reduce the autonomy of all of its citizens—imposing curfews and travel restrictions, or derogating from privacy rights—to deal with the threat.

There is a similar loss of autonomy as the number of Fredonians increases, as each Fredonian’s claim to the original physical subject of the contract (Fredonia) is divided, and as each one’s vote, or say in matters that affect them, is diluted. Attempts to coordinate solutions to these problems are, in turn, made more difficult now that more people participate in and each person has a lesser say over the solution. Further, chaos becomes ever more probable with the constant influx of unreasonable people (the Fredonians having taken no steps to assure
the civic quality of new entrants) who are unwilling to cooperate.\textsuperscript{118}

Admittedly, even if the Fredonians, at the genesis of their social contract, had focused on circumstances which ensure the civic quality of each new member, and focused on the ratio of members to scarce resources (or optimal number of parties to the contract), there would have been costs in terms of autonomy. Legal systems that regulate procreation, immigration, and education require the same sorts of state expenditures that systems primarily relying on\textit{ ex post} criminal sanctions do. But assuming the antecedent laws were effective, and were not so coercive as to themselves reduce autonomy,\textsuperscript{119} there would be a net gain in autonomy when using antecedent law. And this remains true even if we discount any gain in autonomy experienced by those subjected to the laws (e.g., a minor subject to compulsory education, a teen prevented from becoming a parent, or those benefitting from a general reduction of cultural pronatalism).\textsuperscript{120} The autonomy cost of implementing antecedent laws is only a fraction of those incurred due to the initial failure to assure civic quality and an optimal population range.

**III. THREE COUNTERARGUMENTS**

Finally, it is important to consider and assess the likely counterarguments. First, as a descriptive matter, one might ar-

\textsuperscript{118} For an interesting discussion of the costs of enforcement in the context of international institutions, see Steiner et al., \textit{supra} note 81, at 716 ("The more severe the enforcement problem, the more restricted the membership. When actors face an enforcement problem (that is, when individuals do not have an incentive to voluntarily contribute to group goals), collective action is problematic. Moreover, the severity of the enforcement problem increases with the number of actors . . . ." (quoting Barbra Koremenos et al., \textit{The Rational Design of International Institutions} 55 INT'L ORG. 761, 783 (2001))).

\textsuperscript{119} For example, a polity might choose withdrawal of official charters for businesses that violate immigration laws rather than increased removal of persons, or vicarious parental liability laws rather than population quotas. However, for a discussion of the difficulty of eliminating coercion even in structural changes to the law, see Waldron, \textit{supra} note 98, at 1141-52.

\textsuperscript{120} This article will not discuss the full argument, but there is possibly a gain in autonomy as persons migrate from a primarily personal or agent-relative morality focused on one's biological counterparts, to one more inclusive of impersonal or agent-neutral (utilitarian, for example) morality. For a discussion of personal and impersonal morality, see Nagle, \textit{supra} note 30, at 164-88.
gue that states (perhaps the United States) can and do exist without antecedent law, that is, that antecedent law cannot be distinguished from traditional law. The second is a normative argument. It acknowledges that the form exists but argues that the state should minimize any influence it has through law on the creation and quality of persons within it. The third argument also admits that the form exists but argues that the state should fashion a particular content, or substantive antecedent law that is antithetical to the content proposed in Part II.

A. Antecedent Law Need Not Exist

As to the first counterargument, when a state grants child tax credits, regulates marriage, regulates contraception and abortion, regulates immigration, or standardizes aspects of education, it influences the number and quality of persons within it.\(^{121}\) It would be a mistake to think that only states with explicit family planning policies, like the PRC, regulate their demography, while states, like the United States, with more subtle policies do not; it would also be a mistake to think that states like the PRC must rely on constant coercion to do so.\(^ {122}\) Moreover, even if a state uses its authority to protect broad procreation or immigration rights against legislation that might limit them, it is still actively influencing the size and composition of its constituency. For example, when a court overturns a local no-growth ordinance, it enables the influx of new members the citizens sought to prevent; it imposes its own outcome over the more democratic one, the one chosen by the citizens.


\(^{122}\) See, e.g., Yilin Nie & Robert J. Wyman, *The One-Child Policy in Shanghai: Acceptance and Internalization*, 31 Population Dev. Rev. 313, 313-36 (2005) (“The one-child family is considered normal; few are still concerned with the policy per se, while others see it as unnecessary. The one-child policy seems to reflect Shanghaiese current preferences; its status as a legal requirement may be largely irrelevant.”); Baochang, *supra* note 80, at 145 (finding that “government-mandated fertility and achieved fertility have converged in China”).
Similarly, when a state tries to take its hand off the reins and have no antecedent law at all, it may merely reinforce, by tacit agreement, the behavioral norms which exist and past laws helped shape.\(^{123}\) If a state once promoted pronatalism to build its armies or its workforce, the decision to switch to a rhetoric, unaccompanied by regulation, of reproductive rights does not reverse the trend; it simply shifts state policy into neutral and allows the state to coast forward on its existing path.\(^{124}\) The sea of dicta emphasizing reproductive freedom in the United States\(^{125}\) is of little help when in terms of cultural norms “a couple must normally choose not to have a child.”\(^{126}\) This is the extant pronatal cultural preference that is fostered by law.

The United States has one of the highest fertility rates in the industrialized world. It also has a one thousand dollar per

\(^{123}\) “Reproductive regulation cannot be separated from the vision of woman as mother, which is its genesis . . . .” Abrams, supra note 121, at 456. Abrams refers to “the pronatalist message of religion, philosophy, and politics and its manifestation into law” and finds that, even in the modern reproductive rights precedent, pronatalist norms are reinforced. Id. at 456, 483-91; see also M.A. Ryan, The Argument for Unlimited Procreative Liberty: A Feminist Critique, 20 HASTINGS CTR. REP. 6, 6 (1990) (“From a feminist perspective, unlimited procreative liberty risks treating children as property, distorts understanding of the family, and neglects moral concerns about how we reproduce.”). By not refuting pronatalism, even seemingly neutral legal doctrines fail to rebut this status quo. Cf. STEINER, supra note 81, at 176 (“Legal norms capture and reinforce deep cultural norms and community practices. They entrench ideas and help give them the sense of being natural, part of the inevitable order of things.”); Robert E. Scott, The Limits of Behavioral Theories of Law and Social Norms, 86 VA. L. REV. 1603, 1605 (2000) (“Of course, no one believes that the only way that the state ever influences the behavior of its citizens is through the incentive effects of legal rules. Quite clearly, the state sometimes influences behavior by shaping preferences rather than by constraining opportunities.”); ROUSSEAU, supra note 5, at 95 (“Among all the peoples of the world, it is not nature but opinion which decides the choice of their pleasures. . . . Although the law does not regulate mores, legislation is what gives rise to them.”).

\(^{124}\) Purdy argues that promoting a broad version of reproductive autonomy in certain circumstances will have pronatal consequences, increasing fertility rates. See generally Purdy, supra note 9, at 940-54.

\(^{125}\) See, Dillard, supra note 111, at 15-20. In a display of the pronatalism Abrams identifies, that particular dicta—mostly arising in cases dealing with the right not to procreate—has been read as a constitutional rule protecting an absolute right to procreate. See, e.g., State v. Oakley, 629 N.W.2d 200, 219 (Wis. 2001) (Bradley, J., dissenting) (“Men and women in America are free to have children, as many as they desire. They may do so without the means to support the children and may later suffer legal consequences as a result of the inability to provide support.”).

child tax credit and other pronatal institutions, as well as a Supreme Court that has treated, in pervasive dicta (often repeated by commentators), both procreation and contraception as coextensive fundamental privacy rights. The United States aside, those polities representing the largest populations in the world have all, at one time or another, explicitly regulated procreation. It seems unlikely that states do, or even can, avoid influencing the presence and civic quality of their constituents.

B. Antecedent Law Should Not Exist

The second counterargument holds that a state should minimize antecedent law because it interferes with privacy rights and/or autonomy and is therefore inherently illiberal. Advocates of this view claim that having a child is a private or autonomous act. But that certainly might come as a surprise to the

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128 See Dillard, supra note 111, at 15-20.

129 See id. 35-37.

130 See generally Eichner, supra note 23; Amartya Sen, Fertility and Coercion, 63 U. CHI. L. REV. 1035, 1039-41 (1996). Sen is an eloquent proponent of a broad procreative right and defender of the inviolability of the familial realm. For a rebuttal to Sen’s characterization of the right and inviolability of the realm, see generally, Dillard, supra note 111. Furthermore, Sen has argued that any encroachment on the realm can result in a net loss of autonomy. Sen states:

A case for state intervention in fertility decisions is sometimes derived from a diagnosis of “externalities”: a family’s decision to have one more child could affect the interests—or for that matter the sense of propriety—of other people. This diagnosis can be used to advocate many different policies, from changed price incentives through taxes and governmental subsidies to legal and other restrictions on the family’s reproductive decisions. This easy “translation” of interventionist arguments, from standard cost-benefit analysis to family planning, needs close scrutiny. As discussed above, we cannot but see family planning as a rather private subject in which—to use Mill’s phrase—there is “no parity” between the family’s own direct involvement and those of others. . . . This is not an argument to ignore all else, but that “all else” has to be very powerfully contrary to outweigh the general presumption in favor of leaving reproductive behavior to the family in general and to the woman in particular.

Sen, supra, at 1049-50 n.41.
person born, and, unless parents plan to keep their child in a cage, the persons with whom the child will interact—and whose lives she will inevitably affect.131 If not the state, then who should be responsible for the presence and civic quality of the polity? Does it really make sense to ignore these issues entirely? Is not the history of procreative freedom also the history of bad parenting and its consequences?

When we aggregate all acts of procreation in a given period of time, the impact of those acts can be seen even more clearly as “public.”132 Considering that even a single act will project its effects through all future descendants, procreation may be the most public act in the average citizen’s life.

Moreover, there is nothing in the form of antecedent law that is itself illiberal, nor is it illiberal for the state to seek to maximize autonomy. Similarly, the particular substance or content of antecedent law enacted to achieve that end would not be illiberal, as long as its means were not so coercive as to be counterproductive (autonomy reducing) or to violate legitimate rights. As shown in Part II, antecedent law as a form can promote autonomy more than traditional forms of law. This is a view with which some proponents of a broad procreative right, like Amartya Sen, might agree, even though they would choose a different means.133

A variant to the second argument treats antecedent law as a form of social engineering that is undemocratic. “It is axiomatic to liberal democracy that the governed should choose the gov-

131 For a discussion of the interpersonal aspects, or negative externalities, of procreating, see Dan Brock, Shaping Future Children: Parental Rights and Societal Interests, 13 J. POL. PHIL. 377 (2005). John Stuart Mill, referring to the moralities of justice that prevent harming others or hindering their pursuit of the good, said that “[i]t is by a person’s observance of these that his fitness to exist as one of the fellowship of human beings is tested and decided; for on that depends his being a nuisance or not to those with whom he is in contact.” MILL, supra note 40, at 60. Rousseau refers to the civil religion as “sentiments of sociability, without which it is impossible to be a good citizen or a faithful subject.” ROUSSEAU, supra note 5, at 102.

132 See Brock, supra note 1310, at 378 (“It is widely recognized, both in history and in political theory, that the effect of many individual decisions, themselves each rational and justified as individual choices, may be collectively undesirable for a group or society.”).

133 See Sen, supra note 125, at 1061 (arguing in part that promoting education can reduce fertility, enhance freedom, and be “the ‘solution’ to the population problem”).
ernment, not vice versa. . . . Any attempt to directly influence the composition of future generations amounts to the state’s choosing the governed, and that is not acceptable in a liberal democracy.”134 Under this argument the state should play little if any role, and the parents should have plenary authority—even to the point of engaging in genetic enhancement of their children.135 The argument may be premised on the assumption (very much like the first counterargument) that, because at some point in history people formed the state and its first laws, the role of who makes whom can never be reversed. But that aside, there are at least three responses.

A democratic regime is an artificial entity made to represent each citizens’ individual interests.136 The governed choose the government, which then affects the governed. Do the governed have an interest in who one another other is, in whom they share the polity? Does one care about whom one is in social contract with, or just about the terms of that contract? Why should one not have a say in something that affects one so deeply as the determinants of the polity around one, and thereby the laws one will be subject to? In a democratic polity, each citizen relies on all other citizens to determine the government and the economy, in short, the state of affairs, including antecedent law. If antecedent law is created through a democratic process there is nothing undemocratic about it; to leave it wholly to the realm of the family, in the name of preserving privacy rights, would be far more undemocratic.

Moreover, leaving it to the private realm of family life does not necessarily protect liberal values. The citizens are generally not constrained by constitutional limits, such as a prohibition on practicing or teaching discrimination, whereas the state is. Avoiding antecedent law also prevents the state from actually

134 Regulating Eugenics, supra note 7, at 1596-97.
135 See generally id. (arguing that liberal eugenics, in which parents modify genetic makeup of their children so as to enhance their life choices, is best understood as a fundamental right).
136 See Joseph Raz, Rights and Politics, 71 IND. L. J. 27, 35 (1995) (“The public interest is, and is generally taken to be, a function of individual interests.”); HOBBS, supra note 32, at 138 (explaining that persons “have made an artificial man, which we call a commonwealth”).
promoting liberal values. An antecedent approach to civil rights law acknowledges that some in the polity recognized and respected civil rights before formal civil rights laws were ever promulgated, and avoids presuming that secondary-type laws that constrain racist behavior suffice. Treating racism as an absence of civic quality, antecedent law could promote autonomy by preventing the creation of racists—intensively targeting specific communities where education—whether at home or in school—was lacking or contrary to civil rights norms.

The second response is that, as all will admit and as one opponent to antecedent law stated, “although we accept a certain amount of molding as necessary for society to function, we accept only that amount that is necessary.” In other words, both the state and parents inevitably make choices that help determine the presence and civic quality of persons in the polity—whether they want to or not. And once the door is open, determining what it means for “society to function” and what is “necessary” is not an easy matter. Yet, it is better to task the state with this responsibility than to leave it to parents who are unelected, unrestrained by constitutional prohibitions, not obligated to be transparent and accountable in their dealings, and not necessarily mentally fit.

Third, the fear of social engineering, as described by opponents of antecedent law, seems to be partially based on the threat it poses to pluralism, i.e., the states ability to impose a comprehensive concept of the good. However, civic quality, as defined above, on all points of its spectrum, is not a comprehensive concept of the good or a moral doctrine. It is more akin to the “public civility” that Rawls advocates to ensure a minimum environment where pluralism can flourish. We can return to the example of academia. University law (itself analogous to antecedent law) is first about exclusion of those incapable of composing themselves in a manner conducive to the beginnings of a well ordered society that ensures pluralism.

137 Regulating Eugenics, supra note 7, at 1598 (referring to compulsory education).
138 See generally Regulating Eugenics, supra note 7.
139 See id. at 1596 (“The real trouble with eugenics is not that it can be coercive; it is that the state can use it to create the citizens it wants to govern.”).
140 RAWLS, supra note 24, at 92.
C. Promoting Values Other Than Autonomy

The third, final, and most insidious counter-argument admits that antecedent law exists, but argues for contents antithetical to those suggested in Part II. It is here that proponents of eugenics have historically made their claims, and in reaction to them we might have thrown away the entire form of antecedent law just to be safe.\textsuperscript{141} That would have been a mistake. Eugenics involves, by necessity, genetics.\textsuperscript{142} Antecedent law, as a form, has no necessary relation to genetics or biology. Here the form and content distinction is vital.

The form focuses on how law determines presence and thus civic quality. This form can be used to explicitly reject any underlying value, or state interest, in genetic attributes per se, including the value of adding more or fewer persons of a particular race or genetic makeup.\textsuperscript{143} Again, we can do so because it seems likely that genetics or biology have nothing to do with civic quality, and that the relevant attributes can be instilled in anyone through upbringing and education. And if we are going to reject eugenics we may choose to do so fully, regardless of whether it is pursued by the polity or by its members.\textsuperscript{144} In doing so, we could reject the very act of determining who should

\textsuperscript{141} Commentators certainly seem wary of any law that explicitly controls the presence and quality of persons in a given polity. See, e.g., Regulating Eugenics, supra note 7; see also Matthew J. Lindsay, Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860-1920, 23 LAW & SOC. INQUIRY 541 (1998); Matthew J. Lindsay, Preserving the Exceptional Republic: Political Economy, Race, and the Federalization of American Immigration Law, 17 YALE J.L. & HUMAN. 541 (2005). Admittedly the PRC’s family planning regime—a key example of antecedent law—has involved segregable instances of eugenics, see GREENHALGH supra note 46, at 217, though as noted in Part III, this is something that antecedent law as a form can explicitly and effectively reject.

\textsuperscript{142} See Regulating Eugenics, supra note 7, at 1579.

\textsuperscript{143} This would include the type of pronatal quasi-eugenics hinted at by some proponents of increased fertility rates. See, e.g., Russel Shorto, No babies?, N.Y. TIMES MAGAZINE, June 29, 2008, at 2, available at http://www.nytimes.com/2008/06/29/magazine/29Birth-t.html?ref=world (“The fears on the right are of a continent-wide takeover by third-world hordes — mostly Muslim — who have yet to be infected by the modern malady called family planning and who threaten to transform, if not completely delete, the storied, cherished cultures of Western Europe.”).

\textsuperscript{144} See, e.g., Regulating Eugenics, supra note 7. Note though, that the liberal eugenics defended in that work, id. at 1582, namely those which seek to enhance autonomy, are very different from the sort of pronatal quasi-eugenics proposed to stave off the “third world hordes” referred to above.
be present in the polity or attempting to influence our collective civic quality with reference to genetics.\textsuperscript{145}

Another type of antecedent law that might be rejected is one that values the mere production of human life per se and pursues it as an end in and of itself.\textsuperscript{146} In this case, if we agreed that the mere production of more human lives was not valuable, we would reject laws premised on that value.\textsuperscript{147} Antecedent law allows us to reject these things, this content, without rejecting the form itself, and losing its ability to promote other values.

These types of substantive antecedent law, at least in the foreseeable future, do not pose the greatest threat to the type of autonomy states like Fredonia value. Rather, the greatest threat may be posed by another substantive antecedent law, perhaps dominant today, a type of pronatal nationalism.\textsuperscript{148} This pronatal nationalism values primarily the military and economic strength of a nation, as well as its “growth” (and growth in literal terms, as opposed to human betterment)\textsuperscript{149} as ends in and

\textsuperscript{145} Of course, there are pressing questions regarding how a state like the United States could regulate the conduct of prospective parents in this regard absent state action. They will not be discussed here.

\textsuperscript{146} Some commentators take this view, though they often proceed from religious conviction. “The right to procreate goes back to the very beginning of time, and is part of our very nature. ‘Be fruitful and multiply,’ it should be recalled, was the first commandment given to our first parents.” Steven W. Mosher, People of Faith Beware: The Left has Decided that There is no Right to Have More Than One Child, CATHOLIC EXCHANGE, July 31, 2008, http://www.catholicexchange.com/2008/07/31/113314/. Mosher also argues from an economic perspective. See infra note 153 and accompanying text.

\textsuperscript{147} Ronald Dworkin has argued that valuing life in this way is essentially religious and, therefore, outside of the state’s interest. RONALD DWORKIN, LIFE’S DOMINION 155-68 (1993); see also Francis Kamm, Abortion and the Value of Life: A Discussion of Life’s Dominion, 95 COLUM. L. REV. 160, 164 (reviewing RONALD DWORKIN, LIFE’S DOMINION 155 (1993)) (Kamm refers to Dworkin’s argument that “[s]ome intrinsic value is incremental value; that is, the more there is of what is valuable, the better. The sacred is nonincremental value: that something sacred is valuable is not reason to produce more of it, but is reason to treat what exists of it properly.”).

\textsuperscript{148} Note that there is a thin distinction between pronatal eugenics and pronatal nationalism, which may overlap depending on the pronatalist’s view of what sort of humans need to be produced. Again, defining the fundamental procreative right as self-replacement would allow states to prevent would-be pronatal nationalists from breeding in pursuit of national supremacy.

\textsuperscript{149} As an alternative, one can view human betterment as only beginning with security, but proceeding towards higher levels of human development. See, e.g., ABRAHAM HAROLD MASLOW, MOTIVATION AND PERSONALITY 80-106 (1954) (setting forth Maslow’s theory of a hierarchy of human needs in which security is merely something on which to build).
of themselves. It seeks to produce economic and political persons rather than legal persons, either ignoring or presuming their susceptibility to law, their civic quality.

Referring to state interests in regulating abortion, Justice Stevens said that the state “may also have a broader interest in expanding the population, believing society would benefit from the services of additional productive citizens—or that the potential human lives might include the occasional Mozart or Curie. These are the kinds of concerns that comprise the State’s interest in potential human life.” What Justice Stevens describes is antecedent law that treats prospective members of the polity as specific (and perhaps non-consenting) means to the state’s or other citizens’ ends, rather than as ends in and of themselves, or as people whose autonomy we seek to promote.

The following quote illustrates this kind of antecedent law:

When fertility drops below national replacement levels, the number of productive workers likewise falls. . . . And in these terror-ridden times, it is not only the economy that nosedives with fewer workers, but national defense. . . . And while high technology may replace some of the foot-soldiers, the money for such is being diverted to pension benefits. . . . ‘Does this mean that the future belongs to those who believe they are (or who are in fact) commanded by a higher power to procreate? Based on current trends, the answer appears to be yes. . . . Today, however, it has become clear that no law of nature ensures that human beings, living in free, developed societies, will create enough children to reproduce themselves.152

150 Contrast such a view with that suggested by Rawls. Referring to the difference principle not requiring continual economic growth he finds “[w]e certainly do not want to rule out Mill’s idea of a society in a just stationary state where (real) capital accumulation may cease.” RAWLS, supra note 24, at 159.


This view is not novel, nor limited to procreation.\textsuperscript{153} As one author recently opined in advocating for increased immigration, “Maintaining the United States global economic and military supremacy is inextricably interwoven with a growing population.”\textsuperscript{154} Where is the notion of civic quality in this? While World War II was under way in Europe, scholars in the United States expressed the state’s economic and military interest in adding persons to the polity by suggesting that immigration could take up the slack where domestic fertility left off.\textsuperscript{155} Today, some proponents of expanding the military advocate offering United States citizenship, regardless of one’s current immigration status, in exchange for military service.\textsuperscript{156} According to this view of antecedent law, the polity’s prospective members are future soldiers, laborers, childbearers, taxpayers, and consumers,\textsuperscript{157} not

\textsuperscript{153} This value, or a fear of foreign invasion, most likely led Rousseau to equivocate as to whether a polity should limit the size of its population. See ROUSSEAU, supra note 5, at 43-48, 66-67. He also may have premised the claim on a state’s ability to export excess persons to colonies. See id. at 45.


\textsuperscript{155} See A.H. Feller, Book Review, 50 YALE L.J., 949 (1941) (reviewing GUNNAR MYRDAL, POPULATION: A PROBLEM FOR DEMOCRACY (1944)).

\textsuperscript{156} See Jeff Jacoby, Op-Ed., Through the Military, A Path to Citizenship, BOSTON GLOBE, Feb. 13, 2008, at A13. Admittedly, the autonomy of any polity’s members might be contingent on successfully defending the state against foreign invasion. However, that argument is contingent on an accurate empirical assessment of the actual threat to the polity, and should not ignore means other than antecedent law for addressing (or reducing) the threat.

\textsuperscript{157} Longman, supra note 152, at 69-70, 78:

A nation’s GDP is literally the sum of its labor force times average output per worker. Thus a decline in the number of workers implies a decline in an economy’s growth potential.

\ldots

Current population trends are likely to have another major impact: they will make military actions increasingly difficult for most nations. \ldots Given their few sons, it is hardly surprising that Russian mothers for the first time in the nation’s history organized an antiwar movement, and that Soviet society decided that its casualties in Afghanistan were unacceptable.

\ldots

Education should be a lifetime pursuit, rather than crammed into one’s prime reproductive years.

For another read on population and economic development see, HERMAN E. DALY, THE ECONOMICS OF SUSTAINABLE DEVELOPMENT 1 (1996). Daly refers to sustainable devel-
autonomous would-be-members whose civic quality we promote. “Population growth is a multiplier of wealth... the more minds you have at work, generally the better off you are; human beings are the ultimate resource, the one resource you cannot do without.”

As Karl Polanyi described, this is a view of humans as a resource *themselves*, or “complete agreement on the desirability of a large population... [And] ready agreement on the advantages of cheap labor.” It is a view that has led polities like the United States to a position where it may not fare well in an assessment of the civic qualities of its constituents. The view is commonly expressed through pronatalism, but also through viewing the immigration law of a state primarily in relation to the state’s economy.

Education too is not, from this perspective, treated as an end or value in itself, or valued for its ability to increase civic quality or autonomy. Rather, it is desirable primarily because it can increase gross domestic product. William Easterly, for one, sees little value in the increasing levels of education throughout the world over the past several decades, citing one particular study that found “no positive association between growth in education and growth of output per worker.” Longman’s view is that “education should be a lifetime pursuit, rather than crammed into one’s prime reproductive years” and is premised on a very particular view of prospective members of the polity.

opment as resisted by “most economic and political institutions” which are founded on traditional quantitative growth and fear its replacement by something as subtle and challenging as qualitative development. *Id.* Of course, it may also be that these institutions have vested interests in avoiding replacing growth with qualitative development, such as an industrialist relying on the availability of cheap labor and greedy consumers.

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158 *Economy’s Reaction to a Growing Population* (Fox Business television broadcast Aug.14, 2008), *available at* [http://www.foxbusiness.com/video/index.html?referralObject=3029763](http://www.foxbusiness.com/video/index.html?referralObject=3029763) (quoting Steven W. Mosher of the Population Research Institute); see also William Easterly, *The Elusive Quest for Growth: Economists’ Adventures and Misadventures in the Tropics* 94 (2001) (referring to the genius principle which, loosely stated, posits that the more babies born, the greater the likelihood that one of them will grow up to be a genius capable of solving the world’s problems—like overpopulation).


160 *See supra* note 86.

161 *See Easterly, supra* note 158, at 73-78.
In contrast, scholars who value autonomy tend to treat “children primarily as future citizens, belonging to their communities and their nation” and to view “state regulation of education, labor and maltreatment as justified by the state's interest in children's welfare and in their growth to autonomous citizenship.”

Moreover, education, in the pronatal nationalist and economic growth model, promises a narrow version of autonomy through personal material accumulation, rather than a prerequisite to one’s membership in the polity. It is part of what Polanyi called the “ascendancy of economics over politics proper.” Members of the polity are primarily economic producers rather than political constituents. In this view, a polity that consisted of a small population of highly educated and empathic citizens of high civic quality, but that had few riches and little military might, would be worthless. This is a view of persons as political or economic, and not necessarily legal.

Under the pronatal nationalist view, in direct opposition to the substantive antecedent law proposed here, each member views new members of the social contract in terms of their potential usefulness, and assumes their behavior is guided by power (coercion) or material incentives and disincentives (indeed, this particular view of ourselves is promoted). The polity’s value is determined by its gross domestic product and

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164 POLANYI, supra note 156, at 119.
165 Again, the purpose of this article is only to introduce the concept of antecedent law, but readers may find that something like compulsory university-level education would not be inconsistent with the content suggested in Part II, while a state paying its citizens to procreate in order to build its military and economic strength would be. Though there is nothing prejudicially antinatal in the substantive antecedent law proposed here, the substantial resources required to ensure the autonomy of each new person, as well as the finite nature of all polities, makes it tend in that direction—at least relative to current fertility rates worldwide.
166 Arguably, we need not worry about the civic quality and autonomy of new members of the polity, because we can simply divide off into sub-polities that have their own exclusionary antecedent laws ensuring minimum civic quality and optimal population ranges, such as modern gated-communities or even individual families hole up on private tracts of land. We might even argue that trying to impose civic quality and optimal
military might rather than the civic quality and autonomy of each citizen.

CONCLUSION

In pursuit of certain values, such as military and economic might, states may choose to fill themselves with as many persons as possible, irrespective of their civic qualities, as one of the first orders of business. But as external threats to states subside, they may reach a point where doing so is not necessary and where the costs outweigh the benefits. States may also choose to do so because they view the mere production of human life as per se valuable, because they view massive populations as deterring the effectiveness of internal factions,\textsuperscript{167} or for any number of other reasons. But whatever the reason, we should be sharply aware of the role the law plays in this process because it is that process which shapes the basic state of legal affairs that lawyers must work within. As an express concept, the form antecedent law can ensure that when we think of law, we consider the number and capabilities of those subject to it, how they came to be, and how other persons subject to it will come to be in the future.

\textsuperscript{167} Referring to the Framers' attempts to use federalism to avoid faction influence one commentator notes, “Contemporary observers confirm the fact that ‘the smaller the population and geographic area, the greater the likelihood of dominance by a single political party or machine with a single set of mores and the greater the opportunity for aggregation of economic power to overshadow the political scene.’” John Denvir, \textit{Justice Rhenquist and Constitutional Interpretation}, 34 \textit{Hastings L.J.} 1011, 1038 (quoting J. Choper, \textit{Judicial Review and the National Political Process} 252 (1980)). Using antecedent law to disable factions from doing evil may also disable ordinary citizens from doing good.
Antecedent law may also help us to consciously choose the values we pursue. As a result, we might choose autonomy as a value rather than military or economic might, and we might choose to view the polity more like a university, intent on promoting the civic quality of each citizen, rather than as a dominant military force or a productive factory. Today we use the term “civil society” to refer to those members and institutions that comprise a sub-unit of the polity and who possess and act on certain civic qualities, but there is no reason why any member of a polity should ever have come to exist outside of its civil society—in a Lockean sense—in the first place. Political identity may best be found in the civic quality of each person that inhabits a state—and whether by action or omission, it is the law, as much as any other creator, that puts them there.

Rawls said that our “social world might have been different and there is hope for those at another time and place.”168 Lawyers who wish to change the world might first consider the type of antecedent or background law that makes the world—by which we really mean the crowd of people we have to share it with—susceptible to change.

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168 RAWLS, supra note 24, at 38.