Child Welfare and Future Persons

Carter Dillard
CHILD WELFARE AND FUTURE PERSONS

*Carter Dillard*

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I. Introduction

A leading expert uses this parable to describe the growing debate over how to raise the child welfare system in the United States from the abyss into which it is falling: A traveler comes across a village where the inhabitants are plucking babies out of a nearby river, busily pulling each to safety as they stream endlessly down from an unknown source. The traveler wisely declines to help, preferring to trek upstream to stop the flow of babies at its source. For this traveler it is more rational to go upstream, and he argues against those that work downstream to fix a problem so far from its source. This allegory illustrates two sides of a debate which is taking center-stage among children’s advocates; the debate focuses on two potential remedies to the child welfare system: make it easier for the state to reduce temporary and harmful foster care in favor of procedures that allow for the adoption of abused and neglected children whose parents prove unfit, or follow our traveler’s advice and provide those parents with the resources they need to ensure they never become unfit.

What is not debated, however, is whether the current child welfare system—the overlapping state and federal regime intended to prevent and respond to child neglect and abuse—is in crisis to the

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1 Martin Guggenheim, What’s Wrong with Children’s Rights 174 (2005).
2 The debate is perhaps best summed up in the recent exchange between Martin Guggenheim and Elizabeth Bartholet. See generally Elizabeth Bartholet, Whose Children? A Response to Professor Guggenheim, 113 Harv. L. Rev. 1999 (2000); Martin Guggenheim, Somebody’s Children: Sustaining the Family’s Place in Child Welfare Policy, 113 Harv. L. Rev. 1716 (2000) (reviewing Elizabeth Bartholet, Nobody’s Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative (1999)). Bartholet argues for tempering the current bias which works in favor of biological parents, at times to the detriment of their children. Guggenheim, supra, at 1721. She advocates abolishing barriers to the adoption of foster children and, in some cases, bypassing family reunification requirements where going through the process could potentially harm the child. Id. at 1717–19. Guggenheim, alternatively, advocates for more adequate resources for parents to ensure that children never become abused or neglected. Id. at 1747. Guggenheim specifically refers to “early intervention services for health care, child care, and education.” Id. The horrific state of the child welfare system in the United States is nothing new, and was well known to commentators well over a decade ago. See Stacey L. Arthur, The Norplant Prescription: Birth Control, Woman Control, or Crime Control?, 40 UCLA L. Rev. 1, 76–79 (1992) (describing inadequacies of foster care system).
3 See Guggenheim, supra note 2, at 1716 (discussing two alternative approaches aimed at reforming child welfare system).
point of representing a virtual failure of governance. The system manages to create a bad outcome for every party involved—for the state and all of the interests it represents, as well as for the parents and their children. Beyond the bland abstraction of numbers are the stories of neglect, abuse, and torture by parents, and disastrous interventions by the state. Some of these children, like Bobbijean P., were saved, while others, like Monique Pippillion, were killed. But the stream of neglected and abused children flows on and the debate continues.

Perhaps we have not followed our traveler’s lead and gone far enough upstream, to its very source, to the place where all babies

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1 See In re Bobbijean P., No. 03626-03, 2004 WL 834480, at *4 (N.Y. Fam. Ct. Mar. 31, 2004) ("Our society has reached the breaking point with respect to raising neglected children, often born with extraordinary needs. One only need look at our schools, our jails, our Division of Human and Health Services budgets, and our Family Courts to see that a serious change of direction is necessary in the interests of children, the taxpayers, and the community as a whole.")., vacated, 842 N.Y.S.2d 826 (App. Div. 2007); Guggenheim, supra note 2, at 1716 ("Virtually everyone familiar with current child welfare practice in the United States agrees that it is in crisis.").


3 Guggenheim and Bartholet dispute the figure as between roughly one and three million children that have suffered neglect and abuse, either by their natural or foster parents. See Guggenheim, supra note 2, at 1732–35 (arguing that Bartholet’s estimate of three million abused children in foster care is “significantly overstated” and suggesting that real figure is much lower).

4 Bobbijean P. was placed in foster care at birth because her mother’s three prior children had all tested positive for cocaine. In re Bobbijean P., 2004 WL 834480, at *2. David Oakley fathered nine children but intentionally refused to pay child support, owing in excess of $25,000. State v. Oakley, 629 N.W.2d 200, 201–02 (Wis. 2001). Liana Sandoval, at twenty months old, was beaten to death by her mother’s boyfriend, tied to an eighteen-pound chunk of concrete, and thrown into a canal, even though protective services had been told a month earlier that she and her older sister were covered in bruises and missing clumps of hair. Karina Bland, The Sad Case of Little Liana Sandoval, AZ. REPUBLIC (Phoenix), Jan. 12, 2003, at 1A. Katrina Ferguson gave birth in a toilet to an infant who then drowned; JiMiichael Chapman died at five weeks of age of massive cerebral hemorrhages from blunt force trauma inflicted by his mother; Monique Pippillion died at two months of starvation, weighing two pounds less than she had at birth. Sarah Moore, When Children Fall Victim: Why Do Parents Kill?, BEAUMONT ENTERPRISE (Tex.), Dec. 23, 2007, http://www.beaumontenterprise.com/news/when_children_fall_victim__why_do_parents_kill__06-18-2008_16_14_35.html. Chornice Kabelliyaa punished her foster daughter by plunging hypodermic needles into the girl’s eyes and beating her with various objects. Natalie Singer & Christine Clarridge, Woman Gets 14 Years for Child Abuse, SEATTLE TIMES, Dec. 8, 2007, at B3.

5 See In re Bobbijean P., 2004 WL 834480, at *1 (noting that infant was taken from her mother on emergency basis).
come from, to the point of their very creation. Of course, most courts and lawmakers refuse to venture through the tangled wood of fundamental rights and future interests. Prospective children and their future interests—as well as the amorphous and diffuse interests of the state—seem vague and distant, if not invisible, especially when compared to the very live interests of prospective parents whose right to procreate—a right many presume to be inviolable—is at issue. Wading into that area is difficult to say the least, and obscured by an ancient fog hovering in all of our psyches, a hardwired and subconscious fear of anything that would restrain our procreative right, of anything that might balance our otherwise limitless power to ensure genetic lineage and immortality through procreating against an obligation to care for and nurture offspring.

There are, of course, practical limitations—the type that have always made suggestions of parental licensing schemes comical. These limitations, along with what we perceive to be real ethical boundaries, have created a wall preventing the law from going that far, artificially limiting the field of legal actors to extant parents and their children and preventing us from peering into the genesis of families. But, at the same time, this wall has created a glaring and problematic disparity between lawyers’ and philosophers’ take on the subject. The former ignore procreation, while ethicists like Onora O’Neill, perhaps unfettered by practical concerns, have stormed ahead and delved into the rights and wrongs inherent in the act of creating others.

And yet, as the crisis in child welfare grows and more and more children fall into the abyss, a few intrepid courts have ventured to the source of the matter, limiting the procreative right of criminally

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10 See infra Part III.A.

11 See, e.g., Onora O’Neill, Begetting, Bearing, and Rearing, in HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLECTIONS ON PARENTHOOD 25, 25 (Onora O’Neill & William Ruddick eds., 1979) (“[T]he right to beget or bear is not unrestricted, but contingent upon begetters and bearers having or making some feasible plan for their child to be adequately reared by themselves or by willing others. Persons who beget or bear without making any such plans cannot claim that they are exercising a right.”); see also Maura A. Ryan, The Argument for Unlimited Procreative Liberty: A Feminist Critique, HASTINGS CENTER REP., July–Aug. 1990, at 6 (“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.”); Daniel Statman, The Right to Parenthood: An Argument for a Narrow Interpretation, 10 ETHICAL PERSES. 224, 226 (2003) (questioning right of parents to have as many children as they want, irrespective of parental fitness).
unfit parents by issuing no-procreation probation orders,\textsuperscript{12} thus beginning an entirely new and growing debate in child welfare. Consider the 2007 decision of \textit{In re Bobbijean P.}, in which the New York Appellate Division overturned a lower family court order temporarily prohibiting neglectful parents from procreating on narrow statutory grounds.\textsuperscript{13}

Cases like \textit{State v. Oakley}, \textit{State v. Kline}, and \textit{In re Bobbijean P.}, and the no-probation orders at the core of their holdings, open a door in the wall separating law and ethics. Because cases like these deal with criminally unfit parents over whom courts have jurisdiction, the practical concerns that prevent lawyers from looking into procreative rights and duties (as in the comical scheme of parental licensing) are not present. Instead, the courts are faced with pressing and real equities.

These cases allow us a rare opportunity to try to find a consistent and coherent argument between ethics and law, as well as an opportunity to approach the source of our child welfare crisis. As will be discussed further in Part IV.A, the result is in fact a beautiful connection. Ethicists seem to have little trouble addressing the future interests of prospective children,\textsuperscript{14} but encounter difficulty in expressing a minimum standard of care to be used in protecting such interests. Lawyers have no trouble in developing a minimum standard of care for children (it is, in fact,

\begin{itemize}
\item \textsuperscript{12} See, e.g., \textit{State v. Kline}, 963 P.2d 697, 699 (Or. Ct. App. 1998) (upholding probation condition prohibiting defendant from fathering future children without judicial approval contingent upon completion of drug and anger management counseling); \textit{Oakley}, 629 N.W.2d at 208 (upholding probation condition prohibiting defendant from procreating until he could demonstrate adequate means of support, in part to protect his extant nine children “and any future children” that he procreates, thereby adding more child victims to the list” (emphasis added)).
\item \textsuperscript{13} See \textit{In re Bobbijean P.}, 842 N.Y.S.2d 826, 828 (App. Div. 2007) (“[T]he court should have granted respondent’s motion because it had no authority to impose the ‘no pregnancy’ condition.”); see also \textit{In re V.R.}, No. 5616-04, 2004 WL 3029874, at *7 (N.Y. Fam. Ct. Dec. 22, 2004) (“This court will order the respondent to \textit{conceive} no more children as part of the disposition plan in this case . . . . (1) in the interest of her four other children for whom her parental rights have not been lawfully terminated by the court, (2) in the interest of society which is currently taking on all of the respondent’s responsibilities for her children, and (3) in the interests of her potential children.”).
\item \textsuperscript{14} See \textit{supra} note 11 and accompanying text.
\end{itemize}
fitness), but seem unable to apply it prospectively. Each field respectively fills a void in the other.

Standing directly in opposition to this approach and to cases like Oakley are the many courts that refuse to limit the procreative rights of criminally unfit parents, parents who have abused or killed their children in the past, and parents these same courts simultaneously conclude are unfit to parent in the future and must therefore be subject to no-custody orders to protect any future children they might have. Paralyzed in awe of the procreative right in an almost Kafkaesque way, these courts foresee—but do not prevent—the irreparable injury of children being born into situations where the law forbids them to be. Instead, these courts order their removal into state custody at birth, exemplifying the common inability or refusal in law, as opposed to ethics, to recognize

Guggenheim and Bartholet seem to agree that the goal of any reform should be to get children out of the foster care system, despite their opposing views of how to accomplish this. See Guggenheim, supra note 2, at 1716 (“I agree with Bartholet’s contention that aggressive measures are needed to serve children at risk of entering foster care . . . .”). The state makes an extraordinarily bad parent that appears to border on the unfit. See Sharon Balmer, From Poverty to Abuse and Back Again: The Failure of the Legal and Social Services Communities to Protect Foster Children, 32 Fordham Urb. L.J. 935, 937–38 (2005) (describing failures of foster care system). Balmer cites estimates that 40% of foster children end up on welfare or in prison, that foster children are sixty-seven times more likely to be arrested than children who did not grow up in foster care, that children in foster care are physically abused at a much greater rate than children in the general population, that the rate of child maltreatment in foster care is more than 75% higher than in the general population, resulting in the future interests of future persons. Such courts limit the field of actors to the prospective parents before them; and yet, the ethical issues remain. These courts have in effect held that extant children have a right to a fit parent, but prospective children do not. And although parents have duties to extant children, we must wait for children to come into existence before we can assess whether these duties are actually being fulfilled—regardless of what we might anticipate about the likelihood that such duties will be fulfilled. These same courts have also effectively held that a prospective parent has a claim-right of noninterference to have a child, in the sense of procreating it, but not to have a child, in the sense of retaining custody of it. Moreover, these courts have constructed a procreative right devoid of contingent or opposing duties, and have implicitly valued it (despite its, at best, tenuous constitutional basis) over parental rights which are thoroughly established in binding constitutional precedent.

The result of these holdings is that, where the law would otherwise prevent harm and recognize future interests—as in a court enjoining the breach of a contract or ordering that persons who may be exposed to future harm be included in a tort settlement class—it refuses to do so when it comes to the care of children. The law allows a child to be born to unfit parents, with whom it also prohibits the child from being; and faced with this conundrum, the law ineptly applies a no-custody order, thereby compounding the harm.


Guggenheim and Bartholet seem to agree that the goal of any reform should be to get children out of the foster care system, despite their opposing views of how to accomplish this. See Guggenheim, supra note 2, at 1716 (“I agree with Bartholet’s contention that aggressive measures are needed to serve children at risk of entering foster care . . . .”). The state makes an extraordinarily bad parent that appears to border on the unfit. See Sharon Balmer, From Poverty to Abuse and Back Again: The Failure of the Legal and Social Services Communities to Protect Foster Children, 32 Fordham Urb. L.J. 935, 937–38 (2005) (describing failures of foster care system). Balmer cites estimates that 40% of foster children end up on welfare or in prison, that foster children are sixty-seven times more likely to be arrested than children who did not grow up in foster care, that children in foster care are physically abused at a much greater rate than children in the general population, that the rate of child maltreatment in foster care is more than 75% higher than in the general population, resulting in
Between these holdings and cases like Oakley, a new and growing debate is emerging in child welfare over limiting the procreative right of unfit parents. This goes past the point where family law, as opposed to other types of law, has tended to stop. This Article takes up this debate at its roots. Its primary aim is to avoid much of the confusion that has plagued this emerging controversy by simply reducing the authority and views of commentators down to one moral and legal principle, and then arguing for the codification of that principle.

Cases involving prospective parents so unfit as to be subject to no-custody orders regarding their future children open a small door in the wall that separates law and philosophy regarding the issue of ex ante regulation of procreation. This allows us to evade the common practical limitations, and, in certain cases, achieve the best moral result for all parties involved.

My thesis is that we can state an intermediate-level principle that there is a duty on prospective parents to be fit when they have children, which arises from or creates correlative claim-rights shared by the state and prospective children. A prospective parent has no liberty to have a child until he or she is fit. While practical limitations normally prevent the law from applying this principle, this is not the case with courts that have jurisdiction over persons whom the state has shown to be unfit to parent. In such cases, courts should be empowered by statute—rather than their current mish-mash of authority—to issue a temporary no-procreation order effective until that person becomes fit, rather than a no-custody order to protect any children such person might otherwise have. Such an arrangement would be constitutionally sound, protecting the various interests involved and avoiding irreparable harm.

Part II of this Article briefly discusses the current system’s focus on extant—rather than future—children, and then lays out the

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...in a mortality rate that is almost 350% higher among foster children, and that the rate of substantiated allegations of sexual abuse is four times higher for children in foster care than children in the general population. Id. at 937–38. She argues that the foster care system in this country amounts to what one court called a “‘lost generation of children whose tragic plight is being repeated every day.’” Id. at 939 (quoting LaShawn A. v. Dixon, 762 F. Supp. 958, 960 (D.C. Cir. 1991)).

alternative principle—a simple duty on prospective parents grounded in or creating correlative rights shared by society and prospective children: a duty of prospective parental fitness. Part III describes why this simple principle is obscured from view in the current debate by a sea of conflicting state laws and a lack of constitutional guidance, but is nonetheless lurking beneath the discourse and very much present in other areas of the law. Part IV tests the principle of prospective parental fitness, in something akin to a strict scrutiny analysis, by weighing the interests of the state, prospective children, and prospective parents, and determining how the principle effectuates and impinges upon these various interests.

In discussing the interests of prospective children, Part IV also attempts to bridge the gulf between law and ethics on this issue. The analysis moves past simple applications of Parfit’s non-identity problem and discusses a range of philosophical approaches by which the law could recognize the future interests of future persons in the context of child welfare. Part IV also takes on the common perception of the procreative right, which treats it as limitless in scope and inviolable. Part IV argues that this perception is a myth that urges prospective parents to create children they are legally unfit to care for. Finally, I argue in Part IV that the antithesis of the principle of a duty of prospective parental fitness—one that treats the state as a prospective parent—is unworkable and unconstitutional.

In Part V, I suggest how the principle of a duty of prospective parental fitness might be codified in light of the analysis in Part IV. Finally, in Part VI, I take up the issue of distributive injustice in the

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23 As will become clear, this Article does not take the position that each and every act of procreation is a fundamental right triggering strict scrutiny analysis.
25 Combining this broad procreative right with Elizabeth Bartholet’s adoption proposal may actually increase the number of babies in the stream as parents seek to replace those they have lost. See Bartholet, supra note 2, at 2000–01 (suggesting that adoption is important solution for large number of children suffering abuse and neglect).
26 See Part IV.c. This Article assumes for the narrow purposes of its argument that the Constitution requires natural parents to be the primary custodian of children they create and the state is prohibited from playing that role. Does a preference towards natural parents fade if we consider parenting less of a possessive act and more of a duty to advance the interests of the child?
United States today and argue that it militates in favor of making the suggested principle policy.

This Article is inspired by larger questions it may not fully answer, but I suggest the need for arriving at some principle for prospective parenting. Some commentators might suggest that the principle I describe could be applied discriminately. But this Article will not discuss this issue for the very simple reason that we must first establish the principle before we deal with how it might be misapplied. Most of us apply ethical criteria in deciding if and when to procreate, and consider the harm or good it will do to the future child, to others in the world, and to ourselves. Have we become so relativistic as to think that those criteria have no objective base? If we care about children, must we not necessarily care about their creation? If state intervention to repair a family or to break it up is to be avoided at all costs, does this not call for the application of some standards in the formation of the family? How can we articulate reasons for requiring parents, but not prospective parents, to be fit? As will be shown, these questions manifest themselves in courts’ increasing division over whether people whom the law prohibits from being parents can nonetheless have a constitutional right to constantly produce children for society to parent, thus overriding the interests of the prospective children and society.

Arguably, the child welfare system today, described in the metaphor above as a stream of babies, is itself a product of our failure to protect prospective children. If we had protected them, the state would not have had to intervene. To the extent current law prevents us from going upstream but makes us wait

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28 There are apparently others, however, who do not apply such criteria. See Emily Jackson, Conception and the Irrelevance of the Welfare Principle, 65 MOD. L. REV. 176, 182 (2002) (“Deciding to try to conceive a child through sexual intercourse is usually assumed to be a self-regarding decision that takes place within the privacy of a couple’s intimate relationship.”). Jackson is a staunch proponent of procreative rights and argues against considering future children’s welfare at all in the context of the United Kingdom’s Human Fertilisation and Embryology Act of 1990. Id. at 176–78.
This Article attempts, in part, to provide a legal basis to the ethical claims that James Woodward argued prospective children assert on their prospective parents, despite the nonidentity problem described in Part IV.A. See James Woodward, The Non-Identity Problem, 96 Ethics 804, 815–16 (1986) (arguing that in Parfit’s example of Alma, who was fourteen-year-old girl considering procreating, “duties and obligations constitute[] an important reason . . . for Alma not to have a child”); see also Dan W. Brock, Procreative Liberty, 74 Tex. L. Rev. 187, 204 (1995) (reviewing John A. Robertson, Children of Choice: Freedom and the New Reproductive Technologies (1994)) (“The uncertainty that Parfit and I share in nonidentity cases is not whether the conduct is morally wrong, but how to formulate the moral principles that correctly account for the wrong without having unacceptable implications in the full range of other cases to which they apply . . . .”).


Unlike tort or contract law, however, the law of child welfare in the United States is primarily, if not exclusively, focused on the interests of extant children. At a minimum, it requires that parents meet a certain standard—namely fitness—to maintain custody and parental rights over their children. Thus, as a legal matter, there
are objective statutory criteria defining which parents are fit to maintain custody of children, but these criteria are generally not applied prospectively. The parents must cause the harm that is the basis for a retrospective finding of unfitness.

However, when cases arise where the state may have reason to view prospective parents as unfit to parent their prospective children, the opportunity arises to step out of the extant interest paradigm. Seeking the best and perhaps most efficient ethical outcome, some courts have attempted to address the interests of prospective children—rather then waiting for the interests and the anticipated harms to become actual—by limiting the procreative rights of persons appearing before them. Most often, this involves courts issuing a temporary no-procreation order where parents have proven unfit in the past—usually through the abuse or neglect of another child—and are before the court again and likely to have more children in the future.

Commentators involved in the emerging debate over such court orders more often than not end up arguing past one another because the relevant cases are a muddle of different state family and criminal law regimes and precedent, which involve conflicting interpretations of the level of appellate and constitutional review to be applied. This will be demonstrated in Part III. I do not attempt to sort out this muddle. Rather, I suggest that in the relevant and analogous authority (cases and statutes) there is an appealing moral claim lurking beneath the surface—one that some courts and commentators accept, if only tacitly, and others reject. It is a principle which is consistent with current legal regimes that are widely accepted and analogous to child welfare law, and, most importantly, consistent with binding precedent interpreting the constitutional relationship between children, parents, and the state.

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34 See Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1828 (1995) (“While the state cannot prevent fertile couples from bearing a child, the law monitors parental fitness by way of abuse and neglect statutes . . . .”).
35 See infra notes 46–48, 53–54 and accompanying text.
37 See infra Part III.A.
Fitness may be understood as the minimum (that is, the necessary, but not sufficient) moral and legal competency required for parents to maintain custody of their child. See Troxel v. Granville, 530 U.S. 57, 68–69 (2000) ("Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to ... question the ability of that parent to make the best decisions concerning the rearing of that parent’s children."); Richard F. Storrow, The Bioethics of Prospective Parenthood: In Pursuit of the Proper Standard for Gatekeeping in Infertility Clinics, 28 CARDOZO L. REV. 2283, 2304 (2007) ("[I]n fitness screening the focus is on the prospective parents' competency to perform parental duties adequately."). "Fitness" is a term of art and implies a very high standard that must be shown for the state to intervene, as opposed to a showing that some other custody arrangement would be in "the best interests of the child." See id. at 2315–16 (distinguishing use of fitness standard in adoption context from its use in custody cases). The standard is most likely the legal standard required for a state to terminate parental rights. See Troxel, 530 U.S. at 69 (noting the presumption that fit parents act in best interests of child); Santosky, 455 U.S. at 760 n.10 (expressing doubt as to whether State may constitutionally terminate parental rights absent proof of unfitness); Stanley, 405 U.S. at 652 (1972) ("[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents."). In other words, as a constitutional matter, it seems beyond doubt that a state can deprive parents of custody of their children when those parents are shown to be unfit.

We can view a temporary no-procreation order as equivalent to a court temporarily depriving unfit prospective parents of the custody of their prospective children. If fitness is the minimum constitutional standard for deprivation of custody, then showing prospective parents to be unfit should be all that is constitutionally required for a temporary no-procreation order. "Prospective parent," as the term is used in the principle, would most often refer to a deliberate biological parent, though that need not be the case. See 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, 413–18 (1991) (arguing, in part, that under “intentional” view of parenting, claims of intended parents in surrogacy arrangement outweigh those of gestational host); see also Annette Ruth Appell, Virtual Mothers and the Meaning of Parenthood, 34 U. MICH. J.L. REFORM 683, 716–58 (2001) (summarizing revisionist versions of family models that challenge traditional biologically-based definitions, including fiduciary, psychological parent, adult choice, and feminist perspective models).

That is to say, when applied to a given set of facts, the principle leads to a result that would not be unconstitutional.

And as I propose in Part V, it is a principle that should be crystallized, aired-out, debated, and finally codified. Doing so would avoid the current confusion (described in Part III.A) that has little, if anything, to do with the fundamental issues at stake. Instead, it would allow democratic debate on those issues as well as a clear and concise legal remedy reflecting the compromise of that debate. I state the principle in this way:

There is a duty on a prospective parent to be fit\(^{38}\) when he or she has a child, one arising from or creating correlative claim-rights shared by the state and
prospective children, and the prospective parent has no liberty to have a child until he or she is fit.

There are several moral bases for such a duty, including the obvious utilitarian ones. But one sounding more in the realm of justice is the fact that prospective parents have a unique and virtual omnipotence, in the Hohfeldian sense, over their prospective children and other persons in society with whom those children will interact. By procreating, parents decide a child’s legal, social, and political circumstances. They also alter the rights and duties of those other persons—both extant and future—with whom their children will inevitably establish legal relations. Procreation, in a unique way, creates the lives of some and changes the lives of others. It is an act with massive consequences, and to which the affected parties do not, at least expressly, consent.

Any power the state holds over its citizens pales in comparison to the power prospective parents hold over their children. Moreover, the parent is not elected, restrained through a series of checks and balances, or obligated to be transparent in its dealings and rationales. And despite these differences—making the state a comparatively subdued entity—we still expect to hold claim-rights against it. Can the same not be applied to prospective parents?

In other words, should the power of prospective parents be tempered with some duty? The antithesis of this principle is that there is no duty—or at least not one of fitness—on prospective parents. As will be argued in Part IV.c, this leads to conclusions that are unappealing: for even if parents have duties to prospective children, we must wait for each child to become actual to assess whether the duty is being fulfilled—because extant children have a right to a fit parent, but prospective children do not—regardless of

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39 See, e.g., Amartya Sen, Fertility and Coercion, 63 U. CHI. L. REV. 1035, 1045 (1996) (“[Condorcet] anticipated a time when people ‘will know that, if they have a duty towards those who are not yet born, that duty is not to give them existence but to give them happiness.’ ” (quoting Marquis de Condorcet, Esquisse d’un Tableau Historique des Progrès de l’Esprit Humain 189 (June Barraclough trans., Weidenfeld & Nicolson 1955) (1795))).

40 For a general discussion of Hohfeld’s theories of legal analysis, see generally Wesley Newcomb Hohfeld, Fundamental Legal Conceptions Applied to Judicial Reasoning, 23 YALE L.J. 16 (1913).

41 Or, to put it more accurately, some disability.
what we can anticipate about the likelihood of the parent actually fulfilling that duty and regardless of the number of times the parent has not fulfilled it in the past. We can also state the antithesis of the principle of a duty of prospective parental fitness in this way: a prospective parent has a claim-right of noninterference to have a child in the sense of procreating it, but not to have a child in the sense of having custody of it.

Ethical issues aside, as will be discussed in Part IV.c, this is inconsistent with binding precedent interpreting the constitutional relationship between children, parents, and the state. When applied to a given set of facts, it leads to a result that would be unconstitutional. Throughout the following discussion we shall see that resistance by courts and commentators to the principle of a duty of prospective parental fitness lies in two fallacies: an inability to recognize the future interests of future persons and a persistent misinterpretation and aggrandizement of the procreative right that actively encourages irresponsible procreation and parenting.

III. THE PRINCIPLE IN EXISTING LAW

The following discussion begins by explaining the muddle of existing law and commentary on limiting the procreative rights of unfit parents as a mish-mash of state family and criminal law statutes and precedent, as well as conflicting interpretations of the level of appellate and constitutional review to be applied. The Article then seeks to distill a duty of fitness on prospective parents from that muddle, as well as from analogous authority. 42

A. ESCAPING THE PROCEDURAL AND SUBSTANTIVE MIRE OF THE CURRENT DEBATE

As noted above, 43 the typical procedural postures of the cases at the heart of the debate involve defendants who have proven

42 Marsha Garrison has effectively employed what she calls the “interpretive approach,” which essentially applies existing family law principles to assisted reproductive technology cases. Marsha Garrison, Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage, 113 Harv. L. Rev. 835, 872–73 (2000). The methodology taken in this Article is a similar approach.

43 See supra notes 12–13 and accompanying text.


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

See *id.* at 201 (“We conclude that in light of Oakley's ongoing victimization of his nine children and extraordinarily troubling record manifesting his disregard for the law, this [probation] condition . . . is not overly broad and is reasonably related to Oakley's rehabilitation.”)

See McCanna, *supra* note 45, at 872–73 (detailing several different approaches taken...
Thus, the issue of a duty of prospective parental fitness, which is at the heart of these cases, becomes obscured and goes unaddressed.

For example, in contrast to Oakley, a subsequent opinion from the Supreme Court of Ohio, State v. Talty, struck down an almost identical condition, but on narrow nonconstitutional statutory grounds. The court found that precedent required that any condition imposed not be overbroad. The probationary condition at issue failed because it did not provide a way for the court to later modify the order once Talty was able to show means of supporting his children. The dissent, in a sharply worded opinion, would have upheld the condition as reasonably related to Talty's rehabilitation. Other cases seem to focus on the requirement for a strict rehabilitative nexus in probation conditions, as in the case of People v. Pointer, where the court found that the "challenged condition was apparently not intended to serve any rehabilitative purpose but rather to protect the public by preventing injury to an unborn child." Still, other courts have found such conditions overbroad because the prospective parent could be subject to an order prospectively prohibiting custody of their future children rather than subject to an order prohibiting procreation.
Even where specific state grounds do not exist to distinguish such cases, commentators have suggested that broader constitutional doctrines might still be used to challenge the no-procreation conditions. For example, some have suggested that either the doctrine of unconstitutional conditions—which, in the context of duress, deals with conditioning a benefit on a waiver of rights—or precedent challenging probation conditions once upheld under the increasingly outmoded “act of grace” doctrine, might bring into serious question any no-procreation condition.\footnote{See, e.g., Kelly R. Skaff, Note, Pay Up or Zip Up: Giving Up the Right to Procreate as a Condition of Probation, 23 ST. LOUIS U. PUB. L. REV. 399, 399, 412 (2004) (arguing that Oakley condition is “both constitutional and a valuable alternative to prison,” but noting that conditions premised on “act of grace” theory could be subject to constitutional challenge); see also Lars Noah, Too High a Price for Some Drugs: The FDA Burdens Reproductive Choice, 44 SAN DIEGO L. REV. 231, 252–53 (2007) (noting that doctrine of unconstitutional conditions could be applied to find that orders conditioning benefits on forgoing certain rights are unconstitutional).}

Moreover, the recent case of In re Bobbijean P., which overturned a no-procreation condition on the ground that there was no statutory authority to impose the condition as part of a parental supervision order,\footnote{842 N.Y.S.2d 826, 828 (App. Div. 2007).} arose in family court—outside of the context of criminal probation. Any lack of uniformity we find in the criminal probation context would be exacerbated as family courts begin to impose such orders using their current statutory authority. In all, the vast body of conflicting state laws and doctrines that surround the current debate confuse the underlying principle at the heart of a no-procreation order.

Where courts and commentators have reached the federal constitutional issues involved in such conditions, there is equal disparity. This arises from a lack of Supreme Court guidance for substantive due process review of probation conditions\footnote{See Miles, supra note 17, at 1559 (noting that Supreme Court has not addressed issue of substantive due process review for probation conditions, and noting that lower courts apply varying standards); see also McCright, supra note 54, at 179 (arguing that Oakley court should have applied special scrutiny analysis to balance fundamental procreative right at issue).} and disagreement over how no-procreation conditions in particular, which many consider as involving a special right, would fare on review generally.\footnote{See Steven M. Berezney, Zablocki Reborn: The Constitutionality of Probation Conditions Prohibiting Deadbeat and Abusive Fathers from Conceiving Children, 5 J.L.} In this debate, most commentators never
mention the interests of prospective children, and appear to see procreation as a right with no specific opposing duty.\(^{60}\)

The almost limitless number of legal bases from which to launch an argument, coupled with the uncertainty and non-uniformity surrounding probation conditions generally, leads commentators to diametrically opposing opinions regarding whether, as a general matter, such conditions are lawful.\(^{61}\) Indeed, there is no way to speak generally about the legality of these conditions—each case truly depends on the shifting and uncertain case law of each state. A condition’s legality also depends on the way courts choose to characterize the procreative right and the resulting level of constitutional review which, as will be discussed in Part III.I.A, is an unsettled and largely misunderstood area of law.

However, in much of the relevant authority, as well as in analogous legal regimes, the issue of whether prospective parents are under some moral duty to their prospective children and to society is lurking. Rather than continuing to argue past other commentators on this issue by choosing any one of a number of the statutory or constitutional bases for argument discussed above,\(^{62}\) one option would be to extract the principle and—to the extent there is consensus on it—determine how it might be codified and applied. Assuming the codified principle of a duty of prospective parental fitness were constitutional and reflective of consensus on the

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Footnotes:

\(^{60}\) See, e.g., McCright, supra note 54, at 179 (ignoring interests of prospective children when arguing that fundamental right of “deadbeat” dad to procreate should not be deprived).

\(^{61}\) See supra notes 59–60 and accompanying text.

\(^{62}\) See supra notes 44–60 and accompanying text.
fundamental issues, it represents an opportunity to exit the debate and begin to protect the relevant interests.

B. THE ELEMENTS OF THE PRINCIPLE EMERGE

A duty on a prospective parent to be fit when he or she has a child, especially one arising from or creating correlative claim-rights shared by the state and prospective children, already underlies existing law. Courts like Oakley and Kline have explicitly articulated such a duty, and they will be discussed later; but shadows of it also appear in many other contexts.

First, the overarching goal of child welfare law may be characterized as protecting at least the future interests of extant children.\(^{63}\) Custody determinations are based in part on a long-term assessment of where the child’s interests, present and future, will best be served.\(^{64}\) Presumably, a court removing a child from her parents’ custody and placing her in foster care would not make the same decision as it might if it knew that the same foster home would be drastically different the following week. The law does not take a static view of the child’s life; it anticipates the child’s future.

Furthermore, the entire dependency regime, which deals with the temporary removal of children from parental custody, is designed to allow removal of children before they are actually harmed.\(^{65}\) If there are indications of future harm, the parents can be deprived of their child immediately to avoid harm to the child. The law does not require that the state wait for the harm to occur.\(^{66}\) Conceivably, if

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\(^{63}\) See, e.g., 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.”).

\(^{64}\) See, e.g., Rokowski v. Gilbert, 620 S.E.2d 509, 515 (Ga. Ct. App. 2005) (terminating father’s parental rights because evidence showed it was in best interest of child).

\(^{65}\) See Santosky v. Kramer, 455 U.S. 745, 751 (1982) (“On the day John was taken, Annie Santosky gave birth to a third child, Jed. When Jed was only three days old, respondent transferred him to a foster home on the ground that immediate removal was necessary to avoid imminent danger to his life or health.”).

\(^{66}\) See, e.g., Cal. Welf. & Inst. Code § 300(a) (West 2006) (granting juvenile court jurisdiction where “child has suffered, or there is substantial risk that the child will suffer” harm). Furthermore, a court can use previous harm to a child or its siblings, or other acts by the parent or guardian—including the fact that the parent or guardian caused the death of another child through abuse or neglect—as evidence of likely future harm. Id.; see also Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106g(2) (2000) (defining “child abuse
a court had some indication that a parent were intent on harming the child on a specific date in the future, it could remove the child. The child’s future interests provide a basis for immediate state action.

Thus, the law protects future interests. Remember that, as discussed above, extant parents are also under a present duty to be fit parents, and the breach of that duty can lead to termination of parental rights. However, the law also places a similar, if not identical, duty on prospective parents—in the context of the provision of foster care or adoption. In order to raise a child, these prospective parents are subject to rigorous standards, which

and neglect” as “at a minimum, any recent act or failure to act on the part of a failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which presents an imminent risk of serious harm”); N.Y. FAM. CT. ACT. § 1012(f)(i) (Consol. 2008, LEXIS through Ch. 497 Aug. 20, 2008) (defining “neglected child” in part as child in “imminent danger of becoming impaired”); id. § 1022(a)(2)(B) (“The family court may enter an order directing the temporary removal of a child . . . [when] his or her immediate removal is necessary to avoid imminent danger to the child’s life or health.”); id. § 1031(d) (regarding proceeding for preventing “the return of the child to the care and custody of his parent or other person legally responsible for his care [when it] would place the child in imminent danger of becoming an abused or neglected child”).

See supra note 33 and accompanying text.

See Santosky, 455 U.S. at 745 (“Under New York law, the State may terminate . . . the rights of parents . . . upon a finding that the child is ‘permanently neglected.’ ”); Appell, supra note 38, at 685 (“The current model holds that mothers earn parental status by gestating and birthing while fathers earn parental status by caring for the born child or marrying the mother. Persons who earn this status retain it, until they voluntarily relinquish the status or prove to be unfit.”).

See, e.g., Carter J. Dillard, Rethinking the Procreative Right, 10 YALE HUM. RTS. & DEV. L.J. 1, 51–52 (2007) (noting that adoption is “heavily regulated”). It has also been noted: All states require some form of home study to determine the prospective adoptive parents’ fitness as parents and whether they are the best parents to raise the individual child they want to adopt. The qualities adoption agency workers look for in potential adoptive parents are maturity, sensitivity to human needs, and tolerance towards the unmarried birth parents of their adoptive children. The ways in which the parents deal with crises, the stability of their marriage, and their relationships with friends and family are also important. Agencies consider the prospective adoptive parents’ finances to be an important consideration, but find that ability to manage money is more significant than income level. One of the most important considerations is the prospective parents’ motivation to adopt.

represent a duty, of at least fitness, arising from correlative claim-rights shared by the state and children. “No parental rights attach until the fitness and best-interests standards are satisfied and until the child has resided with the prospective parent for a period of time.”70 Put simply, these prospective parents are under a state-imposed duty to be fit when they have the child.

If the state needs to impose strict ex ante standards on adoptive and foster families, what is it about biological families that distinguishes them enough to eliminate that need? If it is simply a matter of practicality, as in the comical parental licensing scheme, that would not be enough. These practical concerns are not present in the scenario at issue, where a court has jurisdiction and is prepared to find a parent unfit to parent in the future.

Foster and adoptive parents aside, this duty has even been applied to natural prospective parents. An infant can be subject to dependency and removal based on the prenatal conduct of the prospective parents, i.e., based on the breach of some legal duty owed to the unborn child.71 Courts have upheld rebuttable presumptions that a parent is unfit if their newborn infant tests positive for any amount of a controlled substance, finding that “the State, as parens patriae, has a compelling interest in protecting children from abuse, both after and before the abuse occurs.”72 As in other contexts, the state need not “wait for the abuse to occur.”73

This is in part “because the court’s statutory authority to prohibit custody derives from its responsibility to prevent repeated criminal acts” rather than wait for such abuse.74 If the principle of a prospective parent’s duty or prospective child’s claim-right had no

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70 Storrow, supra note 38, at 2303.
71 See, e.g., In re Troy D., 263 Cal. Rptr. 869, 874 (Ct. App. 1989) (upholding dependency action removing infant because of mother’s prenatal use of dangerous drugs).
72 In re O.R., 767 N.E.2d 872, 876 (Ill. App. Ct. 2002); see also Fla. STAT. ANN. § 39.401 (West, Westlaw through 2008 2d Reg. Sess., 20th Leg.) (providing for removal of child suffering from or in imminent danger of illness or injury resulting from abuse); Va. CODE ANN. § 63.2-1517 (2007) (providing for removal of child from custody of parents where person responsible for child’s care presents imminent danger to child’s health).
73 In re J.B., 765 N.E.2d 1093, 1106 (Ill. App. Ct. 2002) (upholding lower court’s decision considering “parent’s abuse of one child when determining whether the parent is also fit to parent his or her other current or future children”), vacated, 789 N.E.2d 1259 (Ill. 2003).
74 Arthur, supra note 2, at 81–82.
basis in the law, one might expect the state not to go as far as it does in protecting such interests. But that is not the case.

One uncontroversial area of the law that is premised in part upon preventing harm to future children is the regulation of pharmaceuticals and medical devices. The premise is relatively simple: the state can and should intervene to prevent prospective parents from harming their prospective children by misuse of such drugs or devices. As one commentator put it, “the FDA has jurisdiction to regulate for the benefit of future persons when the intervention is one made to protect an intended or unintended recipient.”

Another uncontroversial body of law premised on the protection of future generations is the common prohibition of incest—which is tantamount to a categorical no-procreation order on a specific class and array of would-be parents. Here, the law anticipates harm and limits the rights of would-be parents to avoid it. Notice how the interests of society and of the prospective children are treated in common. Both society as a whole and its future members as individuals share this almost inseparable interest, which has been recognized in many other contexts (as described in Part IV.A).

Also, with regard to creating and enforcing surrogacy contracts, legislators and courts have often required a showing of prospective

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15 See Noah, supra note 56, at 233–35 (discussing measures adopted by Federal Drug Administration to protect future persons, including requiring patients to undergo pregnancy testing and practice contraceptive use as condition for using drugs known to cause birth defects); see also Gail H. Javitt & Kathy Hudson, Regulating (for the Benefit of) Future Persons: A Different Perspective on the FDA’s Jurisdiction to Regulate Human Reproductive Cloning, 2003 Utah L. Rev. 1201, 1227 (arguing that FDA regulation of reproductive cloning is consistent with agency’s statutory authority to protect future persons, which FDA commonly exercises in areas such as product labeling, use of in vitro fertilization devices, ooplasm transfer, etc.).

16 Javitt & Hudson, supra note 75, at 1228. In contrast, another commentator views the prevention of harm to future children as a claim-right to noninterference that parents hold against the state and others—a right she characterizes as a fundamental right of parents to protect the bodily integrity of their children. See Megan Anne Jellinek, Note, Disease Prevention and the Genetic Revolution: Defining a Parental Right to Protect the Bodily Integrity of Future Children, 27 Hastings Const. L.Q. 369, 374 (2000) (“[T]he parental right to secure children against bodily indignity allows parents to choose non-life, over disabled life, for their future children.”).

17 See Arthur, supra note 2, at 47 (arguing that protection of prospective children finds support in existing laws criminalizing incest).

18 See id. (“[T]he primary purpose of laws against incest is to prevent the unfortunate genetic consequences that can occur when people who are closely related mate.”).
parental fitness. Consider, for example, the case of In re Baby M, in which the Supreme Court of New Jersey found that the “right to procreate by methods of [the intending parents’] own choosing cannot be enforced without consideration of the state’s interest in protecting the resulting child.” Nor is the consideration of the future children’s interests limited to family law. One commentator recently noted that areas of the law such as trusts routinely assess (and limit) individuals’ actions based on how those actions will impact the unconceived, and in some cases even provide for a guardian ad litem to represent the interests of the unborn. In all, the law seems adept at protecting the interests of future persons in many different contexts.

Concern for the welfare of prospective children may also play a very large role in courts’ general refusal to allow prisoners to procreate, despite the fact that prisoners retain many other fundamental rights. This could simply reflect the notion that, at a minimum, prospective parents should be in a position to interact with and support their future children. In contrast, prisoners have been guaranteed constitutional rights to an abortion.

One emerging area of the law where ensuring the fitness of prospective parents is common and seems likely to continue into the future is in the context of assisted reproductive technology (ART). Clinics routinely employ “gatekeeping” standards to deny

80 537 A.2d 1227, 1254 n.13 (N.J. 1988).
81 See Storrow, supra note 38, at 2309 (“In a little-discussed area of the law in which the best interests of the unconceived are of paramount concern, trust law doctrine prohibits the living beneficiaries of a trust to invade the trust’s corpus after the settlor has died unless it would be in the best interests of the unborn or unascertained beneficiaries of the trust.”).
82 Id. at 2311.
83 See, e.g., Martin v. Snyder, 329 F.3d 919, 921 (7th Cir. 2003) (“[N]or does marriage create a right of procreation from within prison walls . . . .”).
86 See Storrow, supra note 38, at 2288–89, 2314–15 (noting that fertility clinics routinely screen and deny prospective parents based on range of criteria focused on interests of prospective children and arguing that applicable standard should be fitness rather than best interests).
prospective parents access to such technology,\textsuperscript{87} some scholars and professional associations take as a given that prospective children deserve a minimum of parenting skills from their prospective parents.\textsuperscript{88} And while legislation has only recently been proposed in the United States, the field is often state-regulated elsewhere.\textsuperscript{89} “Prominent in both legislative and clinical gatekeeping is the message that child welfare is the most important guiding principle.”\textsuperscript{90} Restricting access to ART based on an assessment of factors such as the prospective parents’ commitment to the child’s welfare and their ability to provide a stable and supportive environment is codified in the United Kingdom,\textsuperscript{91} and even informs general domestic human rights legislation.\textsuperscript{92} Professor Richard Storrow has recently argued that “the mere existence of the gatekeeping function in infertility clinics is probably insufficient to raise a viable procreative-liberty issue under existing constitutional

\textsuperscript{87} Id. at 2288.
\textsuperscript{88} See Judith F. Daar, Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms, 23 BERKELEY J. GENDER L. & JUST. 18, 67 (2008) (“Inescapably, ART involves the welfare of more than one person — the parent and the child. Treatment decisions can and should take into account known or reasonably suspected characteristics that would render the parent(s) unable to deliver a decent minimum of child-rearing. The American Society for Reproductive Medicine has pondered this question of when, if ever, ART providers should decline to treat patients they believe pose a substantial risk of harm to offspring. In balancing the reproductive rights of infertile individuals against the duty to respect the well-being of offspring, the ASRM Ethics Committee propounded that ‘fertility programs should be attentive to serious child-rearing deficiencies in their patients, and if they have a substantial, non-arbitrary basis for thinking that parents will provide inadequate child-rearing, they should be free to refuse to provide treatment services to such patients.’ According to the ASRM, examples of ‘substantial, non-arbitrary basis’ for concern about parental adequacy include uncontrolled psychiatric illness, a history of child or spousal abuse, or drug abuse.”). Daar would apply a narrower test. \textit{Id.}
\textsuperscript{89} See Janet L. Dolgin, Method, Mediations, and the Moral Dimensions of Preimplantation Genetic Diagnosis, 35 CUMB. L. REV. 519, 521 n.8 (2005) (noting ART regulation in Britain, Australia, Canada and Japan).
\textsuperscript{90} Storrow, supra note 38, at 2299.
\textsuperscript{91} See Human Fertilisation and Embryology Act, 1990, c. 37, § 13(5) (Eng.) (“A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment . . . .”); \textit{see also} Jackson, supra note 28, at 195 (“Revealingly, not one speaker in either the Commons or the Lords challenged the incorporation of a direction to take account of the welfare of a child who does not yet exist.”).
jurisprudence.” However, he limits his constitutional assessment to the context of the ART scenario, suggesting that interfering with natural procreation would implicate privacy and autonomy concerns that do not apply in ART cases due to the involvement of third-party medical personnel. As I will argue further in Part IV.A, any interest such personnel may have is dwarfed by the third-party interests of the prospective child and others in society who may have to care for or be harmed by the child.

The premise of protecting future children also manifests itself, though less obviously, in the area of statutory rape law. Plainly, protecting more immediate victims is the primary purpose of such laws. But as one commentator notes regarding the Supreme Court’s decision in *Michael M. v. Superior Court*, “the state’s interest in preventing out-of-wedlock teen pregnancy was now considered an important purpose of statutory rape law. The Court specifically found the state had an interest in reducing the negative ‘social, medical, and economic consequences for both the mother and her child’ . . . .” The Court also referred to the likelihood of the future children of teens as “candidates to become wards of the State,” and implied that the state has a compelling interest in preventing this. This particular state interest in preventing minors from becoming presumably unfit parents—thereby protecting their prospective children and society as a whole—is certainly consistent with the

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93 Storrow, supra note 38, at 2299.
94 See id. at 2294, 2318 (noting constitutional concerns involving fitness assessments for natural procreation and distinguishing assisted reproduction to justify greater regulation of that practice).
97 Michael M., 450 U.S. at 471.
98 See id. at 470–71 (noting social and economic consequences of increasing teenage pregnancy rate). The Court also expressed its concern over the rate of teenage pregnancies that end in abortion. Id. at 471 & n.6. Is the state’s interest in preventing unfit parentage even greater than its interest in preventing abortion? Minors have a right to abortion that is arguably inconsistent with their otherwise limited constitutional status. See Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976) (“It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient’s pregnancy will serve to strengthen the family unit.”).
almost universal prohibition on minors marrying without parental consent and with minimum ages of sexual consent.99

One might argue that laws intended to protect prospective children from their prospective teen parents have little application to adults. In my view, this is a myopic reading of such law. Of course, the designation of minors as minors is arbitrary—we do not mature in the way the law says we do on our eighteenth birthdays. The “consequences” the Court refers to in Michael M.100 stem from the rather obvious likelihood that teens (who are themselves children and presumably under the care of another) will not make fit parents, and the premise that prospective children deserve (have a claim to) fit parents. In other words, we expect parents to have some degree of commitment and skill which children presumably lack.

Where the prospective parent is an adult, but has shown a lack of the necessary commitment or skill, courts have sought to achieve the same result that state legislatures and the Supreme Court achieved in Michael M.101 by enforcing the principle of prospective parental duty and ordering the would-be parents not to procreate until fit. In State v. Kline, the Oregon Court of Appeals upheld a probation condition, which prohibited the defendant from fathering further children until he completed drug and anger management counseling, finding that “[t]he condition provides potential victims with protection from future injury.”102 The defendant, who abused methamphetamines, had his parental rights terminated after breaking his son’s arm; he was later arrested after abusing his infant daughter and fracturing her leg.103 The defendant unsuccessfully claimed that the probation condition was a violation

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99 See Roper v. Simmons, 543 U.S. 551, 569 (2005) (“In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.”); Kate Sutherland, From Jailbird to Jailbait: Age of Consent Laws and the Construction of Teenage Sexualities, 9 WM. & MARY J. WOMEN & L. 313, 314 (2003) (“The age of consent for sexual intercourse ranges from 12 to 18 under various state laws, the most common age of consent being 16.”).

100 See supra note 96 and accompanying text.

101 See Michael M., 450 U.S. at 465 (noting that one purpose of California’s statutory rape statute is to “prevent illegitimate teen pregnancy by providing an additional deterrent for men”).


103 Id. at 698–99.
of his fundamental right to procreate. \(^\text{104}\) \(\text{State v. Oakley}\) involved a similar condition that was upheld by the Wisconsin Supreme Court, obligating the defendant—a father of nine children who refused to pay full child support—to demonstrate adequate means of support before having any more offspring. \(^\text{105}\) As one justice opined: “\[T\]he harm to others who cannot protect themselves is so overwhelmingly apparent and egregious here that there is no room for question. . . . \[A\]ny child he fathers in the future is doomed to a future of neglect, abuse, or worse. That as yet unborn child is a victim from the day it is born.”\(^\text{106}\) Even in cases where courts have refused to issue such conditions, courts have often recognized that doing so would “protect the public by preventing injury to an unborn child.”\(^\text{107}\)

\(\text{In re Bobbijean P.}\) dealt with insolvent parents who had four babies, three of whom tested positive for cocaine; all were in foster care, including baby Bobbijean. \(^\text{108}\) The case was recently overturned on appeal based on issues of jurisdiction and statutory construction. \(^\text{109}\) The lower court had held that:

She should not have yet another child which must be cared for at public expense before she has proven herself able to care for other children. The same is true for the father and his children. As to both parents, providing care for the children includes providing financial

\(^{104}\) \text{Id. at 699.}

\(^{105}\) \text{See 629 N.W.2d 200, 201 (Wis. 2001) (upholding condition as not overly broad in light of Oakley’s conviction for intentionally refusing to pay child support and finding condition “reasonably related to Oakley’s rehabilitation”); see also Kryszak, supra note 60, at 329 (“The probation condition will prevent any future children from being subjected to Oakley’s neglect.”).}

\(^{106}\) \text{Oakley, 629 N.W.2d at 215 (Bablitch, J., concurring).}

\(^{107}\) \text{People v. Pointer, 199 Cal. Rptr. 357, 365 (Ct. App. 1984). “Wrongful life” cases have often refused to compensate plaintiffs for the harm they claim to have suffered from being born. See Noah, supra note 56, at 256 n.98 (noting that majority of states have rejected wrongful life claims). \text{But see Philip G. Peters, Jr., Rethinking Wrongful Life: Bridging the Boundary Between Tort and Family Law, 67 Tul. L. Rev. 397, 398–99 (1992) (arguing for application of family law principles of child support in wrongful life cases, rather than traditional tort principles). Of course, while the compensatory nature of tort law may be ill-equipped to handle such claims, a more preventative and injunctive regime would not have to deal with issues of compensation at all.}}


\(^{109}\) \text{See In re Bobbijean P., 842 N.Y.S.2d at 828 (finding that Family Court lacked statutory authority to impose “no pregnancy” condition).}
support. This is a practical, social, economic and moral reality. In effect, Bobbijean was born to a “no-parent family.” She is for all practical purposes motherless and fatherless. This is not acceptable.

All babies deserve more than to be born to parents who have proven they cannot possibly raise or parent a child. This neglected existence is an immense burden to place on a child and on society. The cycle of neglect often created by such births needs to stop.110

The court’s recitation of the principle that prospective parents are under a duty to their prospective children seems intuitive, and perhaps bound up with the fundamental legal tenet that a parent’s right to have custody of a child is at least contingent on fitness. Squaring that tenet with the right of a prospective parent to nonetheless have children—to procreate into unfitness—is not easily done. What does it mean to have children, in the sense of creating them, with no attendant right to custody? The possessive language surrounding procreation (i.e., have) may reflect an intuitive assumption that procreation is conditioned on custody and care.

Finally, in addition to and perhaps more relevant than all of the existing law discussed above,111 we find support for the principle of a duty of prospective parental fitness in Roe v. Wade.112 In Roe, the majority cited favorably to its decision in Buck v. Bell,113 which upheld as constitutional the sterilization of Carrie Buck.114 Admittedly, the underlying facts of Buck raise serious ethical issues that were not addressed by the Court. However, to the extent Buck is read narrowly and divorced from its facts, as the Court in Roe may have meant it to be, it could be interpreted to stand for the

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110 In re Bobbijean P., 2004 WL 834480, at *4; see also Lee, supra note 16, at 317 (arguing that “responsible parenthood” involves balancing rights of children with those of society at large).
111 See supra notes 69–110 and accompanying text.
112 410 U.S. 113 (1973).
113 See id. at 154 (citing Buck v. Bell, 274 U.S. 200, 207 (1927) in rejecting “an unlimited right to do with one’s body as one pleases”); see also Roe, 410 U.S. at 153 (“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.”).
114 See Buck, 274 U.S. at 207 (upholding sterilization of Carrie Buck based on her own interests, as well as those of her prospective children and society).
notion—which seems just—that procreation is an act with substantial consequence for others, for which procreators might bear some responsibility. And this proposition is the core principle of a duty of prospective parental fitness.

Thus, existing law, in contexts ranging from prohibitions on incest to the regulation of pharmaceuticals and surrogacy contracts, provides a basis from which to distill the elements of the principle: the law does not have to wait for children to be harmed but can anticipate their future interests; it places duties on prospective parents, and these duties arise from or create correlative claims for society and prospective children. But the real value of the principle lies not in the support it finds in existing law, but rather in how it fairly balances the various and competing interests involved.

IV. Testing the Principle

Perhaps the best way to evaluate the principle of a duty of prospective parental fitness would be to see how it impinges on or effectuates all relevant interests—those of the state, the prospective child, and the prospective parent. The following Part will first discuss the relevant interests, viewing each in a way courts and commentators in this area have not. It will stress the future interests of future persons and it will avoid the common misinterpretation and aggrandizement of the procreative right. It will then apply the principle and its antithesis so that we can see how each impinges on or effectuates each interest. Though the following section is not meant to be a strict scrutiny analysis per se, the discussion demonstrates that the principle, if codified, would be narrowly tailored to effectuate compelling state interests.

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115 See Storrow, supra note 38, at 2297 ("[T]he scope of procreative liberty in any individual case depends upon the class of the potential parents involved and the potential for harm that their procreation poses to society.").

116 As discussed in Part III.B, this Article does not take the position that each and every act of procreation is protected as a fundamental right requiring such a rigorous level of review.
A. THE INTERESTS OF THE STATE AND PROSPECTIVE CHILDREN IN FIT PARENTS

“A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection.”117 This interest, as articulated by the Supreme Court, is nothing short of a state’s interest in its own future—the creation and care of its constituent elements defining whether and how it will continue to exist.

The state can protect this interest under various facets of its authority: its police as well as its parens patriae powers,118 its “fiscal and administrative interest” in reducing costs to the state,119 and, of course, its plenary authority to legislate. It is thus a given in our law today that the state has a compelling interest in extant parents meeting some parenting standard—imposing a duty on them—that can override even the most fundamental constitutionally-protected parental and familial rights.120 This state interest is grounded in the overriding role parenting plays in the development of future citizens,121 and that standard, as noted above, is most likely fitness. In his dissent in Santosky, then-Justice Rehnquist discussed the correlation between fit parents and the development of their children as productive members of society:

118 See SAMUEL M. DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM 17 (3d ed. 2004) (noting two sources from which state derives its power to override parental authority).
120 See id. at 747–48 (“Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.”); see also Reno v. Flores, 507 U.S. 292, 304 (1993) (“Even if it were shown, for example, that a particular couple desirous of adopting a child would best provide for the child’s welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child adequately.”).
121 See Ruby Andrew, Child Sexual Abuse and the State: Applying Critical Outsider Methodologies to Legislative Policymaking, 39 U.C. DAVIS L. REV. 1851, 1868–69 (2006) (citing “exhaustive evidence” from Department of Justice that “adults who suffered abuse as children” are more likely to both commit and become victims of crime); Kryszak, supra note 60, at 342 (discussing at length relationship between child neglect and depression, and suggesting no-procreation orders as a remedy); see also Arthur, supra note 2, at 49 (“There is . . . an impressive body of literature supporting thesis that children who suffer from abuse and neglect may later engage in violent criminal conduct.”).
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.\textsuperscript{122}

The interest in parental fitness is so compelling that it may even override the paramount religious and core self-determination interests of parents.\textsuperscript{123} Even prisoners with few means of earning money have been held to their child support obligations.\textsuperscript{124} The state can step in to ensure that parents fulfill their obligations—to the point of holding them criminally liable for failure to do so\textsuperscript{125}—and the state can assume custody of children, dissolve the familial realm, and terminate parental rights if necessary.\textsuperscript{126} This exemplifies the overriding nature of this interest.

Moreover, the state’s interest is not limited to extant children; it also includes, as the Supreme Court reaffirmed recently in \textit{Gonzalez v. Carhart}, an interest in potential (or future) life.\textsuperscript{127} The state can

\begin{itemize}
\item \textsuperscript{122} \textit{Santosky}, 455 U.S. at 789 (Rehnquist, J., dissenting).
\item \textsuperscript{123} See, e.g., \textit{Prince v. Massachusetts}, 321 U.S. 158, 163 (1944) (affirming lower court in finding that freedom of religion “is subject to incidental regulation to the slight degree involved in the prohibition of the selling of religious literature in streets and public places” by minors); \textit{In re Dubreuil}, 629 So. 2d 819, 827 (Fla. 1993) (dismissing parent’s argument that state’s interest in avoiding abandonment of minor children is insufficient compelling interest to override constitutional rights of privacy and religious freedom). James Woodward considers a theoretical case comparable to the situation in \textit{Dubreuil}, but involving parents who choose to conceive despite knowing before they conceive that they will die while their children are young. Woodward, \textit{supra} note 29, at 816.
\item \textsuperscript{124} See Epps, \textit{supra} note 45, at 659 n.251 (“Many courts refuse to modify or terminate a parent’s obligation to pay child support during a period of incarceration because courts view incarceration as a voluntary reduction in income that does not justify a reduction in child support.”).
\item \textsuperscript{125} See, e.g., \textit{Williams v. Garcetti}, 853 P.2d 507, 508, 516–17 (Cal. 1993) (holding that amendment to California’s penal code stating that parents and guardians have duty to exercise “reasonable care, supervision, protection, and control over their minor child” is neither vague nor overbroad (citing \textit{CAL. PENAL CODE} § 272(a)(2) (West 2008))).
\item \textsuperscript{126} See, e.g., \textit{State ex rel. T.P.M.}, 947 So. 2d 751, 757 (La. Ct. App. 2006) (holding that termination of parental rights was in children’s best interest).
\item \textsuperscript{127} See 127 S. Ct. 1610, 1633 (2007) (“[T]he State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child . . . .”). Jellinek, \textit{supra} note 76, at 393 (arguing that post-viability abortion restrictions suggest that “the best interests of potential children are paramount”).
\end{itemize}
act early on to protect this interest, depriving the would-be parents of custody based on acts that occur well before the child is born.\footnote{See Dillard, supra note 69, at 52 (arguing that state action post-procreation is insufficient to protect state's interest).}

In other words, the state is able to formulate its policy to avoid harm rather than waiting for the harm to occur. The state interest at issue in Gonzalez is very different from the interest in ensuring that parents fulfill a duty of care to their children, but the state has a greater and more compelling interest in ensuring parental fitness than in merely ensuring its birth and burdening an unwilling parent with an unwanted child.\footnote{See Roe v. Wade, 410 U.S. 113, 153 (1973) (“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.”).}

The interest described above is a general or common interest in each citizen having some minimum civic virtue instilled in them by parents. This is a form of public good, which the state claims as an interest on behalf of all of its citizens.\footnote{See Dan W. Brock, Shaping Future Children: Parental Rights and Societal Interests, 13 J. Pol. Phil. 377, 391 (2005) (“[T]he societal harm prevention interest could in some cases outweigh individuals' reproductive and childrearing rights and interests.”).}

That interest, however, can also be viewed in a more individualized way. Underlying the phrase “state interest” is the representative nature of the state. It is merely a reflection or aggregation of the rights of its citizens,\footnote{See Joseph Raz, Rights and Politics, 71 Ind. L.J. 27, 35 (1995) (“The public interest is, and is generally taken to be, a function of individual interests. So is the common good or the common interest.”).}

rights which can be violated by the acts of fellow citizens, including the act of procreation. Others’ rights are inextricably bound up in the notion of state interest. It is others in society, and not the abstract notion of the state, that will have to interact with the prospective child. For example, while talk of the state’s fiscal and administrative interests in reducing costs may seem humdrum and impersonal, it can also be described as reflecting other persons’ property rights and the correlative duty of the state not to unjustly take that property and infringe on the holder’s liberty in the form of unnecessary and excessive taxation and redistribution.\footnote{See David Kamin, What Is a Progressive Tax Change?: Unmasking Hidden Values in Distributional Debates, 83 N.Y.U. L. Rev. 241, 273 (2008) (noting that libertarian view of justice yields conclusion that taxes are necessary but unfortunate confiscation of property, therefore redistribution of welfare is inappropriate function of fiscal policy).}  

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Locke recognized the potential for prospective parents to violate these rights by procreating children they would not care for or control when he suggested that parents should be responsible for their children as long as such care and control is necessary—regardless of the actual age of their “children.” Children create duties for those who create them. The people’s interest in not having to take on these obligations creates an opposing state interest. There must therefore be a justification for obligating others to pay taxes to help care for the children that they do not create themselves.

Considered in this light, the state’s interest is not just in parents being fit for their children, but in prospective parents being fit so that society, in the event the prospective parents fail, is not assigned the role of custodian for a child it played no role in bringing into the world. Also note that in the context of no-procreation orders involving siblings, the state’s interest is not only in the prospective child and its relation to society in general, but also in how that child will reduce resources available for his or her own siblings. In addition to these interests, the state also has an interest in avoiding harms inherent in every act of procreation that would necessitate countervailing benefits. In economic terms, procreation can have both substantial negative and positive externalities.
example, consider recent proposals to tax parents who have more than two children in order to offset the carbon dioxide emissions their offspring will inevitably generate. While many of the positive externalities of childbearing are speculative and will never be actualized, some of the negatives cannot be avoided. For example, each new child harms the environment in a certain and quantifiable way, creating an ecological footprint and contributing to environmental degradation. These same children inevitably impinge on core moral and legal rights recognized in constitutional doctrine (e.g., privacy, political, property, etc.). To the extent the state has an interest in the preservation of the environment and protection of these other rights, it is an interest that militates in favor of a duty on prospective parents, one which will instill in each act of procreation the necessary countervailing benefits.

So far this Article has considered the interests of the state and of others in society whom the state represents. But the specter of children being born to unfit parents, being removed into foster care, or both, cannot easily be divided from the interests of the children themselves. As John Rawls said, “the principles of justice also impose constraints on the family on behalf of children who are society’s future citizens and have claims as such.”

Consider, for example, the figures cited by Sharon Balmer, supporting what one court called a “lost generation of children

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137 See Charles A.S. Hall et al., The Environmental Consequences of Having a Baby in the United States, 15 Pop. & Envtl. 505, 505 (1994) (“We conclude that one especially effective way for individuals to protect the national and global environment, and hence protect the wellbeing of all existing people, is to stop creating more humans.”); Robert M. Hardaway, Environmental Malthusianism: Integrating Population and Environmental Policy, 27 Envtl. L. 1209, 1222–23 (1997) (cataloguing environmental impacts of each additional human being).

138 See Dillard, supra note 69, at 56 (“[T]he creation of new persons in a finite space eventually results in either limiting the rights of some in favor of the rights of others, or a general limiting of each person’s overall rights.”). For example, each new person dilutes or limits the effectiveness of every person’s vote, the availability of public resources, and the degree to which each individual can enjoy natural liberty.


140 See Balmer, supra note 21, at 937–38 (citing multiple statistics evidencing failure of foster care system in U.S.).
whose tragic plight is being repeated every day.”  However, to the extent we can divide them from the state interests, prospective children have interests that are also implicated. While extant children have future interests that the law protects, prospective children also have interests that can give rise to claim-rights. Courts and commentators have often failed to acknowledge them, however, perhaps because it is a philosophically and ethically complex area.

This Article will not discuss all of the ethical issues involved in creating persons, but in order to argue that prospective parents are under an ethical duty to prospective children to be fit, it must first be demonstrated that the prospective parents’ procreative acts are ethically related to the interests of prospective children. One way to do that—the way most commonly employed in rights analysis—is to demonstrate that one can both harm and benefit prospective children by creating them. The counterargument often employed to defeat that claim relies on Parfit’s nonidentity problem: consider a woman who chooses to conceive despite knowing that the medication she is taking will cause her child to have a withered arm, and also knowing that if she had waited one month until her prescription had ended, she would have conceived a child without a withered arm. The problem arises in articulating why the woman’s decision to procreate might be ethically wrong. Did she harm the child she conceived and bore? Was that child made worse off by being born, and, if so, how can we compare the child’s existence and non-existence? Is harming someone contingent on making them worse off? Was the mother under a more utilitarian obligation to avoid

141 Id. at 939 (quoting LaShawn A. v. Dixon, 762 F. Supp. 959, 960 (D.C. Cir. 1991)).
142 See infra Part III.B.
143 See infra Part III.B; see also Buck v. Bell, 274 U.S. 200, 207 (1927) (holding that compulsory sterilization was warranted where mother was “probable potential parent of socially inadequate offspring”); Meyer, supra note 20, § 2.1 (“[F]uture people will be bearers of rights in the future.”). But see Laura Shanner, The Right to Procreate: When Rights Claims Have Gone Wrong, 40 McGill L.J. 823, 873 (1995) (arguing that children cannot claim any rights prior to their conception).
144 Derek Parfit, On Doing the Best for Our Children, in ETHICS AND POPULATION 100–01 (Michael D. Bayles ed., 1976); see also Brock, supra note 29, at 203 (defending Parfit’s view that “the woman’s action in conceiving the handicapped child is no different morally than if she had knowingly caused her already-conceived or born child to have a similar handicap”).
causing suffering generally? Did she owe an obligation to the child she would have conceived had she waited?

Some have argued that the nonidentity problem prevents us from demonstrating harm to the person created (and, therefore, any grounds for limiting the right to procreate) because preventing the harm would mean preventing the creation of the person whose interests are at issue. That is, unless faced with creating a life which itself constitutes harm, prospective parents are not under a duty to prospective children.

As one might expect, this argument would alleviate most prospective parents of any ethical obligation towards prospective children. Since the nonidentity problem was first introduced, however, several prominent theorists have articulated reasons that would nonetheless place ethical duties on prospective parents. As an initial matter, some have objected to not considering the welfare of prospective children on deontological grounds, including Kant’s famous maxim that children should only be treated as ends in

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145 See Robertson, supra note 29, at 75–76 (arguing that children’s interests are not protected by preventing their very existence); see also Jackson, supra note 28, at 198–99 (arguing that only parents are capable of comparing value of child’s life versus non-life). But see Robertson, supra note 29, at 31 (arguing that unfit parents may not have right to procreate after all). Of course, it may be that prospective parents have the burden of showing that having children would not harm or wrong them.

146 See Philip G. Peters, Jr., Harming Future Persons: Obligations to the Children of Reproductive Technology, 8 S. CAL. INTERD. L.J. 375, 381 (1999) (arguing that harmfulness of “existence-inducing” acts are difficult to measure).

147 See Jackson, supra note 28, at 177–78 (arguing that child welfare filter should not be imposed on individuals’ conception decisions due to difficulty in comparing existence and non-existence). Some have opposed this view on philosophical grounds, such as where it has been applied in wrongful-life tort cases. See Seana Valentine Shiffrin, Wrongful Life, Procreative Responsibility, and the Significance of Harm, 5 LEGAL THEORY 117, 118–19 (1999) (arguing for philosophical defensibility of permitting “liability assessments for significant burdens associated with being created—even in cases in which the life is worth living and in which those responsible for creating did not have, nor should they have had, special knowledge that the child’s life would feature unusual or substantial burdens”). See generally David Archard, Wrongful Life, 79 PHILOSOPHY 403, 415 (2004) (defending view that we owe prospective children a certain quality of life and that we wrong them when we fail to provide it).

148 See, e.g., Carson Strong, Ethics in Reproductive and Perinatal Medicine 94 (1997) (“[T]he fact that the child with the withered arm has a life that is better than nonexistence does not mean that the child was not wronged.”); F.M. Kamm, Cloning and Harm to Offspring, 4 N.Y.U.J. LEGIS. & PUB. POL’y 65, 72 (2000) (“[W]e can set a high standard for permissibly creating people, demanding that creators create lives that are more than minimally satisfactory.”). See also Archard, supra note 147, at 415 (“An adult may exercise his or her reproductive powers to bring a child into being only if the child in question has the reasonable prospective of a minimally decent life.”).
themselves, and not as a nonconsenting\textsuperscript{149} means of achieving some other end that the parent might have.\textsuperscript{150} Consider how this maxim might discount the claim that procreation is protected as an autonomous act of privacy and self-determination. If the prospective parents are using the child as an integral part of their life plan—as part of a self-determinative act—how is that not treating it as a means? Doesn’t treating the prospective child as an end in itself necessitate a serious consideration of its welfare?\textsuperscript{151}

Others have suggested a more contractarian view, seeing in the nonidentity cases a failure of constructive consent on the part of the prospective child.\textsuperscript{152} Clearly, the child has not, and cannot, consent to being procreated. Does that mean that we must do away with consent altogether? Doing so ignores the opportunity to use constructive consent, or, in other words, a specification of the minimum level of welfare required by prospective children of particular prospective parents. Constructive consent, rather than no consent at all, would at least move us closer to notions of

\textsuperscript{149} For a discussion of the ethical problems arising from the lack of consent by prospective children to their births, see generally Shiffrin, supra note 147.

\textsuperscript{150} Immanuel Kant, Groundwork of the Metaphysics of Morals 41 (Mary Gregor trans., Cambridge Univ. Press, 1997) (1785); see also Brock, supra note 29, at 196 (“Deontological harms . . . cannot always be taken to be second-class citizens in moral reasoning, or dismissed as illegitimate grounds for state preventative action . . . .”); Dena S. Davis, Genetic Dilemmas and the Child’s Right to an Open Future, 28 Rutgers L.J. 549, 567 (1997) (“I maintain that liberalism requires us to intervene to support the child’s future ability to make its own choices about which of the many diverse visions of life it wishes to embrace.”); id. at 570 (“Good parenthood requires a balance between having a child for our own sakes and being open to the moral reality that the child will exist for her own sake, with her own talents and weaknesses, propensities and interests, and with her own life to make.”); Ryan, supra note 11, at 7 (“The success of Robertson’s argument depends upon accepting the view that persons can be object of another’s right.”). Dan Brock gives the example of institutionalizing a market for selling babies to infertile couples, which he finds unethical, but not because it necessarily causes harm to others. Brock, supra note 29, at 196.

\textsuperscript{151} Using a harm-based ethical analysis may work for extant persons, but it may be the wrong approach for future persons.

\textsuperscript{152} See Carl H. Coleman, Conceiving Harm: Disability Discrimination in Assisted Reproductive Technologies, 50 UCLA L. Rev. 17, 49 (2002) (discussing Joel Feinberg’s argument that procreation without harm can still be wrong where there is failure of constructive consent); see also Joel Feinberg, Harmless Wrongdoing 328 (1988) (arguing that action bringing child with impairment into existence is wrong even if action does not cause anyone harm); John Rawls, A Theory of Justice 284–93 (1971) (arguing contractarian view achieves justice between generations). Thomas Hobbes suggested that parents acquired dominion over their children not through the act of creating or the biological tie, but through the child’s consent. Thomas Hobbes, Leviathan 128 (Edwin Curley ed., Hackett Pub’g Co. 1994) (1668).
autonomy and privacy, which are principles that can obviously still apply where multiple persons are involved, as long as all those involved consent to the activity at issue.\footnote{See Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (holding Texas statute prohibiting consensual sexual conduct between homosexuals in privacy of home unconstitutional); Jackson, supra note 28, at 200 (questioning whether pregnancy restrictions violate families' privacy and autonomy).}

Moving towards more consequentialist approaches, some have argued for a comparative or substitutive moral obligation to reduce suffering when procreating by timing procreation so as to avoid unnecessary suffering (i.e., in the case above,\footnote{See supra note 144 and accompanying text.} waiting so as not to have a child with a withered arm),\footnote{See Coleman, supra note 152, at 21 (arguing for comparative evaluation of potential impact of ARTs on resulting children); Meyer, supra note 20, § 2.3 (discussing view that prospective parents should refrain from procreating under certain circumstances to avoid harm to prospective child); Peters, supra note 146, at 387 (“[M]ost people would prefer that their welfare be maximized if they are to be born at all. Put differently, they would favor the avoidance of unnecessary suffering.”). But see id., at 391–92 (noting that Parfit’s conclusions may be avoided by relying on “average utility,” which favors choices that produce greatest average welfare).} or for our purposes, waiting until the prospective parent is fit. Under what he refers to as a class-based method of identifying harm to future children in the context of public health regulation, Professor Philip G. Peters, Jr., proposes a three-step inquiry:

The first step is to identify the parenting options realistically available to the affected parents and clinicians. The second is to compare the advantages and disadvantages of each alternative from the perspective of the resulting children. Finally, the interests of future children must be balanced against the rights and interests of parents and providers.\footnote{Peters, supra note 146, at 388–89. See generally Philip G. Peters, Sr., How Safe is Safe Enough? (2004) (providing full account of Peters’s arguments). To the extent one is conferring a benefit on the substitute child, this approach may be characterized as person-affecting.}

This approach takes all of the prospective children of the prospective parent as a class,\footnote{See Peters, infra note 146, at 376–77 (discussing class-based approach).} which for our purposes, would be those who would be born while the parent is unfit, as compared to those who
would be born to the parent after he or she has become fit. The interests of the former and latter are all considered.

Other less utilitarian and more “person affecting” approaches focus on what it is that we consider to be wrong or harmful conduct, finding that we do in fact benefit and harm the children we create.\(^{158}\) Lukas Meyer has argued that “[c]onsiderations based upon the rights of future people can guide prospective parents in deciding whether they should revise their decision to conceive out of regard for the children they would otherwise have.”\(^{159}\) One method involves using a subjunctive-threshold notion of harm to future people—one not contingent on a comparison with the “worse off” position.\(^{160}\) In more legal terms, this is loosely comparable to notions of constructive consent, or a minimum standard of welfare.

One way to think about this approach is by addressing a potential counterargument made by Laura Shanner. Shanner makes the point that:

> The notion of harm to the unconceived child is, however, problematic within the framework of rights claims. Generally, rights claims are balanced against competing rights claims: one’s right to act may be limited when the act threatens others who have the negative right not to be harmed . . . . [A] right of procreation would have to be matched by an equally compelling right of the future

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\(^{159}\) Meyer, supra note 20, § 3.2.

\(^{160}\) See id. § 3.1 (defining subjunctive-threshold interpretation of harm); see also Coleman, supra note 152, at 53 (discussing theories suggesting that reproductive decisions be based on ability to provide children with “minimally satisfying lives”). But see Meyer, supra note 20, § 3.4 (noting limits of subjective-threshold interpretation of harm, including its failing to account for our desire to improve overall condition of future generations).
child not to be harmed. . . . [A] nonexistent future child would have to assert a valid right not to be conceived. This right of non-conception is therefore a contradictory and impossible concept, leaving the adults’ right of procreation virtually unlimited.161

I would counter that we can avoid the impossible concept by looking at the prospective child’s interest as protected more by a positive right than a negative right. Negative rights, put crudely, are rights to be left alone, and as such may not describe the relationship between prospective children because the latter require the former to affirmatively do something, i.e., procreate. Looked at from the perspective of positive rights, the prospective child’s claim to fit parentage makes sense. Consider the analogous positive rights claim to education: students have a right not to simply be left alone, but to be educated. More importantly, that right is to a certain standard of education or to no education at all. It is better for them to receive no education than miseducation. Likewise, prospective children (and not simply possible future children)162 may have thus had a positive claim right to fit parentage or none at all.

Note that the class-based and subjunctive-threshold/constructive consent methods do not require us to compare existence versus nonexistence. This is arguably impossible, and one of the reasons courts have failed to find that plaintiffs are harmed in “wrongful life” cases.163 Rather, the comparison is made between the various members of the class of prospective children—those who would result from the various choices the parents could make in terms of whether to procreate now or later, before or after ensuring that the minimum threshold is met. In the context of cases like Oakley,164 the determination would be made based on comparing the

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161 Shanner, supra note 143, at 844.
162 See infra notes 186–88 and accompanying text.
163 See Jackson, supra note 28, at 196–97 (arguing that judges are unwilling to compare value of nonexistence and existence in disabled state); John A. Robertson, Procreative Liberty and Harm to Offspring in Assisted Reproduction, 30 Am. J.L. & Med. 7, 18 (2004) (explaining that majority of courts agree that children born with “condition of concern” have not been wronged).
164 State v. Oakley, 629 N.W.2d 200 (Wis. 2001); see supra notes 105–06 and accompanying text.
circumstances of the children born while the parent is unfit to those
that would be born after he or she has become fit.\textsuperscript{165}

Note that those in favor of using nonidentity to disregard the
welfare of future children nonetheless tend to compare existence
and nonexistence.\textsuperscript{166} This is because, despite their claim that we
should avoid considerations of child welfare altogether, they
invariably find living some lives—such as the life of an extremely
disabled neonate—to be worse than not existing at all.\textsuperscript{167}

These issues aside, both the class-based and subjunctive-
threshold/constructive consent methods described above\textsuperscript{168} (as well
as others not discussed)\textsuperscript{169} would provide an ethical base for the
principle I have described.\textsuperscript{170} Because a duty on prospective parents
would permit procreation upon a showing of fitness, it only
temporarily suspends the procreative right. From the vantage of
the full class of prospective children, the duty weighs the harm to
those born to parents while the parents are still unfit against the
lesser degree of harm—and perhaps benefit—to those children born
to the same parents after becoming fit. The duty is thus essentially
comparative, weighing options from the perspective of all of the
prospective children. The subjunctive-threshold interpretation of
harm and attendant notion of constructive consent are particularly
fitting to the analysis, in that the existing legal standard of fitness

\textsuperscript{165} Jackson might object that making an accurate prediction and comparison of the lives of future children is too speculative. See Jackson, supra note 28, at 193 (“This consequentialist analysis rests upon two dubious assumptions. First, that it is possible to forecast with some degree of certainty whether a particular child is likely to flourish before she is conceived . . . .”). She proves entirely inconsistent on this point, however, by later suggesting that such a forecast might be possible if a sufficiently “rigorous” investigation is undertaken. Id. at 194, 195, 203; see also id. at 201 (“Without intensive investigation into the circumstances of the particular family, it is not possible to make a fair and accurate prediction about the future child’s wellbeing.”).

\textsuperscript{166} See, e.g., id. at 196–97 (conceding that existence may not always be preferable to nonexistence).

\textsuperscript{167} See id. at 197 (“If existence is always to be preferred, then it would be difficult to justify denying any premature baby, however terrible her injuries, life-prolonging treatment.”).

\textsuperscript{168} See supra notes 152–204 and accompanying text.

\textsuperscript{169} For example, Laura Purdy questions Parfit’s claim that we are primarily the product of a given sperm and egg, rather than a product of the nurturing we receive throughout our lives. See Laura Purdy, Loving Future People, in REPRODUCTION, ETHICS AND THE LAW 300, 315 (Joan Callahan ed., 1995).

\textsuperscript{170} It is beyond the scope of this Article, but it may be that neither of these approaches can make procreating an autonomous act—that is, they may be necessary but not sufficient conditions to obtain the constructive consent of the prospective child.
could be substituted as the relevant threshold. This would intertwine the ethical and legal standard, viewing prospective children as asserting claim-rights, which create a duty on fit parents. “If we assume that future people have general (human) rights vis-à-vis us, our correlative duties set a normative framework for most of our decisions concerning future people.”

Regardless of which approach one uses, it is vital to recognize that no serious ethicists use nonidentity to discount the interests of others as a means of furthering procreative autonomy. Rather, nonidentity challenges us to articulate those interests in different ways. It is important, however, to step back and note that all of these approaches are only necessary to defend the principle of a duty of prospective parental fitness against a narrow nonidentity attack. The principle could also stand on a number of other ethical grounds not subject to that attack. For instance, nonidentity normally arises in the context of reproductive technology regulation. This context is rife with concerns regarding what might be considered physical disabilities in resulting children, and the child’s interests are taken as a starting point. Commentators in this area often view any duty on a prospective parent as arising from correlative claim-rights shared by the state and prospective children, but one can also view the rights of prospective children as correlative to an a priori duty on prospective parents to be fit. This approach would coincide with some commentators’ arguments in the context of public child welfare that view parental rights as

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111 Meyer, supra note 20, § 3.4.
112 See Note, Regulating Eugenics, 121 Harv. L. Rev. 1578, 1582 (2008) (“[V]oluntary choices by parents . . . . must be reasonably calculated to add to the possible set of life choices that the [future] child will have or augment the child’s ability to pursue her preferred life path.”). See generally Tim Mulgan, Future People: A Moderate Consequentialist Account of Our Obligations to Future Generations (2006) (exploring various approaches to intergenerational justice, none of which (including his) involve ignoring future persons’ welfare). Mulgan’s own approach would place significant duties on prospective parents.
113 See generally Jackson, supra note 28, at 176 (discussing nonidentity problem in context of England’s Human Fertilisation and Embryology Act); Roberts, supra note 158 (discussing nonidentity problem in context of cloning).
114 See Coleman, supra note 152, at 44 (suggesting that determination of whether patient’s disability poses threat to future child should be analyzed from perspective of hypothetical child born following provision of reproductive technology).
115 See, e.g., Roberts, supra note 158, at 37–41 (discussing various interests implicated by prospect of harm arising from cloning technology).
contingent. Many of the arguments made by courts that have issued no-procreation orders seem closer to this approach.

This approach does not run afoul of the nonidentity problem for at least two reasons. First, the prospective child’s rights arises from an a priori duty on the prospective parent, so that the focus is not initially on the child’s interests. Second, it rejects harm as the appropriate standard for assessing the morality of procreation. From this perspective, Parfit has simply asked the wrong question. The focus instead should be on how we should act, when doing so will determine the full quantum of another person’s interests. It makes no sense to start by asking whether we will harm the person’s interests (though we might be able to conceive of an answer) because we have no particular entity and set of interests in mind as yet; that would be getting ahead of ourselves. Rather, we have various potential entities and interests. Our very first though would be how to do the best we can for the child we have; that is, if we ourselves were to be incarnated as one of those potential entities or interests, which would we choose?

Moral philosophy aside, child welfare law is not framed in the simple terms of avoiding harm. Parents are under a legal duty of beneficence to provide for their child—not simply an obligation to avoid hurting him or her. Just as to “have children” in terms of custody means to be beneficent, so can to “have children” in terms of procreation. It is beyond the scope of this Article, but we could even think about abortion in these terms: can we justify abortion by saying that a mother who wishes to abort is unfit because she lacks the requisite duty of beneficence to her prospective child?

One could even eschew the rights-based approach entirely and embrace wholly utilitarian or communitarian perspectives, requiring prospective parents to be fit for all of the rather obvious and immeasurable benefits it would bring society. This would


177 See In re Bobbijean P., 2004 WL 834480, at *4 (arguing that right to conceive child is not essential, but that “rights to conceive and to raise one’s children have been deemed ‘essential’ ”).
involve less of a focus on prospective children and their narrow interests, and more of a focus on maximizing the welfare (or minimizing the suffering of) future generations. Parfit himself opted for something like this latter approach. He tended towards the “no difference” view, that procreating a child into harmful circumstances is no different than inflicting harmful circumstances on a child that is already alive.

Regardless, it should be clear that both prospective children and the state assert compelling interests when we ask whether prospective parents must be fit. As Marsha Garrison concludes, “although the structure and content of legal standards have changed along with social mores and perceptions of children’s interests, family law has consistently preferred the interests of children and the public to those of parents and parent-claimants.” The state finds at interest its own constituency, and through that, its future. This seemingly amorphous interest stands with the interests of the individuals whom the state represents—those individuals who will have to interact with the prospective child and who may have to take on the failed obligations of the prospective parents. To the extent they can be separated from the state’s interest, prospective children have at stake the circumstances of their creation and whether those circumstances rise to the minimum level (fitness) that the law requires, at least for extant parents. Nonidentity aside, as a legal and ethical matter, it is in births below that legal threshold where we might presume some level of harm which might support requiring prospective parents to become fit before procreating.

Using the analogy of the social contract, we can consider whether parental fitness is the bare minimum standard of care prospective members of society must be provided with in order to join, and also the bare minimum standard which current members demand before others may join. It is hard to think that either class deserves less.
When considering the interests of the state in prospective children, it is important to distinguish prospective children from prospective abortees. This issue arises in the context of the Court’s holding in *Roe v. Wade*, which limits the states’ authority to intervene before viability of the fetus and argues that this precludes a state interest in prospective children—or the assertion of interests by prospective children themselves—because prospective children themselves are not viable. Setting aside how *Gonzalez v. Carhart* might alter *Roe’s* viability distinction, the crucial point is that *Roe* and the principle I articulate present different scenarios. The former involves an intent not to have a child, while the latter involves the intent to have a child. The former involves someone who would like to avoid becoming a parent, while the latter involves a willing prospective parent. The former projects no person into the foreseeable future until it is decided by the would-be parent or a court that the child should be born. The latter does so immediately, and with it all of the state interests discussed above, through the intent of an extant person to create a future one.

The former also falls into the realm of the personal and private, as demarcated by *Griswold v. Connecticut*. The otherwise would-be parent is asserting an interest in being and remaining alone. In the latter, however, the prospective parent is asserting an interest in creating and being with another nonconsenting person, a person who when extant will create consequences for the parent and others in society. A prospective parent is one we presume will have a child, until that person changes their mind. A person seeking an abortion

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*id.* at 789 (“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.”).

182 See 410 U.S. 113, 163–64 (1973) (setting forth holding and supporting argument); see also Betesh, *supra* note 59, at 495 (“The United States Supreme Court held in *Roe v. Wade* that a state does not have an adequately compelling interest in protecting a fetus before viability. Thus, it rationally follows that since an *unconceived* child is clearly non-viable, it cannot enjoy any rights provided under the Constitution.”) (footnotes omitted)); Jellinek, *supra* note 76, at 380 (explaining Court’s decision in *Roe v. Wade* as protecting women’s bodily autonomy and denouncing interests of non-viable fetuses).

183 See *Gonzalez v. Carhart*, 127 S. Ct. 1610, 1636 (2007) (“Casey . . . confirms the State’s interest in promoting respect for human life at all stages in the pregnancy.”).

does not intend to exercise the vast Hohfeldian power over the prospective child and others in society, as discussed in Part II. As Professor Richard Storrow notes: “In the abortion context, the state’s position is simply that the fetus’s right to life outweighs the woman’s right to make a procreative decision, at least at a certain point in time. No comment is made about the parenting ability of those who might wish to terminate their pregnancies.”

In ethical terms, *Roe* also stands for the unsurprising proposition that merely possible (or pre-viability) persons do not have a claim-right to exist. “Possible people have no right to be brought into existence . . .” If they did, we would all be under a duty to constantly procreate to maximum biological capacity. But if we are considering a prospective person whom we must presume will exist because extant people have the intent and means to make it so, then a separate question arises as to whether the procreator owes him or her some duty of care. It is not an issue of a claim to life per se (which *Roe* suggests exists after viability), but rather a question of what duty of care is owed to those we intend to create.

Of course, for these reasons, the state’s interest in the principle I have laid out is arguably more compelling than the specific interest articulated in *Roe*. In *Roe*, the state was limited to its interest in protecting life per se: simply the birth of a child and nothing more. This seems rather bleak. How is assuring the mere birth of someone, with no provision for standards of care that will actually make her life worth living, a benefit to the person born or to others in society? Arguably it is not. But with the principle of a duty of prospective parental fitness, the state can act to ensure its interest in the “well-rounded growth of young people into full maturity as citizens,” an interest the Supreme Court lauded in *Prince*. This is more compelling than simply assuring the existence of a person with no provision for his or her care or

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185 Storrow, *supra* note 38, at 2297.
186 See *Roe*, 410 U.S. at 163 (holding that states can protect viable fetal life but cannot prevent abortions pre-viability).
187 Meyer, *supra* note 20, § 3.4.
188 See *Roe*, 410 U.S. at 163 (finding that states’ interests in protecting life begin at viability).
189 See id. at 159 (declining to decide when life begins, and noting divergence of opinion regarding this question).
190 *Prince* v. Massachusetts, 321 U.S. 158, 168 (1944).
guidance. The latter, by comparison, seems in some ways contrary to the state’s interest.

In short, aborting a fetus is not the same thing as creating a person, and ending existence is not the same thing as causing a person to exist without any duty to care for that person. “If the state has an interest in protecting merely potential human life from harm, then a fortiori it has an interest in protecting life that is slated to be born from harm.”

B. THE INTERESTS OF PROSPECTIVE PARENTS

Prospective parents can assert several interests upon which the principle of a duty of prospective parental fitness might impinge. In actual cases where the principle is applied, logic aside, the interests of prospective parents will take center stage in courts’ minds because, unlike the seemingly amorphous state and prospective child, the prospective parent stands in flesh and blood before the court.

1. The Right to Procreate. While there is no textual basis for a fundamental right to procreate in the Constitution, the claim that there is such a right and that its scope is virtually limitless has become dogma. As one of the dissenting justices in Oakley argued, “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.” The dicta surrounding procreation has lifted it to the status of a meta-right, one capable of overriding virtually all competing interests.

Note, supra note 172, at 1594 n.116 (citation omitted).


State v. Oakley, 629 N.W.2d 200, 219 (Wis. 2001) (Bradley, J., dissenting).

See Dillard, supra note 69, at 3–4 (describing society’s conviction that people have personal and private right to procreate). Contrast this view of a potential meta-right with others’ views of rights generally. See, e.g., RAWLS, supra note 139, at 104 (“No basic liberty is absolute, since these liberties may conflict in particular cases and their claims must be
And yet the actual legal and ethical support for such a broad right is simply absent. Commentators ignore that the Court in *Skinner v. Oklahoma* expressly limited its holding to equal protection grounds,\(^{195}\) that the Court as recently as *Roe v. Wade* continued to rely on *Buck v. Bell* (which upheld the involuntary sterilization of Carrie Buck),\(^{196}\) that the sweeping references to the procreative right in modern substantive due process cases are dicta,\(^{197}\) and that, as an ethical matter, because the claimed right cannot logically be based on autonomy or self-determination (the common bases for claims of privacy), it may not be a right at all.\(^{198}\)

\(^{195}\) See *Skinner*, 316 U.S. at 537–38 (condemning Oklahoma’s Habitual Criminal Sterilization Act for violating Equal Protection Clause); VICTORIA F. Nourse, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA AND THE NEAR TRIUMPH OF AMERICAN EUGENICS* 165 (2008) (“If this book has anything to say about the standard debates about Skinner, it is that both liberals and conservatives have made a historical mistake. Skinner was neither argued nor decided as a case about rights in the sense that we use the term ‘fundamental right’ today.”).

\(^{196}\) 410 U.S. 113, 154 (1973) (citing *Buck v. Bell*, 274 U.S. 200 (1927) as support for Court’s refusal to recognize unlimited privacy right).

\(^{197}\) See I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1141 (2008) (“American constitutional jurisprudence appears to treat the right to be and not to be a gestational parent (still in the non-interference sense) as conjoined. But this bundling is not inherent.”) (footnote omitted); id. at 1149–50 (“Griswold thus emphasized the invasion of the marital ‘space,’ not the interference with procreative decisions per se as the harm . . . .”); Dillard, supra note 69, at 15–20 (arguing that Court only addresses broad procreative rights in dicta while holding on narrower grounds); Kryszak, supra note 60, at 332 (noting lower court’s distinction between sex, which is private, and procreation, which is not).

\(^{198}\) See ROBERT H. BLANK & JANNA C. MERRICK, *HUMAN REPRODUCTION, EMERGING TECHNOLOGIES, AND CONFLICTING RIGHTS* 4–5 (1995) (discussing various theorists that reject idea of right to procreate based on autonomy due to interests of future child); S.L. Floyd & D. Pomerantz, *Is There a Natural Right to Have Children?*, in *SHOULD PARENTS BE LICENSED?* 230, 230–32 (Peg Tittle ed., 2004) (challenging notion that right to procreate can be based on autonomy or self-determination); see also *In re Baby M*, 537 A.2d 1227, 1254 (1988) (“A person’s rights of privacy and self-determination are qualified by the effect on innocent third persons of the exercise of those rights.”). Emily Jackson has argued at length that no consideration of future children’s welfare is justifiable, in the context of ART or otherwise, on various grounds including the notion that claim procreation falls within an impenetrable zone of privacy and self-determination. *See Jackson*, supra note 28, at 178 (“The decision to conceive a child goes to the heart of an individual’s identity and is precisely the sort of choice that we all ought to be able to make within the privacy of our most intimate relationship.”). The crucial error here is that Jackson is referring to the prospective parent’s identity, but it is the prospective child’s identity that is dramatically more at issue. One has to confute procreation with consensual sexual conduct in order to crop off the latter half of the picture—wherein a child arrives—and in order to view it as a personal, autonomous, or private act. Arguing that privacy, or what Jackson calls a domain wherein one can claim themselves as the “self-authenticating source” of the good life, *id.* at 187 (quoting D. Cornell, *AT THE HEART OF FREEDOM: FEMINISM, SEX AND EQUALITY* 37–38 (1998)), justifies
Thus, more than a few commentators have expressed serious doubts regarding the actual status of the right. 199

If the prospective parent is unfit, notions of privacy become even less apposite. Having children one cannot or will not care for means someone else will have to do it or the children will go un cared for. There is nothing personal or private about this scenario.

Nonetheless, even though a duty on prospective parents to be fit when they have children might further the parents’ interests in other ways, 200 it would limit unfettered procreative choice. As such, it could be argued that prospective parents have an interest in avoiding a duty to be fit that must be weighed against the interests of the state and prospective children. It could also be argued that the principle constitutes an unwarranted invasion of the right of the prospective parent to choose freely when and under what circumstances to have a child. If this right is protected as

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199 See Brock, supra note 130, at 390 (“[Reproductive rights], like other rights, are not absolute, however, and so might in some cases be overridden by a society’s interest in the nature of its population and citizenry and their effects on the nature of the society.”); Callahan, supra note 17, at 69 (“If there were an absolute legal liberty to reproduce, there would be no issue here. There is no such absolute legal right, however, and the state frequently interferes with people’s reproductive choices and behaviors. . . . Even less clear than the legal right to reproduce is the purported moral right to reproduce.”); Katheryn D. Katz, Lawrence v. Texas: A Case for Cautious Optimism Regarding Procreative Liberty, 25 WOMEN’S RTS. L. REP. 249, 249 (2004) (“Whether there is an affirmative right to procreate at any time, at any stage of life, by any means, and in any circumstance has not been established.” (footnotes omitted)); Storrow, supra note 38, at 2296 (“This disagreement about whether and how procreative liberty applies to assisted reproduction probably arises from the fact that procreative freedom is not particularly well defined or stable.”); Jellinek, supra note 76, at 378 (“The Court’s vague consideration of reproductive liberty premised an ongoing trend in judicial opinion: the failure to articulate procreative freedom as an absolute right.”); Note, Human Cloning and Substantive Due Process, 111 HARV. L. REV. 2348, 2354 (1998) (“Despite the Court’s occasional references to a broader principle of reproductive freedom, the Court has not truly tested a right to procreate.”).

200 See infra Part IV.b.3.
fundamental by the Constitution—as many have argued it is,201 it would weigh heavily against the principle.

But even those that recognize the procreative right as constitutionally protected have argued that the interest at stake is not one of unfettered procreative choice at all, but a more contingent right. “Only at its crudest level is human procreation defined as conception, gestation, and birth. ‘To be sure, these [are] components of the reproductive process . . . . [B]ut [none] of these desires . . . implicates a fundamental right.’”202 Rather, it is argued that the right assumes the intent to assume the role of parent and that procreation, as a protected value, is linked and perhaps imbedded in the intent to provide actual care to prospective children.203

Lower courts struggling with parents who bear children with no intent to actually care for them echo this view: “A mother who does not and cannot grasp her existing parental responsibilities cannot reasonably be held to have a constitutional right to keep bearing more children for whom her only acts of motherhood are conceiving them, growing them in her uterus, and inevitably giving birth.”204

As will be discussed further in Part IV.C, some courts and commentators have suggested that the availability of no-custody orders, which would prevent unfit prospective parents from taking actual custody of their children once they have them, make the use of a no-procreation order constitutionally overbroad.205 According to the argument, because the probationer can procreate the child

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201 See, e.g., Epps, supra note 45, at 613 (“Finally, because of the fundamental nature of the right to freedom in procreation decisions, the dangers inherent in restricting this right, and the negative message sent to the poor, their children, and the world, if all other means of forcing someone to treat their children properly fail, incarceration of the offenders is preferable to use of a probation condition that seeks to limit the right to freedom in procreation decisions.”).


205 See Arthur, supra note 2, at 69–71 (discussing position of several courts that no-procreation conditions are constitutionally overbroad and superfluous when imposed in connection with no-custody orders).
directly into state custody, the child is not threatened and the procreative right need not be curtailed to protect it.\textsuperscript{206} A procreative claim-right to bear children with no attendant claim-right to custody of them is incoherent given our presumption that parents—and not the state—raise children.

One judge recently held:

This court notes, however, that the language of the United States Supreme Court . . . . does not say that the right to conceive a child is essential, but the rights to conceive and to raise one's children have been deemed 'essential' . . . . To use the language of the United States Supreme Court, there is absolutely nothing \textit{precious} about giving birth to repeated children, only to immediately require friends, relatives, or strangers, as well as society as a whole, to raise those children at its expense. . . . Constitutional rights provide protection of basic rights but there is no basic right to be protected when the potential "right to have a child" would equal the right to neglect a child and commit a crime against that child, or force others to raise it, both physically and at public expense.\textsuperscript{207}

The most outspoken proponent of broad procreative rights, Professor John Robertson, has argued "that genetic connection without more—reproduction \textit{tout court}—is not a protected aspect of procreative liberty because it is insufficiently involved with the values and interests that make procreation valuable to us."\textsuperscript{208} Perhaps commentators insisting on the inviolability of the

\textsuperscript{206} See Callahan, supra note 17, at 72–73 (discussing arguments raised in Rodriguez and Howland that no-procreation conditions add nothing to effectiveness of no-custody orders).


\textsuperscript{208} John A. Robertson, \textit{Liberalism and the Limits of Procreative Liberty: A Response to My Critics}, 52 \textit{WASH. \\& LEE L. REV.} 233, 243 (1995); \textit{see also} Callahan, supra note 17, at 74 ("First, the reproductive rights that have been affirmed by the courts are not limited to the bare right to become pregnant and give birth to a child, which might then be taken away immediately.").
procreative right simply assume these values. Emily Jackson argues that “becoming a parent is one of the most momentous events in a person’s life, often assuming a central place in the trajectory of her life plan.”\textsuperscript{209} But what if it is not? What if a court can reasonably predict that the parent will immediately abandon the child or will be forced to surrender it to state custody due to a no-custody order? Presumably, the values are not present and the right would not be obtained. In other words, if the right is contingent on the prospective parent being willing and able to care for the child, there is no right infringement at all in imposing a temporary order delaying procreation until that contingency is met.

Alternatively, one view of the procreative right focuses less on it being tied to parenting, and more on its satiable value to procreators as a means of replacing themselves.\textsuperscript{210} This view has special implications for codification of the principle of a duty of prospective parental fitness and the attendant level of constitutional review, as will be discussed in Part V.

There is another way to distinguish between all of these views of the right, and the one advanced by defendants in cases such as \textit{Oakley}.\textsuperscript{211} Arguably, the behavior these defendants seek to protect is more akin to a right to have unprotected sex without fear of violating probation, something which would fall more into the realm of the private and within the constitutional rights doctrine, beginning with \textit{Griswold},\textsuperscript{212} that protects it. Of course, the difficulty arises in dealing with the potential and rather interpersonal, albeit unintended, consequences of that behavior. Regardless, such a right stands in stark contrast to the formulations of the procreative right.

Whether or not one agrees with these assessments of the procreative right, establishing and maintaining \textit{parental} rights

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\textsuperscript{209} Jackson, \textit{supra} note 28, at 185.
\textsuperscript{210} See Dillard \textit{supra} note 69, at 63 (“The right to procreate, correctly defined, is a right at least to replace oneself . . . ”); cf. Storrow, \textit{supra} note 38, at 2298 (“And though the contours of procreative autonomy are not well defined, the contours of parental autonomy, by contrast, are. The problem is, the one does not necessarily lead to the other.”).
\textsuperscript{211} See State v. Oakley, 629 N.W.2d 200, 207 (Wis. 2001) (describing defendant’s argument that no-procreation condition violates his constitutional right since condition effectively eliminates right to procreate).
\textsuperscript{212} Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (recognizing constitutional right to privacy within penumbras of specific guarantees enumerated in Constitution).
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requires more than simply producing the child at issue. Parental rights are contingent on responsibilities. Blackstone stated the moral obligation in this way:

The duty of parents to provide for the maintenance of their children, is a principle of natural law . . . By begetting them, therefore, they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved . . . and if a parent runs away, and leaves his children, the churchwardens, and overseers of the parish shall seize his rents, goods, and chattels, and dispose of them toward their relief.

Courts and scholars have suggested that the parental right is akin to a trust “subject to a correlative duty to care for and protect the child, and terminable by the parents’ failure to discharge their obligations.” “A parent’s rights with respect to her child have thus never been regarded as absolute, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence of some embodiment of family.” This is consistent with the very foundations of our constitutional rights analysis. As John Locke wrote, “The Power, then, that Parents have over their Children, arises from that Duty which is incumbent on them . . . .” For Locke, parents are under a heavy obligation to care for, train, and educate their children to ensure

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213 Arthur, supra note 2, at 80–81 (arguing that recognition of parental rights of those who have reproduced requires assumption of parental responsibilities).
215 DAVIS ET AL., supra note 118, at 640; see also Michael H. v. Gerald D., 491 U.S. 110, 119 (1989) (referring to “the right, as well as the duty, to prepare the child for additional obligations, which includes the teaching of moral standards, religious beliefs, and elements of good citizenship”); Scott & Scott, supra note 176, at 2401 (viewing parent-child relationship as fiduciary with reciprocal rights and responsibilities).
217 LOCKE, supra note 133, at 324.
they will not menace society, and this duty did not end until the child was so prepared. A child’s rights naturally flowed from this duty. Parents have control (claim-rights of non-interference held against others in society) in part because, as the duty-bound overseer, they need it.

What reasons exist for creating such a trust if it is known, ex ante, that the correlative duty cannot, or will not, be fulfilled? If the rights we seek to value and protect under the Constitution are correlative to and contingent on a duty, how can they be bestowed in anticipation of the breach of that duty? And yet, as will be discussed in Part IV.c, that is exactly what some courts have done.

Thus, while prospective parents may assert that a duty of parental fitness unduly infringes a constitutional right to procreate, there is little support for that claim. The right itself, often taken as dogma, is in reality based on scant support, and those commentators that have analyzed the right in depth find it either satiable or contingent on the intent and ability to engage in future parenting. Moreover, the parental right, which in contrast enjoys constitutional protection, has a correlative duty of fitness, one which we might expect any procreative right to share. Thus, requiring a prospective parent to delay procreation until they are fit, at best, constitutes the “regulation” of liberty, a regulation which still protects the “central range of application” of the right. We can view a temporary no-procreation order as equivalent to a court temporarily depriving unfit prospective parents of the custody of their prospective children. Again, if fitness is the minimum constitutional standard for deprivation of custody, then showing prospective parents to be unfit should be all that is constitutionally required for a temporary no-procreation order.

2. The Familial Realm. One way to ignore limiting duties on prospective parents would be to treat the prospective child as an

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218 See Dillard, supra note 69, at 40–42 (discussing Locke’s conception of parent-child relationship).
219 See, e.g., Arthur, supra note 2, at 79–80 (suggesting that right to procreate is more accurately described in terms of ability to assume role of parent).
220 See Pierce v. Soc’y of Sisters, 268 U.S. 510, 535 (1925) (“[T]he parental right, which in contrast enjoys constitutional protection, has a correlative duty of fitness, one which we might expect any procreative right to share. Thus, requiring a prospective parent to delay procreation until they are fit, at best, constitutes the “regulation” of liberty, a regulation which still protects the “central range of application” of the right. We can view a temporary no-procreation order as equivalent to a court temporarily depriving unfit prospective parents of the custody of their prospective children. Again, if fitness is the minimum constitutional standard for deprivation of custody, then showing prospective parents to be unfit should be all that is constitutionally required for a temporary no-procreation order.”)
221 For a general discussion of the permissible regulation of liberties, see Rawls, supra note 139, at 111.
entity incapable of holding rights and thereby incapable of creating correlative duties. The prospective parent could assert that only their interest or right obtain, or using the language of the Court in *Stanley v. Illinois*, assert something like the “private interest . . . of a man in the children he has sired.”222 This would be another interest held by the prospective parent (the procreative right aside) that a duty of fitness impinges upon “the private realm of family life which the state cannot enter.”221 It could thus be argued that the sired’s private interest prevents the state from asserting a duty of fitness on prospective parents. Intruding on the realm would violate parents’ “intrinsic human rights,”224 which proceed from biology.

This private interest and realm, however, as well as the act of treating the prospective child as an entity incapable of holding rights—which thereby creates correlative duties—can be called by another name: property.225

Most people think of *Meyer* and *Pierce* as primarily about intellectual liberty and secondarily about family autonomy. I have suggested that they are also about property—property in children . . . I have flipped the coin of family autonomy to show its underside, stamped with “liberty” but standing for the power to own another human being and to cast social regulation of this power as an assault on freedom.226

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225 Note the language surrounding discussion of the realm. See, e.g., id. at 846 (“Moreover, the natural parent initially gave up his child to the State only on the express understanding that the child would be returned in those circumstances.”). Commentators have long recognized the connection between property and parental claims. See HENRY H. FOSTER, JR., A “BILL OF RIGHTS” FOR CHILDREN 4 (1974) (“We inherited a common law concept of status derived from a feudal order which denied children legal identity and treated them as objects or things, rather than as persons. Chancery, with its vague doctrine of parens patriae, and occasional interventions by ecclesiastical courts, accorded only slight amelioration of a paternalistic common law.” (footnotes omitted)).
226 Barbara Bennett Woodhouse, “Who Owns the Child?”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1112–13 (1992). For a sustained and comprehensive attack on the inviolability and presumed justice of the traditional biological family realm, see generally JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN (2006). Rawls eschewed any notion of an inviolable familial realm free of state influence. See RAWLS, supra note 139, at 166 (“If the so-called private sphere is a space alleged to be exempt from justice, then there
Excluding the interests of prospective children (or extant children) on this ground raises several ethical questions. Is it just to treat prospective children either as non-entities, or at least as agents incapable of asserting claims? Does doing so conflict with principles we find elsewhere in law, in which the interests of children and future entities are fully recognized?

But there is another issue looming here—specifically with regard to prospective children and how they affect the logic of the familial realm argument. Case authority for such a realm is premised on a state invading an existing realm. Therefore, it is uncertain to what extent that authority would apply before the realm is created—that is, before the birth of a child whose abuse or neglect we are concerned about and before their nexus to the parent comes into being. In other words, how can the argument of the inviolable realm apply before the child, and thus the specific parent-child realm or nexus, becomes actual? If the realm does not exist before the child in question is born, one could treat procreative rights as lesser than parental rights. As described above, this is more consistent with constitutional doctrine, in that a prospective parent does not yet enjoy a “private realm” with regard to any child whose abuse or neglect we are concerned about.

The notion of a private familial realm—assuming we recognize it before the child in question comes into existence—also raises another issue. Where such a realm has been recognized, it is viewed as almost sacrosanct in many contexts. The family is viewed, in the highest forms of international law, as the “fundamental group unit of society.” The importance of protecting the family realm thus springs in part from the role it plays in creating society itself. This is intuitive—future citizens come, prepared or unprepared, largely

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227 See supra note 138 and accompanying text.
228 Of course, one might argue that the same logic that provides for the protection of future persons, or future interests, also protects a future or prospective realm. However, endowing a future realm with interests would require different ethical bases than those used to endow future children with interests. Whether a realm can assert rights and interests at all is uncertain.
from their family. But then it also seems plausible that society (represented by the state) would have an urgent interest, protection aside, in the creation of that realm.

This is the paradox of waiting to focus attention on the family realm until it is actually formed. In doing so, we create a disability on the state vis-à-vis the realm, treating it as an exclusive zone that the state cannot enter. But the state, cognizant of the great harm to children (and through them its own interests) occurring in the realm and having failed to exercise any care in the realm’s creation, feels and suffers under this disability. The state wishes to disavow the realm and intervene within it to protect those interests—eagerly waiting on the border for the harm required in order to act. When the harm comes, the state acts. But at that point, the state has not only failed to prevent the harm, it has also added to it through the intrusion itself.

If society and the state at least partially value the private realm of family life because it ensures the continuity of both entities, and both are intent on avoiding invasion of the realm in order to protect that interest, the state should ensure the realm is one that will not need invading. Doing so might also be in the prospective parents’ interest.

3. Prospective Parents’ Interest in a Duty to Be Fit. The discussion above has focused on the interest that prospective parents might have in avoiding a duty of fitness. However, it could also be that they have a compelling interest in such a duty. The same interests that parents have in a private familial realm—in the state not barging into the home to mandate counseling or treatment, to remove the children, to terminate parental rights, or to convict and sentence offenders—all weigh in favor of such a duty. By ensuring a duty exists ex ante, the realm is more inviolable and less likely to be invaded. Society, the state, and parents all benefit from the creation of a realm that is actually compliant with the law—and less subject to its intrusion.

The lower court in *In re Bobbijean P.* found that:

At this time the court is simply recognizing that the best way for the respondents to become capable parents for their newest baby, Bobbijean, as well as for their other children, is to concentrate on the things necessary to
make them adequate parents and not to make being a parent harder by having more children.\textsuperscript{230}

In many of the cases discussed above,\textsuperscript{231} the alternative to a no-procreation order would be for the court to order incarceration of the parent, as it would achieve the same result. One commentator recently hypothesized that probationers prefer no-procreation orders to incarceration, explaining why the orders are rarely reviewed on appeal.\textsuperscript{232} In theory, and perhaps the law must presume this, the probationers in these cases intend to become fit. If it can be objectively shown that a temporary no-procreation order would help them achieve this goal (and arguably it has),\textsuperscript{233} then such orders further that interest. Unlike liberty interests based on autonomy and self-determination, procreation also involves massive moral and legal responsibilities, the failure of which entail significant moral and legal liabilities. In Hohfeldian terms, the prospective parents wield a dangerous power over themselves, from which the state could temporarily immunize them.

This poses the perhaps controversial question of whether the state should protect the interests of prospective parents against themselves. As Professor James Gordley has argued, paternalism makes most sense when the fear is:

\begin{quote}
[N]ot that a person may choose wrongly, but that he has chosen an arrangement, however freely, that unduly
\end{quote}

\begin{footnotes}
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\item \textsuperscript{231} See supra notes 46–57 and accompanying text.
\item \textsuperscript{232} See Rachel Roth, "No New Babies!" Gender Inequality and Reproductive Control in the Criminal Justice and Prison Systems, 12 AM. U. J. GENDER SOC. POL'Y & L. 391, 406 (2004) ("The prospect of jail time no doubt has a chilling effect on the pursuit of appeals."). Of course, this raises the question of whether the probationers waived a right they value only under the threat of going to jail, thereby making the waiver constitutionally invalid. It is hard, however, to avoid seeing a probationer’s choice of a no-procreation order over incarceration as expressing a real preference for the former. While the unconstitutional conditions doctrine might prevent courts from making probationers decide, the trend is still telling. It suggests the right to bear children is at least not as valued as strongly as certain other liberty interests.
\item \textsuperscript{233} See Stich, supra note 17, at 1030 n.118 (discussing court’s finding of authority showing that birth of additional children increases risk of abuse and neglect of all children, in part due to financial problems, stress, and social isolation).
\end{itemize}
\end{footnotes}
restricts the choices that he should make for himself. The clearest example would be selling oneself into slavery... Thus the state might intervene so that individuals would have more control over choices they should make for themselves.234

Parenting places long-term strictures on the lives of procreators. For persons unfit to parent, having children may represent what ethicists consider to be a repugnant option,235 or a choice (like gambling) the very existence of which can limit autonomy.236 Will we reject placing any duty on the procreative right so as to give it unfettered to all prospective parents, pretending that doing so is in the parents’ interests? In doing so, we would be ignoring the Pandora’s Box we have given them, which will open upon birth of the prospective child. Is doing so in line with notions of an egalitarian society, when that society at the same time refuses to provide equal access to more basic—and unencumbered, but rather empowering—goods like justice, healthcare, and education? Treating procreation as an interest superior to these more beneficial goods makes no sense.

There is in fact a relationship between procreative choice—along with the time and other resources that even the minimal provision of care requires—and poverty.237 Having children can exacerbate
rather than eliminate poverty traps and class stratification.\textsuperscript{238} Many scholars focus on poverty as a cause of parental unfitness,\textsuperscript{239} but it is certainly a two-way street. It would be counter-productive to urge unfit prospective parents to take on obligations they cannot meet.

Of course, opponents will scoff at the notion of paternalism in this context; not because it is ethically offensive, but for the more troubling fact that—legal duty aside—the prospective parents may never actually be subject to liabilities for having children they are not fit to care for. There are few, if any, legal disincentives preventing parents from simply relinquishing their children to the state, as the cases preferring no-custody orders to no-procreation orders reflect.\textsuperscript{240} If parents need never care for the child they procreate and never suffer any negative consequences for failing to do so, there is little need for paternalism.\textsuperscript{241}

This lack of an actual duty underlies the opinions of courts that overturn no-procreation orders in favor of no-custody orders that prevent parents from taking custody of their children once they give birth. Such orders raise the antithesis of the principle, or a lack of duty, as well as serious constitutional issues.

C. THE ANTIITHESIS OF THE PRINCIPLE, AND WHY IT FAILS

The antithesis of the principle of a duty of prospective parental fitness is simply that there is no duty on a prospective parent to be fit when he or she has a child. As Emily Jackson argues, a couple “could be crack-addicts and known child abusers, who have had all

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\item[\textsuperscript{238}] See Dasgupta, supra note 135, at 635–36 (discussing effects of population growth on environment and ability of family to achieve higher socio-economic status).
\item[\textsuperscript{240}] See infra Part IV.c.
\item[\textsuperscript{241}] Consider the prevalence of safe haven laws permitting parents to effectively abandon their children at hospitals or other designated “safe havens” without suffering legal consequences. Recent events in Nebraska illustrate the extreme limit of such policies: the Nebraska statute, enacted in July 2008, imposes no age limits; consequently children as old as seventeen have been abandoned in the state, including one twelve-year-old whose mother drove nearly 1,000 miles to leave her son at a Nebraska hospital. Chris Reinolds, Smyrna Preteen Given Up: Nebraskans Accept Child, ATLANTA J.-CONST., Oct. 27, 2008, at A1.
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of their previous six children taken into the care of the local authority . . . . [P]rotecting their bodily integrity and sexual privacy trumps our concern about the risk of harm they present to future children.”

This may seem like an abstract proposition with no application, but it manifests itself throughout the law. Consider again Justice Bradley’s dissent in Oakley: “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.”

This antithesis manifests in a uniquely apparent way when appellate courts overturn no-procreation orders on the grounds that this potential infringement on the procreative right is unnecessary, as the state can simply take and protect the child via a no-custody order. The argument is simply that because the probationer can require a parent to deliver a newborn child directly into state custody, the child is not threatened and the procreative right need not be curtailed. In other words, it seems that current precedent requires that the parent have the child so that the child can then be taken away, most likely to a virtually unfit foster care arrangement.

This is tantamount to a statement that the procreative right is a claim-right to bear a child with no attendant claim-right to custody (and certainly no correlative duty of care or to arrange for care) over the child. This statement, as an incoherent characterization of the procreative right, has already been criticized above. Yet commentators have gone further in arguing against such holdings, finding that courts arrive at no-custody orders with constitutionally

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242 Jackson, supra note 28, at 184.
243 State v. Oakley, 629 N.W.2d 200, 219 (Wis. 2001) (Bradley, J., dissenting).
244 See Arthur, supra note 2, at 69–71 (discussing Pointer, Howland, and Rodriguez decisions); Callahan, supra note 17, at 72–73 (discussing Howland and Rodriguez decisions).
245 Even if foster parents stand ready, foster care is itself a creature of the state. See Smith v. Org. of Foster Families for Equal. and Reform, 431 U.S. 816, 845 (1977) (“A foster family has its source in state law. . . .”).
246 See Callahan, supra note 17, at 72 (discussing view that no-procreation order “add[s] nothing to decrease the possibility of further child abuse or future criminality,” (alteration in original) (quoting Rodriguez v. State, 378 So. 2d 7, 10 (Fla. Dist. Ct. App. 1979))).
247 See Balmer, supra note 21, at 937–38 (noting widespread abuse, neglect, and increased criminal behavior associated with children raised in foster care).
248 See supra Part IV.B.1.
suspect analysis and that the orders are ineffective, inconsistent with the goals of probation, and harm the mothers from whom the children will be taken at birth more than a no-procreation order would.\textsuperscript{249}

The antithesis raises even larger questions. Can the state be the primary custodian and caregiver of prospective children? Can the state constitutionally hold these duties of care and fitness? Note that this question differs from the question of whether states can place a duty of fitness on prospective parents based on correlative claim-rights by the state and prospective children. I have argued at length that the state can act to protect future interests and even persons (prospective children).\textsuperscript{250} Court ordered custody of prospective children arguably does this, but the crucial point is that it does so much more: the state assumes the duty for the care of prospective children not by requiring things of the natural parent, but by taking on the duty itself.

That scheme, and the underlying proposition that the state has the primary duty of care for future children, is incoherent and arguably unconstitutional given the cardinal presumption underlying all family law, that natural parents as “first best caretakers,” and not the state, carry the exclusive primary duty to raise children.\textsuperscript{251} As a leading casebook on the subject of children in the legal system makes clear, we have not adopted the Spartan rule “that children belong, not to their parents, but to the state.”\textsuperscript{252} The prima facie right, as well as the primary duty, falls squarely and

\textsuperscript{249} See Arthur, supra note 2, at 71–79 (noting instances of recurring child abuse, inadequate foster care, and emotional harm to biological mothers denied custody at birth); Callahan, supra note 17, at 75 (“[M]y position is that immediately removing a woman’s infant(s) and permanently precluding her from taking custody of her biological child(ren) is far more restrictive of a meaningful right to reproduce than is temporarily prohibiting her from reproducing. . . .”).

\textsuperscript{250} See supra Part IV.A.

\textsuperscript{251} See DAVIS ET AL., supra note 118, at 1 (arguing that foundation of our family law system is premise that "parents are the 'first best' caretakers of children"). The procedural posture of these cases would make testing their constitutionality difficult. However, to the extent the courts’ actions are based on specific statutes and a given state authorizes broad taxpayer actions and standing, a challenge would not be impossible.

\textsuperscript{252} Id. at 631 (quoting In re Tuttendario, No. 7289, 1912 WL 3920, at *3 (Pa. Quar. Sess. 1912)); see also Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (“In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians.”).
exclusively on the shoulders of natural parents. This core constitutional doctrine is described in no uncertain terms by the Supreme Court in its leading child welfare cases: “The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”253 “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”254 “The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”255 Martha Minow notes that, among other principles the Supreme Court adheres to in describing the constitutional law of the relationship between child, parent, and state, one important principle is that “parents have primary responsibility to raise children.”256

This duty is primary, in that it originates and lies with the parent. This rule is core constitutional doctrine. It prohibits the state from becoming a procreator and parent, carrying as an institution the rights and duties reserved for parents by the Constitution. It assures the pluralism upon which our democracy relies because the state cannot create, inculcate, and thereby control the citizenry that elects it, or, in other words, the state cannot make the child a “mere creature of the state.”257 While the state can impose parents’ own prospective duties in the interests of the prospective child, it cannot—absent compelling necessity258—assume

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255 Troxel, 530 U.S. at 66 (quoting Wisconsin v. Yoder, 406 U.S. 205, 232 (1972)).
257 Pierce, 268 U.S. at 535.
the primary duty placed on those parents. Doing so without the justification of necessity would mean the state would in effect become Sparta, assuming the primary duty and role of parent.\textsuperscript{259} Leaving aside the empirical fact that the state makes a horrible custodian of children,\textsuperscript{260} as a matter of principle under our constitutional arrangement this is a role exclusively for—and obligatory on—the parent.\textsuperscript{261} Where an extant child must be placed in state custody to protect her from harm, the state can justify taking on the duty to parent out of necessity.\textsuperscript{262} But where is the necessity before the child is born?

Cases like \textit{Howland}\textsuperscript{263} are thus incoherent—simultaneously relying on the doctrine of the familial realm for a proposition of law for which it does not stand\textsuperscript{264} and violating the principle for which it does.\textsuperscript{265} It makes the state the family without any compelling necessity, encouraging the child to be born into its custody and destroying the division the doctrine of an a priori familial realm is premised upon.\textsuperscript{266} In violation of \textit{Pierce}, it makes the child the “mere creature of the state.”\textsuperscript{267} Moreover, how can this be squared with Locke’s view of parents’ duties to their children and others in society, as represented by the state?\textsuperscript{268} It obligates others, through the state, to care for children they had no role whatsoever in creating.

The \textit{Howland} court and similar courts not only place a duty on the state that the state cannot take, but they sever the procreative right from any correlative duty of care to prospective children, in defiance of all of the ethical and legal authority discussed above.\textsuperscript{269}

\textsuperscript{259} See Woodhouse, supra note 226, at 1089–90 (noting Plato’s and Sparta’s proposition that children be taken from parents and placed in hands of state).

\textsuperscript{260} See supra notes 4–7 and accompanying text.

\textsuperscript{261} See supra note 26 and accompanying text.

\textsuperscript{262} See Guggenheim, supra note 258, at 619 (noting that state may have moral obligation, as well as constitutional obligation, to care for child whose parents cannot provide care).

\textsuperscript{263} Howland v. State, 420 So. 2d 918 (Fla. Dist. Ct. App. 1982).

\textsuperscript{264} See supra Part IV.B.2.

\textsuperscript{265} See \textit{Howland}, 420 So. 2d at 920 (finding that no-procreation condition only reasonably relates to future criminality if defendant has custody of child he begets).

\textsuperscript{266} See id. (finding no-procreation condition invalid since defendant is already prohibited from having contact with or residing with his minor children).


\textsuperscript{268} See supra notes 133, 217–18 and accompanying text.

\textsuperscript{269} See supra Part IV.B.
Where is the state’s compelling interest in assuming the duty, rather than imposing it on the prospective parent? In the case of extant children, it does so because it must. The parent will not—or cannot—and the state has to protect the child and itself. The extant child is present and suffering. But assuming a duty with regard to prospective children—as the state is forced to do by court order in cases like *Howland*—works to the state’s detriment, incentivizing unfitness by removing any accountability for the unfit parent having a child that the parent cannot care for, and creating a burden on the state contrary to its interests.\(^{270}\)

The duty on the state aside, the antithesis would value the procreative right over parental rights, assuring a right to procreate but not to parent. This seems to be an inconceivable result when one contrasts the differing levels of support for procreative and parental rights: parental rights are well established while procreative rights are not. If a state interest in preventing harm can override the parental right, it can certainly override the procreative right.

Thus, the antithesis seems unworkable for several reasons. In contrast, the principle of a duty of prospective parental fitness avoids these pitfalls, both constitutional and logical, by better balancing the interests of all.

\section*{D. THE PRINCIPLE AS NARROWLY TAILORED TO EFFECTUATE THE WEIGHTIER INTERESTS}

How would a duty on a prospective parent to be fit when he or she has a child effectuate or impinge on all of these various interests? Ideally, it should not impinge on any of the prospective parents’ interests more than what is required to actually and fully effectuate the state’s interests, including the interests of the prospective children whom the state represents.\(^{271}\)

\(^{270}\) See *supra* Part IV.A.

\(^{271}\) See Arthur, * supra* note 2, at 72 (“[T]he ideal probationary scheme for which the courts should strive would eliminate the opportunity for repeated child abuse without violating reproductive freedom.”). Arthur also argues that any alternatives to an *Oakley* no-procreation condition cannot be accepted unless they accomplish the state’s objective as effectively as a no-procreation order. *Id.*
For the prospective parents, such a duty would delay exercise of their procreative right. Depending on how one reads the procreative right, this may or may not be a substantial infringement. For example, if we take the procreative right as bound up with and inseparable from an intent and ability to care for the resulting child—as many courts and commentators do—there is arguably no infringement. In order to properly claim and state such a right, prospective parents would also have to show a desire and perhaps ability to care for and protect the child. The duty of fitness is thus part of (and correlative to) the right itself, meaning it does not infringe on the right at all.

If we view the right as *tout court*, however, carrying no such duty, then imposing one would infringe upon the right by delaying its exercise. Prospective parents would rely on dicta in *Skinner*, as well as *Griswold*'s line of privacy cases, to argue that such a delay unconstitutionally infringes on their fundamental procreative right. They would also argue that the state and the prospective child's interests are not sufficiently compelling to justify the delay, or that some lesser restriction on the procreative right—such as a no-custody order—would effectuate those interests just as well.

The duty could, however, further the interests of prospective parents in the inviolability of the family realm by at least attempting to ensure the fitness that would prevent the state's later intrusion. In this way, and noting that the familial realm with respect to the prospective child has not yet been formed, the realm itself seems to weigh in favor of the duty. Certainly other autonomy and self-determination interests also weigh in its favor. These are the interests would-be parents have in the state taking a more paternalistic role in procreative decision making—a role that the parents will later undoubtedly claim to be beneficial.

Also, the duty perfectly effectuates the interests of the state and prospective children. It would seek to ensure a sufficient environment of care for the children that will become the state's

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272 See *supra* notes 202–04 and accompanying text.
273 See *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942) (recognizing right to procreate is basic civil right, but striking down Oklahoma's Habitual Criminal Sterilization Act on equal protection grounds).
274 See *Griswold v. Connecticut*, 381 U.S. 479, 483–84 (1965) (recognizing right to privacy found in penumbras of other constitutional guarantees).
constituent elements, and it would prevent prospective parents from infringing on the rights of others by having children they would not care for or control. Prospective parents would also be prevented from foisting the duty on others, thereby ensuring an incentive for prospective parents to become fit. Where siblings are involved, the duty would make resources available for the other children in the family. The duty might also reduce the harms and negative externalities that are inherent in every act of procreation by, at the very least, ensuring the countervailing benefit of children being born into fit families.

In terms of prospective children’s interests, the class-based and subjunctive-threshold/constructive consent approaches, as well as the other perspectives discussed in Part IV.A, describe the interests these children share (despite the nonidentity arguments made by some commentators)\(^{275}\) with the state when they are born to fit parents. These approaches logically explain the concern for the welfare of future children that more thoughtful persons—and yes, probably even our nonidentity adherents—feel when they consider becoming parents.\(^{276}\) This concern leads them to properly time and prepare for each birth. The key question here is how to articulate a more objective standard which prospective parents must meet. The law already provides such a standard. Because fitness is the undisputed legal minimum standard parents must meet to retain custody and rights to their children,\(^{277}\) we can assume the law takes lack of fitness as representing some substantial degree of harm to children. In fact, such harm has been held to be enough to justify the state overriding constitutional parental rights and invading, if not dissolving, the familial realm.\(^{278}\) The principle of a duty of

\(^{275}\) See Brock, supra note 29, at 203–04 (describing Parfit’s nonidentity problem).

\(^{276}\) See supra notes 160–65 and accompanying text.

\(^{277}\) See Troxel v. Granville, 530 U.S. 57, 68–69 (2000) (“[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family. . . .”).

prospective parental fitness, as opposed to its antithesis,\(^{279}\) seeks to avoid this harm.

If the duty of fitness does not arise until the child has arrived, the parent can breach that duty, necessitating removal of the child and possibly termination of parental rights by the state. But how does that actually remedy the harm to the state’s or the child’s interest? The “remedy” in that case constitutes a net loss for the state, parent, and child.\(^{280}\) The state suffers under its own failure to ensure care for its future citizens and must call on others to attempt to fill the gap. The parents’ rights are infringed and their home is subject to intrusion. And the child, most of all, will not have its most minimal needs met. This loss cannot be remedied or compensated for, and the parties cannot be put back into their original positions; the “remedy” constitutes an irreparable injury to all. By wrongly treating it as compensable, the antithesis invites such repetitive irreparable injury, leading to a constant reduction in the overall quantum of child welfare.

And yet, in contexts where there is far less, if any, harm—as in the case of surrogacy contracts\(^ {281}\) or the regulation of some pharmaceuticals and medical devices\(^ {282}\)—the state does not wait, but

\(^{279}\) See Arthur, supra note 2, at 73–83 (discussing in empirical terms why counseling, foster care, and termination of rights all fail to sufficiently effectuate interests of state, parent, and child).

\(^{280}\) As the Court found in Santosky, the assumption that the termination of the natural parents’ rights will benefit the child, is a hazardous assumption at best. Even when a child’s natural home is imperfect, permanent removal from that home will not necessarily improve his welfare. . . . Nor does termination of parental rights necessarily ensure adoption. . . . Even when a child eventually finds an adoptive family, he may spend years moving between state institutions and “temporary” foster placements after his ties to his natural parents have been severed.

Santosky, 455 U.S. at 766 n.15 (citations omitted). But bear in mind that the state’s—or its proxies’—proof that a parent is horrible does not automatically militate in favor of natural parents, especially if the natural parents’ own insufficiency caused the state to have to take up parenting in the first place.


\(^{282}\) It has been convincingly argued that some birth defects are not harm at all. See Brock, supra note 29, at 203–04 (describing John Robertson’s arguments regarding Parfit’s example of child with withered arm). Furthermore, such defects might be acceptable to prospective parents and might not involve the state’s interests at all.
rather applies something like the principle and seeks to avoid the harm. The state recognizes the future interests and claims of future people and seeks to achieve an ethical and logical result. But in the context of child welfare, an area that should be of primary interest to any state, the state suddenly halts and waits for a harm it cannot remedy. By applying the principle of a duty of prospective parental fitness and its antithesis, we see that only the former actually effectuates the state interest, and in a way this, at most, only delays the prospective parents’ procreative right while still furthering all of the other interests involved.

As a more general matter, temporary and injunctive measures are specifically designed to avoid irreparable harm, in that the law should not allow a foreseeable injury to occur that it cannot remedy. In contractual or tort disputes between private parties, where there is no state interest and a child’s welfare is not at stake, the law seeks to prevent irreparable injury by allowing immediate injunctive relief.283 This reflects the age-old rule that when an injury cannot be remedied adequately the law should avoid it. But if we adhere to the antithesis here, in an area where all of the interests could not be more compelling, the state is suddenly absent, insisting that irreparable injury must occur before it interferes. This is disjointed and illogical: where an Oakley order284 could temporarily suspend the procreative right to circumvent irremediable harm, courts applying the antithesis, as in Howland,285 instead choose to wait for the harm.

The interests that the state, the prospective children, and the prospective parents all share in avoiding the irreparable harm brought on by unfitness trump any interest a prospective parent might have in avoiding a temporary interference with their procreative right. The state has at stake the creation and care of those citizens that will determine its future and the rights of others

285 See Howland v. State, 420 So. 2d 918, 920 (Fla. Dist. Ct. App. 1982) (invalidating no-procreation condition as not reasonably related to future criminality because defendant was already prohibited from having any contact with his offspring).
that would be saddled with a duty of care for a child they did not create. Prospective children have at stake a minimum level of care and fitness, which the law has already determined they should have.

Consider too, that even if proponents of the nonidentity argument prevail, which is extremely unlikely, this would only prevent the weighing of the interests of the prospective child that has allegedly been harmed. This does not mean the state’s detached interest in parents being fit, thereby avoiding certain costs and harm to the state, would not by itself outweigh the narrow interests of the prospective parents in avoiding fitness. Even Emily Jackson seems to admit that, in fact, it would. The state could hardly assert a greater interest than its interest in the care of its future constituents.

Nothing an unfit prospective parent could assert about his or her right to procreate at will—especially when doing so would be harmful to their own interests—is as compelling as all of these interests. The imposition of the duty and the temporary suspension of the procreative right, as the only means of effectuating the state’s compelling interests in assuring ex ante parental fitness and avoiding the irreparable harm unfit parenting causes, is a narrowly tailored measure.

V. CODIFYING THE PRINCIPLE

By codifying the principle of a duty of prospective parental fitness, a principle that could be applied in cases in which courts already have jurisdiction over persons adjudged unfit to parent, states could avoid the procedural and substantive mire that plagues the current debate over no-procreation orders. Other commentators have suggested something similar. By failing to codify the

\footnotesize{See Jackson, supra note 28, at 191 (“[W]here the gist of the objection to a particular would-be parent is the likelihood that their child would be taken into the care of the local authority. . . . the state may have economic, as well as child welfare reasons for denying treatment to a particular couple.”).}

\footnotesize{See Adrienne McKay, Termination of Parental Rights in California: Why a Temporary Prohibition on Conception Would Have Better Served Ethan N., 35 Sw. U. L. Rev. 61, 66 (2005) (suggesting that implementation of statute permitting judges to order temporary prohibition against conception would further legislative intent to preserve child’s stability and continuity); Stich, supra note 17, at 1053 (discussing preferable of legislative action over judicial discretion).}
authority and specify the exact procedure, state legislatures have simply shifted the political burden to the courts—preferring not to deal with what is no doubt a sensitive issue among voters—thereby exacerbating the child welfare crisis. It seems likely that there are courts around the country that want to balance the equities I have described through the use of a temporary no-procreation order, but absent express statutory authority, these courts are likely unwilling to risk reversal by wading into the sea of confusion braved by the courts in Oakley, State v. Kline, and In re Bobbijean P.

As discussed above, most of this confusion lies in the uncertainty surrounding probation orders generally, the lack of statutory authority for family courts to issue no-procreation orders specifically, and the confusion about whether such orders satisfy constitutional requirements. States could avoid this by statutorily authorizing a proceeding based on the same constitutional due process standards required and long upheld for termination of parental rights, as laid out in Stanley, Lassiter, and Santosky—a proceeding based on clear and convincing evidence of a lack of fitness which provides counsel for the prospective parent. In theory, primary jurisdiction would lie in the state’s equivalent of family court—a court normally vested with equitable and injunctive authority—which would already have jurisdiction based on the prospective parent’s prior acts of abuse or neglect. This court would be authorized to issue a temporary no-procreation order, which could be withdrawn when fitness is established or could be converted to a no-custody order—with penalties—in the event that

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288 Oakley, 629 N.W.2d 200.
291 See supra Part III.A.
293 Matters of jurisdiction and practicality aside, this may be integral to establishing clear and convincing evidence of unfitness.
For example, Dan Kahan has noted the problem of “sticky norms.” See Dan M. Kahan, Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem, 67 U. CHI. L. REV. 607, 607–08 (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 Eric A. Posner, Symbols, Signals, and Social Norms in Politics and the Law, 27 J. LEGAL STUD. 765, 795–97 (1998) (discussing problems with states supplying or encouraging norms through legal incentives); 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 . . . .”).

In re V.R., No. 5616-04, 2004 WL 3029874, at *8 (N.Y. Fam. Ct. Dec. 22, 2004). In reaching its decision to issue a no-procreation order, the court provided the following analysis:

The court offers these factors as a 4-prong test narrowly tailored to meet the “strict scrutiny test” for impinging on constitutional rights. . . .

(1) a neglect case is pending against the parent involving the removal of a child; and

(2) the parent has previously had one or more children placed in foster care, voluntarily or involuntarily, or placed with a relative resource or similar individual as an alternative to foster care under the supervision of the Department; and

(3) the parent has demonstrated that he or she will not or cannot for the reasonably foreseeable future have the capacity to physically take care of the activities of daily living of a child at issue in the neglect case, i.e., providing food, clothing, shelter, health needs, education needs, etc; and

(4) the parent has demonstrated that he or she will not or cannot reasonably for the foreseeable future provide for the child’s needs financially, by any legitimate means (including welfare, temporary assistance, disability payments, unemployment, wages, wages of a spouse or partner, etc.).

Id.
principle of prospective parental fitness without the clear authority to do so. As the court noted, the procedure would survive strict scrutiny, and this is consistent with the proper balancing of interests that I described in Part IV. Quite simply, the state has no other means to effectuate its compelling interest in assuring parental fitness. Any ex post measure is actually contrary to most of the interests involved—including that of the state—and ensures irreparable harm. No measure that prevents the state from acting until the parent has proven unfit can be said to effectuate its interest.

All of this presumes, as did the court in In re V.R., that such measures would be subject to strict scrutiny analysis. Given the right level of procedure, however, that may not be the case at all. Another more interesting point, based on the discussion in Part IV.B.1, is that even if substantive due process would apply, each and every act of procreation cannot be considered a fundamental right protected as such under the Constitution. Despite the dogma surrounding procreation as a fundamental right—dogma that undoubtedly has kept even courts faced with criminally unfit parents from applying the principle of prospective parental fitness—actual authority supporting procreation per se as a fundamental right is lacking. Even the most fervent supporters of a broad procreative right tend to condition it on something akin to, if not the equivalent of, prospective parental fitness. All of this suggests that, in constitutional terms, procreation with no intent to care for the prospective child would be treated as a mere liberty, derogation of which would not be subject to strict scrutiny analysis.

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296 Id.
297 Id.
298 See Arthur, supra note 2, at 86–93 (discussing procedural due process standard of review used for conditions of probation requiring birth control). The standard of review to be applied remains an open question. In a case involving a social service worker conditioning the return of a mother’s children on the mother undergoing a tubal ligation, the Eighth Circuit argued at the summary judgment phase that the state could not dispense with procedural protections in coercing an individual to submit to sterilization—even assuming a compelling state interest. Vaughn v. Ruoff, 253 F.3d 1124, 1129 (8th Cir. 2001). On appeal following the trial, however, the Eighth Circuit denied characterizing the mother’s claim as a procedural due process violation, concluding instead that “the coercive threat of losing one’s children speaks to a substantive due process issue.” Vaughn v. Ruoff, 304 F.3d 793, 796 (8th Cir. 2002).
299 See supra Part IV.B.1.
Another view of the procreative right treats it as fundamental (though subject to derogation, as all rights are) up to the point of the procreator replacing herself; thereafter, however, the right is subject to limitation based on the equivalent of rational basis review. Given the statutory model described, parents falling under it would have already had a child or children that they had abused and neglected, so strict scrutiny would not be required.

All of this can be considered, and the same conclusion reached, by comparing the procreative right to the parental right. If the state’s interest in fit parents is sufficiently compelling to divest parents of their fundamental parental rights, it is sufficient to temporarily suspend their procreative rights, especially when only the latter approach can be said to rationally protect and further virtually every interest at issue.

VI. DISTRIBUTIVE INJUSTICE

In the intense debate over how best to prevent the child welfare system and the children in it from falling further into the abyss, experts agree that the ebbs and flows come and go based largely on the distribution of wealth. To stay out of the system, children require resources that society has refused to give them:

The abysmal conditions of poverty and despair into which millions of poor children are born are not immutable facts of life. It is essential that we determine the extent to which these conditions are caused by factors for which we may hold the larger society accountable and, therefore, could improve or eliminate.

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300 See generally Dillard, supra note 69 (positing that procreative right includes—at minimum—act of replacing oneself and—at most—procreating up to point that optimizes public good).

301 See Guggenheim, supra note 2, at 1742 (arguing that equal distribution of resources would obviate need to remove poor minority children from their own communities in order to improve their quality of life). Note that the use of a fitness standard, in theory, makes fulfilling procreative or parental duties less contingent on wealth than a “best interests” standard might.

302 Id. at 1738.
The isolating and individualizing nature of “rights talk” aside, some rights and duties cannot be meaningful if left entirely to one’s luck of the draw in life. For instance, the ability to meaningfully exercise one’s right to counsel in a criminal trial depends on one’s wealth, and others’ wealth should be (and is, in theory) redistributed if the defendant’s is lacking; so too with parental rights—though how exactly the wealth should be distributed is debatable.303

We step out of this debate if we consider how to redistribute wealth to prospective parents, rather than extant parents. If we consider how to provide for children before they actually arrive, it is an entirely different matter. This would entail a preferable debate over how to create social conditions so that parents are “not likely to produce children they are not able to care for.”304 The principle of a duty on prospective parents allows us to preemptively distribute and equalize procreative, as opposed to parental, rights. This would have several advantages. It would be designed to ensure that prospective parents fulfill their duties to their prospective and eventually extant children, rather than retrospectively trying to repair the irreparable damage to all concerned resulting from the parents’ failure to fulfill their duties.

It would also provide a better moral claim to sufficient, and perhaps even substantial, redistribution. Whether or not the principle is codified, there is arguably a strong sense among some that procreative and parental rights should be contingent on duties. A system (such as that represented by the antithesis) that allows unfettered exercise of procreative and—whenever possible—parental rights, without ever actually enforcing the duties, flouts this sense of how things should be.305 It forces a limitless duty of care onto others who may not want it. Could this sense of duty nonetheless creep back in politically, if not legally, and seek to force the duty back on parents by refusing to provide resources to children (i.e., as an almost passive-aggressive expression of the duty)? This could be the price of treating procreation as a private or autonomous

303 See id. at 1741–43 (criticizing view that privileged Americans should adopt poor children and arguing instead for greater social responsibility and recognition of family unit).
304 Callahan, supra note 17, at 77.
305 Consider Bartholet’s arguments for adoption, supra note 2. Perhaps there has to be some quid pro quo, where society is only willing to care for children with whom they can be assured a parental relationship and the chance to provide love and care in exchange for the same.
act—prospective parents cannot have it both ways. If having children is a private matter, caring for them may be as well.

Alternatively, the principle of a duty on prospective parents forces us to confront the issue squarely, and actualizes the moral limits (in the form of duties) on procreative and parental rights upon which society’s redistributive desires may be contingent. When imposed, such limits would mean more resources would willingly be given to allow unfit prospective parents to become fit up front. Consider Philip Peters’s three-step inquiry weighing the advantages and disadvantages of alternatives from the perspective of the prospective parents and children: resources that would otherwise go to care for failed and unfit families would instead go to avoiding them. The state need not be Sparta to marshal the resources of all of its citizens in the interest of their collective future. This in turn would create a well-documented economic paradigm—the “demographic dividend”—that would create economic growth and development.

This seems to be intuitively desirable. Imagine the task of creating a more egalitarian distribution of fitness for an array of prospective parents. Now envision the task for the same array of unfit extant parents and the families they oversee. Is there something perverse in insisting on the latter scenario? If we feel compelled to do so, that compulsion should provide us with a lens to see just how much the myth of the broad procreative right skews our moral senses. The right becomes a meta-right, obligating irreparable injury to the interests of society, prospective children, and perhaps to the parents themselves.

VII. Conclusion

A codified version of the principle of a duty of prospective parental fitness would be no more than a crystallization of the moral and legal obligation that operates intuitively on the decision making
of most prospective parents—which might account for a significant portion of the well-being in the world today—and that underlies the holdings of courts in cases like Oakley. It is better to bring out the duty of prospective parental fitness as concrete matter for debate and the democratic process than to leave it for ad hoc application by courts who must risk reversal on abstract grounds unrelated to the equities at issue. Doing so would promote a result that furthers most of the interests involved, and certainly the weightier of those interests. The codification would address the crisis of child welfare at its source, rather than trying to play catch-up after the most compelling interests at issue have been irreparably harmed.

It is true that the child welfare system in the United States is a sea of conflicting interests—between children, their parents, and the state. But the interests are thrown out of balance because one in particular, the procreative right, is given preeminence, such that it pushes all others out of its way—unwilling to even be delayed—thus forcing the system into crisis. Our stream of abused and neglected children springs from this preeminence and from our failure to place any duty of fitness on prospective parents. And yet, the principle that would place such a duty on prospective parents is lurking throughout our law today—recognizing the future interests of future persons and protecting them in various contexts that are vastly less important than child welfare. Codifying this principle in child welfare law, where it is most needed, would side-step the procedural and substantive mire of the current debate, stem the stream of mistreated children, further most of the interests involved, reduce distributive injustice, and push the law in line with core constitutional principles. Adhering to its antithesis will do the opposite. The source of the stream is well known, but whether the law can venture there remains to be seen.