

## **What the State Owes ‘Bastards’: A Modest Critique of Modest One-Child Policies**

**MATTHEW LEE ANDERSON**

**ABSTRACT** *This essay criticises ‘modest’ one-child policies, which would impose sanctions upon parents who create multiple children. Specifically, this article considers what the state owes individuals who would be born (illegally) beneath restrictive procreative policies and argues that such policies would fail to show due respect to second- or third-born individuals created beneath them. First, I argue that modest procreative restrictions (like sanctions) are likely to generate only modest compliance. I then suggest it is reasonable to think a one-child policy fails to demonstrate due respect to existing second and third children. I argue that such a policy generates an undue burden on any second or third children who would be born beneath them, before concluding by considering whether the state might be able to avoid effectively reinscribing ‘bastardy’ into its law by locating responsibility for the effects of such a policy entirely on the parents, rather than on children.*

### **1. Introduction**

‘One-child’ policies often evoke visceral opposition, thanks in large part to their association with invasive means of enforcement like forced sterilisations or abortions. When such unreflective repulsion is set aside, though, deep if inarticulate intuitions that there is a fundamental right to procreate free of the state’s prohibitions often remain. Moral philosophers have recently argued, though, that the right to procreate does not extend to having multiple children. On theories where rights are founded in interests, whatever is worthwhile about procreating (as distinct from parenting) can be satiated with one child or with ‘self-replacement.’<sup>1</sup> As the refrain goes, the right to procreate is not an absolute right to unlimited procreation. Weakening the right to procreate this way makes one-child policies more palatable, provided that they respect other rights, such as privacy or bodily integrity.<sup>2</sup> In this way, philosophers like Sarah Conly have defended modest one-child policies, which seek to control population growth through education, incentives, or financial penalties – rather than coercively requiring sterilisation or abortions.<sup>3</sup>

This essay argues that imposing penalties for procreating too many children generates dilemmas for a liberal state that, at best, should make such policies options of last resort, if not preclude their implementation altogether. One path a critique of modest one-child policies might take would be to argue that whatever grounds the right to procreate is not satiable after one child, but sustains a right to multiple children. Alternatively, one could argue that the fundamental right is the broad right to found a family, which gives individuals a wide degree of latitude over both the size and means by

which they form it. This second strategy would bundle the right to procreate inside a cluster of closely related practices of family formation, and so shift the discussion of the state's limits over family formation away from its authority over procreation *per se*.<sup>4</sup> The argument I develop here attempts to sidestep these fundamental questions about the basis or satiability of the right to procreate, though. Not only are such strategies unlikely to be successful, they remain within the parent-centric account of procreative rights I wish to challenge here. In other words, by focusing on the limits of the state's ability to restrain the reproductive choices of prospective parents, such arguments overlook what the state owes individuals created beneath such restrictive policies.

I develop my worries as follows. First, I suggest that the puzzle about one-child policies arises from two sources: the asymmetrical nature of procreative norms and the fact that modest enforcement will likely lead to only modest compliance. I then take up Sarah Conly's argument that prohibitions on procreating can demonstrate equal respect if it is generalised in such a way that does not select for characteristics or competence. I suggest that the principle of vicarious blame that Conly seems to accept implies that existing second or third children would be stigmatised by a one-child policy. I then turn to my central worry about such policies, namely, that they would burden second and third children with the stigma of having been told by their government that they ought not exist. My worry is that such a stigma fails to satisfy the respect they are owed by their government. Finally, I consider whether the government might mitigate this message by extending compensatory benefits to 'illegitimate' children, and whether such a compensation would justify one-child policies.

## 2. Modesty and the Likelihood of Malfeasance

Determining the basis or grounds of procreative rights is challenging because of the inherent interpersonal quality of procreative acts. Unlike any other wrong, violating a procreative restriction generates a person to whom the state, on most liberal accounts of government, owes respect.<sup>5</sup> Such a problem means that the right to procreate cannot be subsumed beneath broader rights like autonomy or privacy. Additionally, the rights to procreate and terminate are asymmetrical: the successful exercise of the positive right to procreate generates a new person, while the successful exercise of the right to avoid procreating does not. As Dillard observes, 'not procreating is personal; procreating is interpersonal'.<sup>6</sup> If procreation is ever prohibited, successful malfeasance inherently entangles another individual in its web in a way that terminating a life does not. Wrong-doing creates a new citizen to whom the state *prima facie* owes the same respect it owes any other citizen. The state takes into account the rights and interests of future individuals in setting its policies, which means it must consider these individuals as well. What does the state owe 'bastards' – children conceived illegitimately or outside its norms for appropriate procreation?

The question of what the state might owe 'bastards' is particularly urgent for modest one-child policies, which are likely to generate only modest compliance. Sarah Conly, the foremost defender of such views, argues a one-child policy might be equitably enforced through financial penalties that are indexed to people's incomes, and so equally burdensome upon individuals across the socioeconomic spectrum.<sup>7</sup> In this way, state restrictions on procreation can be both respectful and non-invasive. Yet,

Conly allows that such modest penalties are likely to engender only moderate success. As she (rightly) observes, we 'don't actually expect complete compliance' when we establish a law – nor do we invest the resources required to prevent each and every citizen from breaking it. At most, we might expect 'sufficient compliance' or 'common compliance'.<sup>8</sup>

It is easy to see how incomplete compliance would arise beneath a modest one-child policy. Some parents will simply view penalties as the cost of having a large family within their society.<sup>9</sup> Certain religious groups might aggregate their financial resources to pay procreative fines for their members, distributing their costs across their communities and so enabling parents to have larger families. Others would be incentivised to try to evade the penalties, perhaps by hiding the births of their children.<sup>10</sup> While the interest in having multiple children will doubtlessly diminish as the social and economic costs of child-rearing go up, it seems unreasonable to think that modest policies would extinguish it altogether. As nearly everyone acknowledges, the drive to procreate seems to be one of the most recalcitrant, durable features of humanity. While a government might need to consider what it owes to illegitimately created children in every context where it restricts procreative practices, then, the question seems especially pertinent to those situations where its restrictions are universally applied and accompanied only by modest means of enforcement.

My worry, which I develop below, is that the reason for a state's pursuit of modest one-child policies generates a tragic conflict between the interests of parents and those of children. A prospective parent's right to due and equal respect from their government grounds the state's limitation to 'modest' means of enforcement for one-child policies. But such a policy risks infringing upon the respect the state owes the second and third children who are created beneath it. In other words, the reason a state might pursue a modest, rather than an aggressive, one-child policy is the same reason why the state ought not to pursue such a policy.

### **3. Vicarious Applicability and Equal Respect**

Among the various entitlements or expectations that an individual might have of their government, few seem as central as the expectation that they will be treated equally and with respect. While the state's laws or policies might establish or respond to inequalities, we reasonably expect its disparate treatment to be accompanied by sufficiently weighty, non-arbitrary reasons. Otherwise, the government risks enacting what John Corvino and others have described as 'dignitary harm' – the 'harm involved in treating people as having less than equal moral standing'.<sup>11</sup> Such a harm is neither a feeling nor a psychological state: rather, it happens when the state fails to respect one's status as a citizen and person, by permitting or lending its imprimatur to discrimination on the basis of traits or attributes that are irrelevant to the pertinent context.<sup>12</sup> The government can clearly fail to protect its citizens against invidious discrimination within social interactions. But it can also impose 'dignitary harms' on citizens, by creating contexts in which discrimination on the basis of otherwise irrelevant attributes becomes possible. The possibility of such harms arising seem particularly tied to the law's 'expressive' dimensions, the message it sends to individuals about their standing within the community. If the state sends a message that an individual is not of equal

standing, it imposes a dignitary harm and thus fails to fulfill its responsibility to show equal respect to every citizen. In this way, the government wrongs that citizen – a term I employ to distinguish the ‘dignitary harms’ an individual suffers at the hands of their government from the psychological or social harms that message is likely to generate.<sup>13</sup>

The possibility of the state wronging citizens by imposing ‘dignitary harms’ is especially poignant for procreative policies, which rely heavily upon the law’s expressive dimensions for their effectiveness.<sup>14</sup> Those risks increase in proportion with the policy’s punitiveness. Where the state sends a message through incentivising, disincentivising, or merely educating about behavior, the risks of it wronging those who do not comply are very low. Attach sanctions to the policy, though, and those risks increase. As Conly observes, a disincentive ‘might do the exact same amount of harm to the individual as [a] sanction attached to breaking a law’, but even if the material effect is identical the ‘message is very different’.<sup>15</sup> A policy that discourages procreative action might still place stigmas on those who fail to comply; but those stigmas are far more likely to be dignitary harms in cases where the state’s policy is not simply to discourage procreation, but to prevent it by sanctioning it.

Conly allows that the state is obligated to demonstrate equal respect to citizens and argues that only a generalised procreative sanction, on the basis of number, satisfies such a constraint. As she puts it, ‘one of the things we most unequivocally have an interest in is equal respect’. But she objects to procreative sanctions that are founded upon a particular characteristic or the competence of the parents, and instead she defends sanctions that have been generalised in such a way that they are not disproportionately burdensome on anyone. Sanctioning procreation for competence invites prejudice: as she argues, many ascriptions of incompetence to parents are ‘simply reflections of our moral beliefs about the parent’s way of living, rather than a realistic assessment of the possibility of the child born to parents having a flourishing life’.<sup>16</sup> A characteristic-based restriction, such as restrictions on female children, would send an inherently disrespectful message to existing individuals with that characteristic. It would be a ‘statement about my worth, and about my children’s worth, and it is a statement that our worth is very little’.<sup>17</sup> Specifically, narrowly drawn procreative sanctions suggest the prospective parents’ ‘nonexistence is to be preferred to [their] existence’ and is thus an ‘insult of the worst kind’.<sup>18</sup> Generalising the restriction on the basis of number escapes these problems, provided that the sanctions are structured in such a way that they do not in fact disproportionately target certain segments of the population regardless of the government’s stated intent. A rule that only allows one child means everyone ‘would share the same status, and the opportunity to partake of the same good’.<sup>19</sup>

Conly’s objection to narrow procreative restrictions seems to rest upon a principle of vicarious significance, in which the message of a procreative restriction applies both to future individuals with that characteristic and its present bearers. The restriction presumes that children will be like their parents in the relevant way, which means the reasons for the restriction bear on the parents themselves. But Conly does not address whether generalising a procreative restriction circumvents this vicarious feature of procreative restrictions, or what role such a principle might have in generalised procreative restrictions which are based on number and not characteristics. I suspect there is at least some reason to think that the vicariousness of procreative reasons risks sending

a message to every second or third child already in existence that their 'non-existence is to be preferred' to their existence.

Suppose a modest one-child policy was implemented, as Conly argues it should be, on the basis of the impending ecological disaster and our demonstrable unwillingness to reduce our consumption of the earth's resources. Such a policy is generally applicable. But just because of its general applicability, its message seems to be not about a society's overconsumption of resources *per se* but about its overpopulation. Were such a policy enacted, it would seem to entail that any future second or third child would be a "child which ought not to have been born".<sup>20</sup> If such a message is vicariously attributable, then, it would apply to existing individuals who are themselves second or third children – regardless of whether they or their parents are conscientious consumers of resources or not.<sup>21</sup> While the state's *reason* for enacting such a policy might be to prevent ecological disaster, restricting procreation on the basis of number rather than consumption risks imposing stigmas on existing parents of multiple children, and on second and third children, even if those families have opted to be extremely sparing in their consumption so that they might responsibly have multiple children. The messaging significance of a policy is not limited to the state's reasons for enacting it, but includes its form: if a state aims at limiting population growth in order to dissuade overconsumption, its policy should be narrowly tailored so as to restrict *on that basis*, rather than on number alone.<sup>22</sup> At the very least, we would need some account of why the vicarious principle applies in cases of narrow restrictions, but not when restrictions are based solely on number.<sup>23</sup>

If such a principle holds, then a one-child policy would seem to impose socially disabling stigmas upon existing second and third children, and upon their parents. Indeed, such stigmas are the point: as Conly notes, a 'fine conveys the message that what you have done is unacceptable to those around you'.<sup>24</sup> Even if large families are socially stigmatised, lending the government's imprimatur to such a judgment risks enabling further discriminatory treatment by other citizens. Consider individuals who might have deeply wanted more than one child, but who are now faced with higher costs of doing so because of procreative sanctions. Such people would have reasonable complaints against parents of multiple children, and against the children themselves, for increasing the social and economic cost they would have to pay for having a second child. The expressive significance of the government's prohibition is so strong that others would have special warrant to show animus toward parents of second and third children and toward those children themselves. Even if opprobrium toward large families is appropriate, it is easy to see how such responses might be disproportionately harsh; some families with two children might be far more conscientious in their use of resources than many small families. Even if the government were also sending punitive messages about overconsumption, conscientious families of two children would have a reasonable complaint that they are being treated unequally in the relevant sense by their government.<sup>25</sup>

One might deny, of course, the principle of vicariousness. Yet there are fairly persuasive reasons to accept it. Current procreative practices set the context within which individuals in future generations are harmed or benefited. As Carter Dillard argues, we should expect parity between future and present generations with respect to procreative rights.<sup>26</sup> Dillard uses such a principle to argue that if the right to procreate can be constrained in the future because of overpopulation, it can be similarly limited

today. This parity of rights across generations, though, seems to be accompanied by a correlative parity of the expressive significance of procreative restrictions across generations. Suppose a society enacts a policy that individuals with Trisomy 21 will be sterilised, but the policy will not go into effect until 2075. Whatever the reason for its enactment, current individuals with Trisomy 21 would have a reasonable complaint that the government has sent a message about the existence of individuals with such a condition, namely, that it is less preferable than their non-existence. Legislation designed to prevent future harms does so through moderating and altering how we arrange our lives in the present. But the expressive significance of environmentally based procreative policies is similarly responsive to existing conditions, even if such policies are oriented toward preserving a certain kind of future for non-existing individuals who may or may not be born. As such, it seems reasonable to see procreative restrictions as vicariously imputable to contemporary individuals who share the qualities that the policies will restrict in future generations. If so, however, then it seems plausible that generalising a procreative restriction on the basis of number would still fail to demonstrate equal respect to existing second and third children.

#### 4. Existence and Equal Respect

Were one to reject the principle of vicarious significance, however, there remain questions about what significance a one-child policy would have for individuals who are born illegitimately beneath it. Even if the messaging significance of a generalised one-child policy (on the basis of number, not characteristics or competence) does not extend to existing second or third children, it does extend to any future second or third children. If we adopt Conly's understanding of the significance of such a policy, it communicates to such individuals that, according to the state, their non-existence is preferable to their existence – an insult of the highest degree. A state that enacts penalties for creating brown-eyed individuals conveys that such individuals ought not be born – and a state that enacts a policy against second children communicates the same, even if it enacts such a policy for the further reason of reducing consumption.<sup>27</sup> Such a policy might be preventative, as speed limits are preventative of reckless behavior. But because of procreation's uniquely interpersonal nature, the progenitors' wrong-doing results in an individual whose existence the state has deemed illegitimate. Moreover, the state sends its message for reasons that the created individual has no control or say over. Nor are those reasons tied to their competence to be a good citizen. Such a child might be a victim of their parents' malfeasance; but it is difficult to see, under that description, how the government's policy demonstrates equal respect toward them. In other words, even modest one-child policies wrong the second and third children who are born beneath them.

One forceful way of avoiding this conclusion would be to argue that being a second or third child is an insufficiently important characteristic for an individual's well-being; it is not central or constitutive of anyone's self-understanding, which means the state might still satisfy its duties of equal respect in imposing sanctions on the basis of number. In other words, dignitary harms only arise if the restriction specifically targets a quality or characteristic that is of sufficient importance to be identity defining – and birth order does not meet that criteria. On this argument, the message sent that *second*

or *third* children ought not exist can be sufficiently respectful. Paradoxically, it is just because being born second or third is irrelevant to the content of a person's life or identity that the restriction of procreation on that basis can be respectful: the individual born illegitimately might have been born first, and nothing especially important about them would have changed. As such, they have no special complaint against the state for its policy that their birth is socially and politically bad; their only complaint can be against their parents, who illegitimately conceived them. Under a generalised one-child policy, the state conveys that it equally welcomes every individual who exists within its confines – just not *as* second or third children.

This line of reasoning, though, invites a number of rejoinders. First, while being born second or third might seem like an unimportant characteristic, it is just as likely that a government prohibition on such individuals would *make* it an identity-defining trait. My worry here is similar to that which emerged in the above discussion about the vicarious applicability of procreative restrictions: a one-child policy seems likely to create or contribute to disabling social stigmas not just upon progenitors, but upon the individuals created. Large families are still common in many places in America, which makes worrying about the burdens of social stigmas upon second or third children seem irrelevant. But the very success of a modest one-child policy (or, indeed, any other disincentives to procreate) will raise the social costs of being a second or third child accordingly. Such children will increasingly stand out, saddling them with unique burdens of explanation and making them socially responsible for their parents' choice to create them. While such a burden might not in fact infringe upon their sense of self-respect, it can hardly be said to enhance or ameliorate it. This is especially the case where procreative restrictions take the form of sanctions, which are applied in *specific* cases of *specific* births – and applied directly to progenitors *post factum*. The effect of such policies seems to be similar to the observer paradox, in which an observed phenomenon is altered when and because it is evaluated. Being 'second-born' may not seem peculiarly important, and thus restricting future generations on that basis may seem like a trivial imposition on those who are born illegitimately. Yet a one-child policy seems to *make* being born second a significant characteristic, both politically and socially.

The burden of being a second child, though, is unlikely to simply be social. While dignitary harms are not psychological harms, it seems reasonable to expect a one-child policy to generate such psychological harms for illegitimate children.<sup>28</sup> The social stigma such a restriction engenders requires, if nothing else, that illegitimate individuals undertake the task of parsing out their identities to determine whether being born second is central to their personhood, a task that seems unduly and unnecessarily burdensome to the individuals affected. They might be able to unravel their identity from their place within the family into which they were born. But the requirement to do so that a procreative restriction places on them constitutes a unique cognitive burden. The messaging effect of the sanction is, after all, not only that their existence as a second child is undesirable or imprudent but that it is so undesirable that society has deemed it *wrong*.<sup>29</sup> In families with significant social, economic, and racial advantages, the thought that one's government has deemed one's existence as a second child wrong may be easily overcome. But in families already encumbered by social disadvantages and stigmas, such a thought seems both unequally and unduly

burdensome – raising questions about whether the impact of such legislation would, in fact, be as neutral as it might seem.<sup>30</sup>

Even if such a psychological burden does not arise, or seems too trivial to count, it seems likely that the message sent to second-born individuals by their government that they *ought* not exist fails to show respect *tout court*. Respect seems to put procedural constraints on governments, such that they must demonstrate they have sufficiently weighty or serious reasons for treating citizens unequally. But it also seems to have at least some minimal substantive requirements, such that some messages to citizens might simply be beyond the pale – regardless of what kinds of reasons for it a government might have.<sup>31</sup> Being told one ought not to have existed seems like a plausible candidate, if any, to fall below this threshold. Conley's intuition that such a message is an 'insult of the worst kind' seems accurate.<sup>32</sup> Such an insult arises, I think, not so much out of the putative value (or lack thereof) of existence, but from the way it extends the scope of the prohibition. 'Existence' is indiscriminate as a feature of a person's life; it has no differentiating or individuating qualities that might help a person separate it from themselves. An individual's identity might have the same content, and lack only existence – as fictional characters do. But that indiscriminate quality seems to make the prohibition on an individual's existence that much more pervasive: there is literally nothing an individual could do to escape from beneath the judgement that one 'ought not exist'. Existence might not make a difference in deliberative contexts; but the assessment that one *ought* not exist indicates that one's existence is wrongful, which does seem to make a difference to us.<sup>33</sup> If nothing else, the former is about the possibility of moral reasons to create and harms that might arise within creating. As a political and legal reality, the latter expresses a social judgment about a person – which makes it uniquely disabling. The judgment that a certain class of people ought not exist might be benign provided that no one in that class ever exists: non-existent Centaurs don't have reasons to complain against those who might object to their creation. Yet existing individuals do seem to have some kind of claim against those who think we ought not to have existed, especially when their objection to our existence has nothing to do with our individual worth or value and is accompanied by penalties that are given *merely* because we have come into existence. If it is possible to have respectful reasons for why someone's non-existence is preferable to their existence, it seems plausible that such reasons should attach to the exceptional horror of an individual's suffering or their irredeemably bad moral life and the suffering they caused. It is hard to see how being born second into a society that is collectively destroying the environment provides such a sufficiently respectful reason for saying all second or third children ought not to exist.

One-child policies, then, that recognise the likelihood of only modest compliance would seem to reinstate the possibility of bastardy into liberal legal systems and societies. The state may aim its penalties at progenitors; yet because of the peculiarly interpersonal context of procreation and the fact that malfeasance results in the existence of a new citizen, it seems extremely unlikely that the messaging effects of such penalties would remain quarantined to the parents alone. Additionally, the messaging effects of one-child policies seem even more directly applicable to children than previous laws establishing illegitimacy. Governments have frequently created (unjust) legal disabilities on individuals who are born out of wedlock – but they have done so primarily for the sake of promoting marriage as the appropriate context for procreation,

rather than for promoting procreation through marriage.<sup>34</sup> Such indirect control of procreative norms was still unjust in that it established a class of innocent victims of the (purported) wrong-doing of their parents. But while such individuals were subject to legal disabilities, the expressive significance of the law seems to have been more narrowly focused on the appropriate means and contexts for procreation – and was not, in that way, a judgment directly about the individual born into such a context. However, procreative restrictions on the basis of the number of children seem to be a direct and thereby more pervasive condemnation of an individual's life, because they indicate that the person's origination *itself* and *as such* is illegitimate. The state's verdict seems to be not upon the means or context of the individual's coming into existence, but upon their existence itself. In that way, a one-child policy seems importantly distinct from the state's legal condemnation of acts that generate persons – such as cloning or rape – which it can do without directly stigmatising the individuals created through them.

### 5. What Does the State Owe 'Bastards'?

If the above arguments go through, modest one-child policies are incompatible with the state's responsibility to demonstrate equal respect for each of its citizens, including those citizens who are created illegitimately. Yet this might not actually follow: a state might argue that its responsibilities to show respect to illegitimate children are equivalent to other children, but that the form or content of such respect in matters of messaging is contingent upon the choices parents make. Even if the child is harmed by virtue of being socially stigmatised due to the government's policy, a government might disavow its responsibility for those harms on grounds that progenitors bear sole causal responsibility for their existence. On this approach, what the state owes individuals in the matter of their birth is contingent upon the compliance of their citizens in abiding by their norms. Parents who knowingly violate a one-child policy also knowingly accept on behalf of their child the stigmatising messages, and thus they bear sole responsibility for the harms their child suffers – including those dignitary harms the child experiences by their government's message that they ought not exist. Such an approach allows the state to wash its hands of the problem and leave such an individual with the stigmas that come from having one's birth financially penalised. The illegitimate child's complaint would only be against the parents, not the state, because parents knowingly conceived them despite the prohibition and subjecting them to the disabilities attached to it.

While such a rejoinder is plausible, merely accepting as a *fait accompli* that there will be second-class citizens because of procreative restrictions seems like a difficult bullet for a liberal state to bite. Nor do I think the state can escape the child's complaint so easily. Suppose an 'illegitimate' individual's life on balance still goes quite well. They overcome what they take to be unjust stigmas, which enhances their satisfaction with their life, and they receive care and attention from loving parents. Any claim they might have against the parents for the stigmas they experience would be distinct from those they have against the state: their parents presumably created them because their existence was desirable, but the state sought to prevent their existence. The parents paid a higher cost to procreate than they would have without a one-child policy, which

places them in a strong position to exculpate themselves for whatever harms or stigmas the child experiences – while the state sought to restrict their parents from procreating. These asymmetrical attitudes and the increased costs parents might pay to procreate make it unlikely that the state could absolve itself from the charge of violating its responsibility to extend due respect simply because it is not causally responsible for the individual.<sup>35</sup>

Additionally, it is unclear in the first place why the state's responsibility to avoid sending messages that impose stigmas on an individual dissolves because that individual's existence is contingent upon another citizen's wrong-doing. Many people think it licit for the state to impose stigmas, even if some theorise that doing so generates deviant behavior.<sup>36</sup> Yet few think the imposition of such stigmas should be extended to non-responsible, third parties. If the state is justified in stigmatising convicts, for instance, it would be manifestly unjust for it to also actively stigmatise parents or children of the wrongdoers – unless they played material or causal role in the wrong-doing. When such stigmatisation of families does occur (as it frequently does), it does so mainly as a byproduct of the punishment. Unlike cases of inherited stigma through punishment, though, a one-child policy directly and actively says something about the second children created. No one could be less responsible for putative wrong-doing in procreation than the individuals who are created from it.

One might argue that whatever harm to the illegitimate individual is trivial in comparison with the harms of living in an overpopulated world and that we should simply accept that some people will be stigmatised out of necessity. Even if so, such individuals are doubly disadvantaged – they face the same burdens of being born into an unsustainable world, but they do so as those who are wronged by their state. Those who are born illegitimately might accept their stigmatisation as a necessary means of avoiding (further) overpopulation, as those who are imprisoned might come to accept their (expected) stigmatisation as part of the state's just punishment. But unlike prisoners, illegitimate children have done nothing to merit stigmatisation, which would plausibly make reconciling their stigmatisation more difficult. The burden of such a stigma would be heavier if such individuals know the state had alternate means of avoiding the putatively bad effects of overpopulation, or more narrow means of controlling population, and opted against them in favor of a restriction based on number. Moreover, given the stakes that the policy appeals to for its justification – avoiding environmental degradation – we should expect such stigmatisation to be intense, and to grow more intense as the problems worsen, and thus not trivial for the person experiencing it at all.

If the state does owe illegitimate children equal respect, but it wants to enact procreative restrictions, it might opt to extend compensatory benefits or goods to illegitimate individuals as a way of mitigating the effects of the stigma that is likely to arise. For instance, if the state enacts financial penalties on parents, it might also extend an allowance to their children, which would be available to them only upon their emancipation. Such a measure would mitigate the discriminatory messaging effects of a policy that deems their non-existence preferable to their existence, though it seems unlikely to remove them entirely. And it still would retain at least some of the punitive dimensions of a penalty, as parents would in effect lose control over the financial resources that they would otherwise bestow upon the child. However, such an approach might

also undermine the effectiveness of such a policy – creating an even larger class of individuals whose relation to their state is complicated, at best.

To be clear, these problems only arise under one-child policies that are accompanied by modest means of enforcement and subsequently expect only modest compliance – and they only arise when the state imposes disincentives to procreate by way of fines or penalties, rather than when the state removes incentives to procreate. Fundamentally, procreative restrictions put the state in something of a bind: either the state attempts to respect parents and their autonomy by not coercively securing compliance through mandatory sterilisations or abortions after one child, or it puts itself in a situation where it is incapable of satisfying the status-rights of individuals whose lives it has deemed illegitimate.

This dilemma suggests that the costs of adopting even modest one-child policies would be higher for liberal states than has been previously observed. Of course, a state might yet deem the potentially cataclysmic consequences of climate change a sufficiently weighty reason to adopt a one-child policy anyway. If access to basic necessities like food, water, and shelter is imperiled, concern about the state establishing conditions which treat certain members as second-class citizens seems less urgent. At the same time, few states have pursued aggressive means to radically constrain consumption – and as I observed above, a consumption-based restriction on procreation might not suffer from the problems that a generalised restriction on having second or third children faces. If the state can only restrict procreation (even if the right to procreate is weakened after a person has one child) by disrespecting those individuals who would be created illegitimately, then it has strong incentives to seek every means necessary to avoid doing so. Even if a state deems one-child policies necessary, they still should be options of last resort.

## 6. Conclusion

The puzzles that arise in considering what the state owes children it has deemed illegitimate raise significant questions about how states might pursue procreative restrictions. Such difficulties arise, as I suggested above, from the peculiar effects of wrongfully procreating versus wrongfully terminating or avoiding pregnancy. The inherently interpersonal character of procreation requires that the state's constraints on its exercise account for both the interests of the parents who seek to procreate *and* for the interests of their prospective children.<sup>37</sup> Regardless of what grounds the putative right to procreate, the state needs to be cognisant of what restricting its exercise means for individuals who will almost surely be created illegitimately – rather than limiting its focus to what it owes to would-be parents. Insofar as there is a reasonable expectation that illegitimate individuals will exist, then it seems as though their interests or claims upon the state ought to receive due and equal consideration in the design of such policies. Even if such policies are still enacted, and my argument that their status-rights are impaired fails, overlooking such individuals entirely in deliberations about the scope of just restrictions on procreation can hardly claim to be respectful.

One implication of my argument is that the government's treatment of parental and procreative rights necessarily come apart – which makes it difficult to argue from the

state's rightful authority to abridge parental rights toward its legitimate authority to abridge procreative rights.<sup>38</sup> There *is* something about existence that makes a difference to the state's exercise of its authority. The state clearly has a duty to protect the wellbeing of existing children. But when it does so, such children are not subject to any inherent stigmatisation. Policies prohibiting child abuse are not disrespectful to children (or parents): instead, the state's respect for the child's wellbeing sometimes prompts the abridgment or termination of parental rights. However, procreative restrictions are aimed at preventing the existence of individuals who would not be harmed by their parents' act of creation. Such restrictions purport to enact the same authority the state employs in the abridgment of parental rights, except pre-emptively. Yet procreative restrictions also uniquely create conditions which stigmatise the child *if* the parents proceed to procreate anyway. The opprobrium from the state may be conditional upon the parents' actions – yet unlike its authority over parental rights, the state's prohibition runs the unique risk of disabling some members of the very generation the restriction is designed to protect. In this way, the state risks being in the unenviable position of having to pursue more aggressive measures to restrict procreation, in order to avoid stigmatising illegitimately created children – or of having to abandon prohibitive population policies and pursue other, more indirect, means of managing population size. A 'modest' one-child policy that is only mostly or sufficiently effective seems to carry injustices of its own, precisely because it overlooks the fundamental gap between prospective prohibitions of a person's existence and interventions determined to preserve or enhance it.<sup>39</sup>

*Matthew Lee Anderson, Institute for Studies of Religion, Baylor University, One Bear Place #97236, Waco, TX, 76798, USA. matthew\_l\_anderson@baylor.edu*

## NOTES

- 1 Sarah Conly argues that the interests-based account of procreative rights entails that it is satisfied at one child. See Sarah Conly, *One Child: Do We Have a Right to More?* (Oxford: Oxford University Press, 2016), 49ff. J. Carter Dillard argues similarly that the right to procreate is founded upon what he calls 'self-replacement' and is objectively satiated when we have our first child. See Carter Dillard, "Valuing Having Children," *Journal of Law and Family Studies*, 12, (2010): 194–95. Christine Overall limits her argument to moral responsibility and disavows any state sanctions against large families, but she argues that 'replacement' means replacing *each* person, and as such one has a right to two children. See Christine Overall, *Why Have Children?: The Ethical Debate*, Basic Bioethics (Cambridge, Mass: MIT Press, 2012), pp. 182–183.
- 2 Dillard op. cit. 195–196.
- 3 Restricting procreative actions might be done narrowly, such as in response to extreme and repeated failures to parent well, for economic reasons, or because of incapacity. Or it could happen on a broader basis, which one-child policies pursue. Dillard focuses on the former, while Conly focuses on the latter. Conly, op. cit., pp. 131ff. and Sarah Conly, "The Right to Procreation: Merits and Limits," *American Philosophical Quarterly* 42 (2005), pp. 105–115. Benatar also challenges an expansive construal of the procreative right, recommending a 'very careful and nuanced reconsideration' of it that (probably) allows lesser interferences of the sort Conly proposes. David Archard and David Benatar, *Procreation and Parenthood: The Ethics of Bearing and Raising Children* (Oxford: Oxford University Press, 2010), pp. 101.
- 4 This would be essentially to argue against Conly's principle that the number of family members 'does not determine the value of family life' (Conly, op. cit., p. 51). While Conly titles her chapter on the 'right to a family', she focuses narrowly on procreation. Overall notes that the absence of sibling relationships in a

- generation raises 'important questions', though she does not set out to answer them. See Overall, *op. cit.*, p. 182. See Conly, *op. cit.*, p. 209ff. on siblings as well, and whether the child's standpoint merits the claim that they have a right to siblings.
- 5 I assume here both that the state does owe respect to individuals as such and that the state has an interest in preserving and protecting the wellbeing of future generations. While both claims are controversial, the latter is necessary for one-child policies, and the former seems to be widely accepted by those who defend modest procreative prohibitions. See, for instance, Carter Dillard, "Procreation, Harm, and the Constitution," *Northwestern University Law Review Colloquy*, 105 (2010), p. 15. See also Conly, *op. cit.*, pp. 153ff. Conly does not suggest that future people have rights, but that 'a good case can be made that we have an obligation not to pre-emptively make it impossible for them to exercise basic human rights once they are born.' She notes that whatever our theory of concern for future generations, we generally think they have some kind of moral weight for us. And the government has a particular responsibility to look beyond the existing generation. This is particularly true in the face of collective action problems: given the difficulties of decreasing a birth rate sufficiently, 'government intervention on behalf of those who don't yet exist is not only permissible, it is a duty'.
  - 6 Carter Dillard, "Rethinking the Procreative Right," *Yale Human Rights and Development Law Journal*, 10, 1 (2007), p. 51.
  - 7 Conly, *op. cit.*, p. 137.
  - 8 Conly, *op. cit.* p. 135. David Benatar seems to suggest that we should reconfigure the right to procreate through a balancing test, in which we consider the goods of procreating against the harms or risks of harms imposed upon it *and* the moral hazards and costs of enforcing restrictions. Within this balancing approach, the moral costs of aggressive enforcement through forced sterilisation or abortions are so high that a justification of a policy seems unlikely. But 'unobtrusive interventions and moderate coercion are far from obviously worse than the harms they might prevent'. While that might be true, such modest means also have far less a chance of success. John Robertson explicitly adopts this balancing-test approach in weighing the right to procreate, but he argues that compulsory implantations of contraceptives are rarely warranted to prevent or respond to irresponsible reproduction. John Robertson, "Norplant and Irresponsible Reproduction," in *Coerced Contraception?* (Georgetown: Georgetown University Press, 1996), pp. 90 ff.
  - 9 While much would depend on the details of the penalty, it is plausible to think non-compliance would be more likely to come from wealthy individuals, who have more means of compensating or offsetting even proportionately burdensome penalties.
  - 10 Daniel Callahan notes this possibility. Daniel Callahan, "Ethics and Population Limitation," in *Ethics and Population*, Michael Bayles, ed., (Cambridge: Schenkman, 1967), p. 31.
  - 11 John Corvino, Ryan T. Anderson, and Sherif Girgis, *Debating Religious Liberty and Discrimination* (New York: Oxford University Press, 2017), p. 73.
  - 12 As Corvino notes, virtually every law burdens citizens unequally. However, just laws do so for good reasons. See Corvino, Anderson and Girgis, *op. cit.*, p. 54.
  - 13 My thanks to an anonymous reviewer for helping me disambiguate these.
  - 14 The law's expressive dimension may become distinctively important in situations 'where behavior is perceived as personal and logistically difficult to regulate – like procreation'. See Dillard, "Rethinking," p. 10. See also Sarah Conly, *op. cit.*, pp. 127 ff.
  - 15 Conly, *op. cit.*, pp. 129–130.
  - 16 Conly, *op. cit.*, 54.
  - 17 Conly, *op. cit.*, pp. 46–47.
  - 18 Conly, *op. cit.*, 48.
  - 19 Conly, *op. cit.*, 55.
  - 20 Jenny Teichman, *Illegitimacy: A Philosophical Examination* (Oxford: B. Blackwell, 1982), p. 7. Teichmann suggests that *any* attempt to control population will necessarily generate such a concept.
  - 21 One possibility is that the principle of vicariousness is limited only to parents who share those traits with their children, since they are the ones who are causally responsible for extending those traits into the next generation. I take it such a narrow claim is Conly's. But as generalising the prohibition conveys a broad stigma against the *number* of children, it seems vicariously applicable not only to those parents who are themselves second or third children, but *all* second and third children themselves.
  - 22 My thanks to an anonymous reviewer for raising this concern.
  - 23 One possibility for thinking the vicarious-principle is limited only to characteristic-based prohibitions is that the generalised policy is responsive to a crisis, and as such its messaging significance is limited only

- to future individuals. Absent such a crisis, there's nothing about being a second or third child that is undesirable. This is clearly the case. But indexing reasons to a crisis this way still leaves open the question of whether doing so undermines the government's duty to demonstrate equal respect to its citizens. I suggest below there are reasons to think we should affirm parity in how we construe procreative rights between generations. Thanks to Kate Greasley for raising this objection.
- 24 Conly, *op. cit.*, 137.
  - 25 Number might not be a wholly irrelevant characteristic for addressing social overconsumption. Yet it seems to offer a generalised prohibition on the basis of the wrong attribute.
  - 26 Dillard argues that it would be odd if the 'value of procreating for persons today outweighs the value of procreating for persons in the future'. Dillard, "Rethinking," p. 48. In other words, if procreative restrictions would be reasonable in the future due to overpopulation, then the right to procreate is similarly limited today.
  - 27 One might argue that the state's restriction is *only* about the means of preventing environmental degradation and has no bearing on the individuals who are born beneath it. However, this seems too angelic: procreative policies of any kind are about who is or is not born, and not only about what effects those individuals may or may not have on the environment. A state might impose a positive policy encouraging the existence of more brown-haired individuals, perhaps to increase aesthetic diversity. Such an endorsement of the trait by a government has some bearing on the individuals who bear it. Procreative restrictions work similarly, even if in the negative. A policy restricting second children might communicate that they are not the governments' preferred means of avoiding environmental degradation. But the government's 'preferred means' requires the non-existence of that (second) child. My thanks to an anonymous reviewer for raising this concern.
  - 28 The literature on the psychological effects of China's one-child policy is complex, but there is evidence that only children in urban areas measure lower levels of self-reported fear, anxiety, and depression than children with siblings – and that this shifted after the one-child policy went into effect. The authors of one study speculate that the social environment for children with siblings under the one-child policy might have played a material role in the outcomes, noting that during the study they 'observed only children uttering comments such as, "You shouldn't have been born...Your parents should have only one child...You shouldn't be here...You are a waste" to children with siblings'. See Bin Yang, Thomas H. Ollendick, Qi Dong, Yong Xia, and Lei Lin, "Only Children and Children with Siblings in the People's Republic of China: Levels of Fear, Anxiety, and Depression," *Child Development*, 66 (1995): 1301–1311. While there are a range of studies confirming that only children do better, most seem to focus on parental attention and investment – rather than on the policies stigmatising effects on second or third children. For an overview of the literature, see Toni Falbo and Sophia Y. Hooper, "China's Only Children and Psychopathology: A Quantitative Synthesis," *American Journal of Orthopsychiatry*, 85 (2015): 259–274.
  - 29 In Rawlsian terms, such a policy seems incompatible with the government's duties to secure the 'social bases of self-respect'. Wrestling with the government's message that 'one ought not to have been born' disables such individuals from the outset in their cultivation of a robust and warranted sense of self-respect, even if such an effort might still be gained. For Rawls's discussion, see John Rawls, *Political Liberalism*, (New York: Columbia University Press, 2005), pp. 318 ff.
  - 30 In addition to the literature cited above regarding the effects of China's one-child policy on children's wellbeing, there is a considerable literature across sociology and psychology examining the deleterious effects of stigma on individuals. One review of the literature indicates that 'stigma does have direct and insidious negative effects on the stigmatised via mechanisms of discrimination, expectancy confirmation, and automatic stereotype activation'. Brenda Major and Laurie T. O'Brien, "The Social Psychology of Stigma," *Annual Review of Psychology* 56:1 (2005): 393–421. At the same time, the correlation of stigmas and negative effects is partially mediated by individuals and their responses to stigmas. One study of incarcerated individuals indicates that *anticipated* stigma is conducive to antisocial behaviors. See Kelly E. Moore, Jeffrey B. Stuewig, and June P. Tangney, "The Effect of Stigma on Criminal Offenders' Functioning: A Longitudinal Mediation Model," *Deviant Behavior* 37:2 (2016): 196–218. In criminological contexts, labeling does not seem to directly lead to deviant behavior: rather, it 'tends to bring about conditions that are conducive to crime and delinquent behavior'. Jón Gunnar Bernburg, Marvin D. Krohn, and Craig J. Rivera, "Official Labeling, Criminal Embeddedness, and Subsequent Delinquency: A Longitudinal Test of Labeling Theory," *Journal of Research in Crime and Delinquency* 43:1 (2006): 67–88. Whether one-child policies would generate psychological or other harms, then, on second children is doubtlessly a complicated empirical question. Yet at a minimum such a policy seems to contribute to

conditions which would make those harms likely, especially as children and adolescents (who are most likely to experience the social repercussions of being second or third children) are more vulnerable. I'm grateful to an anonymous reviewer for motivating me to consider this further.

- 31 As Christopher Eberle argues, a 'responsible citizen in a liberal democracy will refuse to support a coercive law on the basis of any claim that denies the personhood and dignity of his compatriots, no matter how he arrives at those claims'. Christopher J. Eberle, *Religious Conviction in Liberal Politics* (Cambridge: Cambridge University Press, 2002), p. 104.
- 32 Conly, op. cit., 48.
- 33 A number of contractarians have argued that existence is irrelevant for understanding how procreative reasons function. See Rivka Weinberg, *The Risk of a Lifetime: How, When, and Why Procreation May Be Permissible*, (Oxford: Oxford University Press, 2016). David Wasserman takes a similar line in David Benatar and David Wasserman, *Debating Procreation: Is It Wrong to Reproduce?*, (Oxford: Oxford University Press, 2015).
- 34 As Teichmann notes, in the past 'religion and the state have sought to control mating', but today the 'community seeks rather to control reproduction itself' Teichmann, op. cit., p. 182. Teichmann herself understands illegitimacy as predominately attached to norms governing reproduction. To the extent that they were tied to marriage, they were so only insofar as marriage was the means by which appropriate procreation was governed.
- 35 This paragraph is much clearer thanks to the intervention of the Associate Editor, Kerry Bennett.
- 36 'Labeling theory' argues that criminal or other bad behavior stems, at least in part, from internalising labels that mark one as deviant. It once dominated criminology, and though it no longer is the pre-eminent view, criminologists have recently begun returning to it. See Ruth Triplett and Lindsay Upton, "Labeling Theory: Past, Present, and Future," in *The Handbook of Criminological Theory*, edited by Alex R. Piquero, (Hoboken, NJ: John Wiley & Sons, Inc., 2015), pages 271–89.
- 37 My thanks to the Editors for helping me clarify this.
- 38 Dillard argues that the state's interest in preserving and protecting the welfare of children does not start after their conception but justifies pre-emptive protections of their wellbeing through preventing harms. As he puts the question, if the 'state has an interest in preventing living people from existing below a certain minimum level of well-being, why would the state not have an interest in preventing future persons from being created into existences below that same level?' Dillard, "Procreation," p. 17.
- 39 I'm grateful to Michael Austin, Nat Tabris, Frank Beckwith, Paul Billingham, Kate Greasley, Bob Fischer, two anonymous reviewers, and the editors for their critical comments on drafts of this article.