

## BIOPOLITICS AND REPRODUCTIVE JUSTICE: FERTILITY POLICIES BETWEEN WOMEN’S RIGHTS AND STATE AND COMMUNITY INTERESTS

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*In this Article, I argue that the liberal assumption that governments must not engage in biopolitics by setting fertility policies is flawed in both theory and practice. It is flawed in theory because government must take reproduction into account in order to ensure individual women’s rights to liberty and equality and to guarantee reproductive justice. It is flawed in practice since all governments set policies that directly and indirectly affect fertility, even if they do not name them fertility policies. Nevertheless, past and present experience have taught us that fertility policies set by states and communities to respond to their population needs have more often than not ignored the rights of the women recruited to carry them through. States have used women as a means to an end rather than as an end in themselves.*

*In order to resolve this dilemma, I offer a test for assessing the legitimacy of fertility policies. In this Article, I identify three types of interests that fertility policies may serve: legitimate state and community interests, individual liberty interests, and individual equality interests. The validity of a given fertility policy should be assessed by examining it against these interests, and two rules should guide this examination. First, fertility policies should only be based on a state’s need to promote legitimate interests (the “legitimate interests prong”). Second, due to the primacy of individual rights, even legitimate state and group interests in fertility can only be realized while respecting and promoting individual rights, especially individual women’s rights, to both liberty and equality (the “liberty and equality prong”). I will then discuss and examine various fertility policies from around the world, including the United States, in light of the suggested test.*

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## INTRODUCTION

“I cannot imagine anything more emphatically a subject that is not a proper political or governmental activity or function or responsibility. . . . This government . . . will not . . . as long as I am here, have a positive political doctrine in its program that has to do with the problem of birth control. That’s not our business.”

President Dwight Eisenhower, December 1959<sup>2</sup>

“More state abortion restrictions were enacted in 2011-2013 than in the entire previous decade.”

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The United States fertility rate dropped in 2012 to a record low of 1.88 children per woman.<sup>4</sup> This rate is below the replacement level of 2.1 children per woman, which is “the level at which a given generation can exactly replace itself.”<sup>5</sup> The U.S. fertility rate has been below the

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<sup>2</sup> President Dwight Eisenhower, *Transcript of the President’s News Conference on Foreign and Domestic Matters*, N.Y. TIMES, Dec. 3, 1959, at 18.

<sup>3</sup> *News in Context: More State Abortion Restrictions Were Enacted in 2011-2013 Than in the Entire Previous Decade*, GUTTMACHER INST. (Jan. 2, 2014), <https://guttmacher.org/media/inthenews/2014/01/02/index.html> (summarizing findings of Elizabeth Nash et al., *Laws Affecting Reproductive Health and Rights: 2013 State Policy Review*, GUTTMACHER INST., <http://www.guttmacher.org/statecenter/updates/2013/statetrends42013.html> (last visited Mar. 28, 2015)).

<sup>4</sup> Joyce A. Martin et al., *Births: Final Data for 2012*, 62 NAT’L VITAL STAT. REP., no. 9, 2013, at 1, 7 (noting the decline of the total fertility rate in the United States to “1,880.5 births per 1,000 women” in 2012).

<sup>5</sup> *Id.* at 7.

recommended replacement level since 1971.<sup>6</sup> Nevertheless, no official government policy has been crafted to try to reverse this trend. A major reason for this omission may be the prevailing U.S. perception that national governments have no business interfering with personal reproductive choices, as illustrated by President Dwight Eisenhower's quote above. Eisenhower's exact sentiments are echoed in Justice Brennan's famous words: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>7</sup> Nevertheless, apparently unperturbed by Eisenhower's and Brennan's concerns, and perhaps in part in order to forestall the demographic decline, states have enacted more abortion restrictions in 2011 to 2013 than in the entire previous decade.<sup>8</sup>

A similar approach to Eisenhower's nonintervention approach is conveyed in Michel Foucault's 1976 lecture series *Society Must Be Defended*.<sup>9</sup> In his lectures, Foucault describes the emergence in the second half of the eighteenth century of a new form of state power (biopower) which has given rise to a new form of state politics he terms "biopolitics."<sup>10</sup> Biopolitics seeks to control the population of the state through the regulation of processes "such as the ratio of births to deaths, the rate of reproduction, [and] the fertility of [the] population."<sup>11</sup> Foucault distinguishes between conventional state power which is focused on the individual and seeks to discipline the individual body (anatomy-politics), and biopower and biopolitics, whose focus is on the entire mass of people—the population.<sup>12</sup> According to Foucault, in the second half of the eighteenth century, for the first time in history, the population, as such, is seen as a political, scientific and biological problem, in which advances in the sciences, such as demography and medicine, allow the state to regularize and regulate.<sup>13</sup> This is a worrying development for Foucault, who believes that a liberal state that respects individual rights simply cannot engage with biopolitics or with problems of population, since "[h]ow can the phenomenon of 'population,' with its specific effects and problems, be taken into account in a system concerned about respect for legal subjects and individual free enterprise? In the name of what and according to what rules can it be managed?"<sup>14</sup>

Foucault's concern is not misplaced. Many countries around the world, from China and Romania to Israel, Japan and the United States, engage in biopolitics to varying degrees and with

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<sup>6</sup> *Id.*

<sup>7</sup> Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (emphasis omitted).

<sup>8</sup> See GUTTMACHER INST., *supra* note 2. See also U.S. Representative Bob Goodlatte's remarks during discussion of proposed anti-abortion legislation in the House Judiciary Committee, of which he is the chair. Laura Bassett, *GOP Congressman: Limiting Abortion 'Promotes Job Creation,'* HUFFINGTON POST (Jan. 15, 2014, 4:07 PM), [http://www.huffingtonpost.com/2014/01/15/bob-goodlatte-abortion-jobs\\_n\\_4604169.html](http://www.huffingtonpost.com/2014/01/15/bob-goodlatte-abortion-jobs_n_4604169.html).

<sup>9</sup> See generally MICHEL FOUCAULT, *SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLÈGE DE FRANCE, 1975-76* (Mauro Bertani & Alessandro Fontana eds., David Macey trans., Picador 2003).

<sup>10</sup> *Id.* at 243.

<sup>11</sup> *Id.* In this Article, my interest in biopolitics is specifically focused on government's influence on reproduction and reproductive rights (and not, for example, on morbidity rates).

<sup>12</sup> *Id.* at 242-43.

<sup>13</sup> *Id.* at 245.

<sup>14</sup> MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE, 1978-79*, at 317 (Michel Senellart ed., Graham Burchell trans., Palgrave Macmillan 2008).

less than full attention to the rights of the individuals affected by their policies.<sup>15</sup> Furthermore, not only states, but other communities, especially national and religious communities, engage in biopolitics, and contrary to Foucault's claim that biopolitics is a new phenomenon, have been doing so for many generations.<sup>16</sup> The best example of religiously-inspired biopolitics is the Genesis proverb "be fertile and multiply,"<sup>17</sup> which, perhaps because of its religious nature, has probably been the single most important and influential biopolitical act in the history of the world.

Foucault's aversion to biopolitics is motivated by his conviction that biopolitics cannot, under any circumstances, be reconciled with individual rights. However, this Article will claim that this dichotomous position is mistaken and can be attributed at least in part to Foucault's male centered understanding of both individual rights and of state power. A known feminist critique of Foucault's writings on state power and on the regulation of sexuality holds that Foucault completely ignores the unique position of women and the unique impact of the regulation of sexuality on them in his analyses. For example, Professor Sandra Bartky argues:

Foucault treats the body throughout as if it were one, as if the bodily experiences of men and women did not differ and as if men and women bore the same relationship to the characteristic institutions of modern life. Where is the account of the disciplinary practices that engender the "docile bodies" of women, bodies more docile than the bodies of men? . . . To overlook the forms of subjection that engender the feminine body is to perpetuate the silence and powerlessness of those upon whom those disciplines have been imposed. Hence, even though a liberatory note is sounded in Foucault's critique of power, his analysis as a whole reproduces that sexism which is endemic throughout Western political theory.<sup>18</sup>

Bartky's critique is to the point, but it uncovers only half of Foucault's oversight. Women's unique position with respect to the regulation of sexuality works in two seemingly contradictory ways. On the one hand, as Bartky points out, it makes them more vulnerable to a violation of their bodily integrity and their basic rights through oppressive regulation. On the other hand, and at the same time, it also makes them more vulnerable to the absence of regulation. Thus, feminists have argued that the lack of state regulation and support for matters pertaining to women's unique reproductive functions and needs, such as those concerning pregnancy and child

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<sup>15</sup> On China, see Rachael Savanyu, *The Public Womb: Women under China's One-Child Policy*, in *International Watch*, 9 BUFF. WOMEN'S L.J. 11, 17-20 (2000-2001). On Romania, see Florin S. Soare, *Ceausescu's Population Policy: A Moral or an Economic Choice Between Compulsory and Voluntary Incentivised Motherhood?*, 2 EUR. J. GOV. & ECON., 59, 60 (2013). On Israel, see Gila Stopler, *Israel's Natality Policy and the Rights of Women and Minorities*, 11 MISHPAT UMIMSHAL 473 (2008) (Hebrew). On Japan, see Michiko Miyazaki, *The History of Abortion-Related Acts and Current Issues in Japan*, 26 MED. & L. 791 (2007) (discussing the history of abortion law in Japan). On the United States, see Lisa Powell, *Eugenics and Equality: Does the Constitution Allow Policies Designed to Discourage Reproduction Among Disfavored Groups?*, 20 YALE L. & POL'Y REV. 481, 484-85 (2002). See also *infra* Parts I-IV for a detailed discussion of policies in the United States and various countries.

<sup>16</sup> Paul Demeny, *Population Policy* in 2 ENCYCLOPEDIA OF POPULATION 752, 752-53 (Paul Demeny & Geoffrey McNicoll eds., 2003)

<sup>17</sup> *Genesis* 1:28.

<sup>18</sup> SANDRA LEE BARTKY, *FEMININITY AND DOMINATION: STUDIES IN THE PHENOMENOLOGY OF OPPRESSION* 65 (1990).

birth, prevent women from fully realizing their reproductive rights as well as their other liberal rights, and from obtaining reproductive justice.<sup>19</sup> Unlike men's, women's oppression can be deepened not only by the state's *misuse* of its biopower, but also by its *disuse* of its biopower. Foucault's and Eisenhower's male-centric failure to acknowledge this fact can account for their insistence that any form of biopolitics is unsuitable for the liberal state.

While the feminist position that I have just stated is quite common in most parts of the world, other feminists, and especially U.S. feminists, object to any government intervention in issues concerning fertility and reproduction, due to the tendency of states and communities to disregard women's rights when engaging in biopolitics. To these feminists the slogan "government, stay out of my uterus" has become a rallying cry.<sup>20</sup> This Article will question both the feasibility of this rallying cry and the assumption that the full withdrawal of government from any and all fertility and reproduction issues is indeed in the best interests of women. While fully acknowledging that grave violations of women's rights may occur when governments engage in biopolitics, and while agreeing that in some respects government should certainly stay out of women's uteruses, this Article will use a feminist perspective to claim that women should insist that in other respects, and under certain conditions, governments must take full cognizance of their uteruses when crafting public policy, and that by not doing so governments are violating women's equal rights. This position, which is widely shared by feminists around the world, is much less popular in the United States.<sup>21</sup> American exceptionalism in this area can be attributed in large part to the choice-based legacy of *Roe v. Wade* and to the continuing feminist struggle to preserve its precarious gains.<sup>22</sup> However, as Professor Robin West eloquently argues, *Roe's*

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<sup>19</sup> See, e.g., Natasha Bhushan, Note, *Work-Family Policy in the United States*, 21 CORNELL J.L. & PUB. POL'Y 677, 677, 683 (2012). "Reproductive justice" as referred to in this Article is the full realization of both the negative and the positive rights aspects of women's reproductive health. A commonly used definition of reproductive justice in the United States, which comes from a founding organization in the American reproductive justice grassroots movement and which excellently captures this meaning, is the following:

[T]he complete physical, mental, spiritual, political, economic, and social well-being of women and girls [that] will be achieved when women and girls have the economic, social and political power and resources to make healthy decisions about our bodies, sexuality and reproduction for ourselves, our families and our communities in all areas of our lives.

ASIAN COMMUNITIES FOR REPROD. JUSTICE, A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS, AND REPRODUCTIVE JUSTICE 1 (2005), available at <http://strongfamiliesmovement.org/assets/docs/ACRJ-A-New-Vision.pdf>. It is important to note that the grassroots reproductive justice movement in the United States is critical of the use of "rights talk" and of litigation strategies to achieve reproductive justice in light of the skewed understanding of reproductive rights in the United States, which is based on a negative right to privacy. See Cynthia Soohoo, *Hyde-Care for All: The Expansion of Abortion-Funding Restrictions under Health Care Reform*, 15 CUNY L. REV. 391, 398-99 (2012). While this Article shares the American reproductive justice movement's criticism of the current skewed understanding of reproductive rights in American law, it does not share its aversion to "rights talk" or to the use of courts to monitor government fertility policies.

<sup>20</sup> See, e.g., FORA.tvPolitics, *Rep. Tammy Duckworth Slams GOP: 'Stay Out of My Uterus.'* HUFFINGTON POST (Jul. 28, 2013), <http://videos.huffingtonpost.com/rep-tammy-duckworth-slams-gop-stay-out-of-my-uterus-517871980>.

<sup>21</sup> See, e.g., Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394 (2009) (discussing how the constitutional right to abortion legitimates a minimalist state response to women who opt to carry their pregnancies to term and to poor parents who in actuality require more support).

<sup>22</sup> *Id.* at 1398-1405; *Roe v. Wade*, 410 U.S. 113, 152-55 (1973).

continuing vulnerability should not prevent feminists from openly critiquing its problematic choice-based legacy, and the way in which it has weakened the struggle for reproductive rights more broadly conceived in the United States.<sup>23</sup>

Contrary to Foucault, I will claim that there are a host of economic, societal and feminist reasons why governments may take a deep interest in the size and growth of their populations, and that therefore governments do have a legitimate interest in engaging in biopolitics, fertility, and reproduction.<sup>24</sup> Thus, the real question is not whether governments should take an interest in the size and growth of their population, but how can they do so without violating individual rights, especially women's rights. I will further claim that as a factual matter all governments, including the U.S. government, necessarily engage in fertility policies, since there is no government that does not make an abundance of direct and indirect policy choices that affect fertility and reproduction.<sup>25</sup> In this context, the Article will argue that nonintervention in fertility is as much a fertility policy as any interventionist fertility policy—and with similarly profound implications.<sup>26</sup>

Consequently, the question we need to ask is not whether it is legitimate for a government to have any fertility policy, but what fertility policies are legitimate for governments to have? In an attempt to answer this question, the Article will identify three types of interests that fertility policies may serve: (1) legitimate state and group interests, (2) individual liberty interests, such as autonomy and privacy, and (3) individual equality interests. The Article will claim that while communities and states may have a legitimate interest in trying to influence fertility rates, this interest may only be realized by promoting individual women's liberty and equality interests. Thus, the answer to Foucault's question, "[i]n the name of what and according to what rules can [the phenomenon of population] be managed?"<sup>27</sup> is that population can and should be managed in the name of women's liberty and equality interests and according to rules promoting these interests.

In Part I of the Article, I will ask whether states can(not) have fertility policies, and explore the interests that underlie such policies. I will begin by describing the liberal critique against any government intervention in reproduction and show how, following *Roe*, this critique has become the basis for American liberal feminist thinking on reproductive rights. I will then move on to discuss the perspective of the state, and flesh out the reasons why states and communities may have a legitimate interest in fertility policies. Then, building on Professor Frances Olsen's argument with respect to the myth of state nonintervention in the family, I will claim that it is theoretically incoherent and factually untrue to hold that states may be able to abstain from making any policy decisions with regard to fertility. If having fertility policies is both legitimate and inevitable, then the question that needs to be asked is not whether states can have fertility policies, but what sorts of fertility policies are legitimate for states to have, and what

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<sup>23</sup> West, *supra* note 21, at 1404.

<sup>24</sup> Demeny, *supra* note 16, at 753-54. At the international level, see Jason L. Finkle & C. Alison McIntosh, *The New Politics of Population*, 20 POPULATION & DEV. REV. (Supp. 1994) 3, 6-7 (1994).

<sup>25</sup> In this Article, "fertility policies" will refer to any policy that directly or indirectly affects women's ability to give birth to children and to parents' ability to raise them.

<sup>26</sup> This argument follows Frances Olsen's famous argument regarding the incoherence of arguing that government can have a policy of nonintervention in the family. See Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835 (1985).

<sup>27</sup> FOUCAULT, BIRTH OF BIOPOLITICS, *supra* note 14, at 317.

types of interests can underlie these policies. I will then discuss the feminist perspective on the types of policies that are legitimate, and indeed required, for a state to have.

Finally, based on this discussion, I will suggest a test for assessing the legitimacy of fertility policies. I will identify three types of interests that fertility policies may serve: legitimate state and group interests, individual liberty interests, such as autonomy and privacy, and individual equality interests, and claim that the validity of a given fertility policy should be assessed by examining it against these interests. Two rules should guide this examination. First, similar to any other government policy, fertility policies can only be based on a state's need to promote legitimate interests (the "legitimate interests prong"). Second, due to the primacy of individual rights, even legitimate state and group interests in fertility can only be realized while respecting and promoting individual rights, especially individual women's rights, to both liberty and equality ("liberty and equality prong"). Any policy should satisfy both prongs of the test concurrently, in order to be considered legitimate.

The remainder of the Article will be dedicated to a discussion of some of the fertility policies that exist throughout the world, including in the United States, and their evaluation according to the suggested test. In Part II, I will discuss pronatalist fertility policies and assess them according to the suggested two-pronged test. In particular I will discuss various restrictions on abortion, ideological propaganda aimed at encouraging women to have children, and support for families. In Part III, I will discuss antinatalist policies and their limits. I will also discuss in detail whether it is legitimate for a state to try to implement antinatalist fertility policies in traditional communities, where women are pressured into having an inordinately high number of children. Finally, in Part IV, I will discuss various eugenic fertility policies, in particular restrictions on interracial and interreligious marriages as eugenic fertility policies.

## I. CAN STATES (NOT) HAVE FERTILITY POLICIES?

In this section, I will flesh out the various arguments for and against states' rights to design fertility policies. I argue that states may, should, and in fact, do have policies that affect fertility, and suggest a test for assessing the legitimacy of these policies.

### *A. The Liberal Approach*

Decisions concerning procreation and family planning are among the most intimate and meaningful life decisions that people make. Consequently, liberal theory holds that the state must stay out of such decisions.<sup>28</sup> Liberal are highly suspicious of government and its motivations. This

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<sup>28</sup> Gila Stopler, *A Feminist Perspective on Natality Policies in Multicultural Societies*, 2 L. & ETHICS HUMAN RTS. 1, 5 (2008). The U.S. Supreme Court has recognized liberty rights, which protect individuals from undue interference by the state, as including decisions related to: abortion, *Roe v. Wade*, 410 U.S. 113, 152-54 (1973); marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942); *Eisenstadt v. Baird*, 405 U.S. 438, at 453-54 (1972) (stating that the right of privacy includes the right of the individual to be free from governmental intervention into the decision to have children); and the raising and education of children, *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (reviewing previous cases where the Court has deemed a government action cannot infringe in the area of private family life); *Pierce v. Society of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925) (holding the state cannot force children to only attend public schools). This line of cases which anchors individual liberty rights in substantive due process is steeped in classical liberal thought. See Davin J. Hall, *Not So Landmark after All? Lawrence v. Texas: Classical Liberalism and Due Process Jurisprudence*, 13 WM. & MARY BILL RTS. J. 617, 638 (2004) (discussing how the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), builds

suspicion leads liberals to adhere to a sharp distinction between the public and the private sphere.<sup>29</sup> While government is allowed to interfere in the public sphere, it must stay out of the private sphere of home and family, and even more so of intimate relations and procreation decisions.<sup>30</sup> In these spheres the greatest possible freedom must be attained.<sup>31</sup> In the famous words of Isaiah Berlin:

[T]here are frontiers, not artificially drawn, within which men should be inviolable, these frontiers being defined in terms of rules so long and widely accepted that their observance has entered into the very conception of what it is to be a normal human being . . . .<sup>32</sup>

Moreover, because autonomy is fundamental to liberal theory, liberals would reject any attempt by the state to take a stand as to the desired number of children per family or to take measures to carry this stand into effect, believing that such measures may obstruct the ability of individuals to freely choose the number of their children.<sup>33</sup> In the United States, this strong liberal stance against any government intervention in reproduction has served as the constitutional basis for the Supreme Court's most important decision on reproductive rights, *Roe v. Wade*.<sup>34</sup> The *Roe* court held that the right to privacy, which is founded on the Fourteenth Amendment concept of personal liberty and on restrictions upon state action, encompasses a woman's decision whether or not to terminate her pregnancy.<sup>35</sup> Thus, the woman's right to choose whether or not to carry her pregnancy to term is an individualistic, negative right to privacy and personal liberty. As West points out, the right to abortion established by *Roe* prohibits the state from interfering in a woman's contractual freedom to purchase an abortion, but it does nothing to ensure that a woman who needs an abortion can actually have access to one or can afford to pay for it.<sup>36</sup> Furthermore, even this negative individualistic right not to reproduce is limited. The Court rejected the claim that a woman has an absolute right to decide when and how to terminate her pregnancy, and held that the state can restrict that right through regulation protecting important state interests.<sup>37</sup> Moreover, *Roe* did not even explicitly create a legal right to abortion, but only created a right against the criminalization of abortion in some circumstances and left the abortion decision and its effectuation to the medical judgment of the pregnant woman's physician, and not to the woman herself.<sup>38</sup>

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on the liberal theory of prior cases).

<sup>29</sup> Stopler, *supra* note 28.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Isaiah Berlin, *Two Concepts of Liberty*, in *LIBERALISM AND ITS CRITICS* 15, 28 (Michael J. Sandel ed., 1984).

<sup>33</sup> Stopler, *supra* note 28, at 5-6.

<sup>34</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>35</sup> *Id.* at 153.

<sup>36</sup> West, *supra* note 21, at 1403.

<sup>37</sup> *Roe*, 410 U.S. at 154.

<sup>38</sup> West, *supra* note 21, at 1403; *Roe*, 410 U.S. at 163-66.



West argues that, notwithstanding all the limitations of the *Roe* decision from a women's rights perspective, there have been very few constructive critiques of *Roe* by feminist legal scholars.<sup>39</sup> She attributes this mainly to *Roe*'s continuing vulnerability, but also to the feminist belief in its efficacy and to the feminist feeling that "*Roe* got so much exactly right" even if it did not get everything right.<sup>40</sup> However, while *Roe* may have "got[ten] so much exactly right" in terms of protecting the right to abortion, *Roe*'s individualistic, negative, choice-based understanding of women's reproductive rights has been detrimental to the American feminist understanding of the proper role of the state in affirmatively supporting women's reproductive rights through appropriate fertility policies,<sup>41</sup> which is further explored in Part I.C.

### B. State Interests and State Actions

Every state and every society has a strong interest in fertility rates. Fertility rates can determine the future of the community—will it grow enough or too much, will it grow smaller or perhaps even disappear altogether? While, in the past, the size of the population was considered vital to ensuring national strength, economic growth, and protection from outside aggression,<sup>42</sup> these days the size of the population and its age composition are considered central to issues such as public spending on elderly care, pensions and health care, and the size of the workforce.<sup>43</sup> All these issues represent legitimate and important interests which any government is permitted and indeed expected to care about and to plan for. The fact that these issues are directly affected by fertility rates makes fertility rates a subject that the government can legitimately be concerned with when working to advance such interests.

It is important to stress that my defense of the government's right to concern itself with fertility rates is limited only to such instances in which the interests that the government is trying to promote through its fertility policies are themselves legitimate interests. Thus, if the government designs fertility policies in order to achieve clearly illegitimate interests, such as racial purity, these policies should be struck down.<sup>44</sup> Furthermore, even state interests that are not facially illegitimate should be carefully scrutinized, and found legitimate only when they aim to achieve societal goals that are appropriate in a democratic society and are sensitive to the need to respect individual rights.<sup>45</sup> Thus, for example, a societal goal of tripling a country's fertility rates

<sup>39</sup> West, *supra* note 21, at 1398-1405.

<sup>40</sup> *Id.* at 1400-02.

<sup>41</sup> *Id.* at 1425 (arguing that *Roe* does not create a robust concept of reproductive justice, but instead, suggests that women have a right to nonreproductive sex).

<sup>42</sup> See Finkle & McIntosh, *supra* note 24, at 3; Demeny, *supra* note 16, at 752.

<sup>43</sup> See Organisation for Econ. Co-operation & Dev. [OECD], *Policy Brief: Can Policies Boost Birth Rates?*, at 1 (Nov. 2007); see also Comm'n of European Communities, *Green Paper "Confronting Demographic Change: A New Solidarity Between the Generations,"* at 13 COM (2005) 94 final (Mar. 16, 2005).

<sup>44</sup> See Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 750 (1994) (highlighting "excluded reasons" that cannot serve as justification for government action in a certain area of life).

<sup>45</sup> See European Convention on Human Rights, art. 8, Nov. 4, 1950, 213 U.N.T.S. 222 (previously titled "Convention for the Protection of Human Rights and Fundamental Freedoms"), for a similar examination of state interests and the right to respect for private and family life. Article 8 states: "Everyone has the right to respect for his private and family life . . . There shall be no interference by a public authority with the exercise of this right except such as is in

should not be considered a legitimate state interest, no matter how dangerously low a country's fertility rate is. The reason is that such a goal, whose achievement would require women to triple the number of their children, is clearly insensitive to women's individual rights. Thus, my claim that governments can design fertility policies to advance legitimate state interests does not mean that the government can decide on any fertility policy that advances these interests. I would, however, argue that it does mean that, despite liberal uneasiness about government intrusion into the private sphere of home and family, governments are justified in trying to craft fertility policies that may advance important and legitimate interests, as long as these policies are compatible with individual rights, and especially with women's rights. The exact contours of this compatibility are discussed in Part I.C below.

Thus far, I have argued that governments may have general legitimate interests to create fertility policies. In addition, from a feminist perspective, governments have the right, and indeed the duty, to design fertility policies that can advance women's rights to liberty and equality. Before turning to the feminist arguments with regard to fertility policies, I first claim that, as a factual matter, it is impossible for governments *not* to affect fertility, directly and indirectly, through their actions and inactions. Thus, my claim is that a decision such as Eisenhower's—not to have any policy with regard to fertility—is as much a fertility policy as the decision to craft a positive fertility policy, and should be regarded as such. This argument tracks Olsen's famous argument with regard to the myth of state nonintervention in the family.<sup>46</sup> According to Olsen, with respect to state involvement in the family the terms “intervention” and “nonintervention” are indeterminate and largely meaningless.<sup>47</sup> They imply that the state can choose either to remain neutral or uninvolved in the family (nonintervention), or to take a stand and get involved in the family (intervention).<sup>48</sup> Olsen argues that this way of presenting state involvement in the family is ideologically driven and analytically mistaken.<sup>49</sup> A state cannot stay neutral or remain uninvolved, since “[a]s long as a state exists and enforces any laws at all, it makes political choices.”<sup>50</sup> Thus, the state already intervenes in the family by the very fact that it decides which groupings to recognize as families and which not, and what rights and duties each member of the family may have towards the other.<sup>51</sup>

A similar argument can be made with respect to fertility. Although the biological fact of giving birth may occur irrespective of the state, almost all other aspects of fertility—from the legal recognition of motherhood through contraception, abortion, and fertility treatment, to maternity leave and child care—are regulated by state laws.<sup>52</sup> Furthermore, the biological fact of giving birth is itself influenced by government policies on all the above-mentioned issues. Thus, for example, the government's refusal to apply anti-discrimination in employment laws to pregnant women, or to mandate paid maternity leave, restricts working women's options for

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accordance with the law *and is necessary in a democratic society . . .*” *Id.* (emphasis added).

<sup>46</sup> See Olsen, *supra* note 26.

<sup>47</sup> *Id.* at 835.

<sup>48</sup> *Id.* at 835-37.

<sup>49</sup> *Id.* at 863.

<sup>50</sup> *Id.* at 836.

<sup>51</sup> See *id.* at 837, 842.

<sup>52</sup> See generally Ryiah Lilith, *The G.I.F.T of Two Biological and Legal Mothers*, 9 AM. U. J. GENDER SOC. POL'Y & L. 207 (2001) (discussing the legal recognition of motherhood).

childbearing.<sup>53</sup> Similarly, restrictions on abortion and on the allocation of federal funds to sex education programs other than abstinence-only programs, restricts women's and girls' ability to prevent or end an unwanted pregnancy.<sup>54</sup> Thus, government cannot, and in fact does not, remain neutral with regard to fertility. Any decision that the government makes, or that it refuses to make, has a clear impact on fertility, both in terms of the individual woman's ability to exercise her reproductive rights and in terms of aggregate fertility rates.

Arguably, even if government actions and inactions affect fertility whether government intends for this to happen or not, one could still claim a distinction between intentionally trying to influence fertility rates and doing so unintentionally. As the argument would go, from the perspective of respecting privacy and autonomy, what is morally wrong, and should therefore be prohibited, is the intention to affect fertility rates, not the actual effect.

However, I would argue that the distinction between acting with intent to affect fertility rates and acting without such intent is unpersuasive for two reasons. First, it would seem rather naïve to assume that governments are unaware of the effects on fertility rates of most of the policies they enact. It is very easy for a government that wishes to influence fertility rates to do so without revealing its intent. Thus, ruling out only intentional fertility policies does not in fact prevent their existence. For example, Professor Patricia Hill Collins shows how U.S. fertility policies (which she terms "population policies"), although allegedly non-existent, and not intended to influence fertility rates, are in fact very much in existence and are designed to result in differentiated fertility rates according to different racial and social classes.<sup>55</sup> She argues that a complex array of state policies governing taxation, insurance, employment conditions and health care regulation encourage middle class white women's fertility, while other policies, including welfare policies that encourage permanent or reversible sterilization, aim to decrease the fertility rates of working-class and poor African-American women.<sup>56</sup> The second reason why I find the distinction between acting with intent to affect fertility rates and acting without such intent unpersuasive is that, as Collins's example clearly shows, not only does ruling out intentional fertility policies not prevent their existence, but it makes it easier for such policies to exist undetected and un-scrutinized. The existence of clear, intentional and transparent fertility policies would make it easier for those influenced by them to identify, scrutinize, and criticize fertility policies.

If the arguments above are correct, then the question that needs to be asked is not whether states should have fertility policies, but what kind of fertility policies should states have? This brings me to the feminist argument regarding the desired design of government fertility policies to which I now turn.

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<sup>53</sup> See Bhushan, *supra* note 19; Jessica Monroe, *Ohio's "Pregnancy-blind" Leave Policy: The Public Policy Ramifications of McFee v. Nursing Care Management of America*, 80 U. CIN. L. REV. 229 (2011).

<sup>54</sup> See, e.g., Elizabeth Nash et al., *Laws Affecting Reproductive Health and Rights: 2013 State Policy Review*, GUTTMACHER INST., <http://www.guttmacher.org/statecenter/updates/2013/statetrends42013.html> (last visited Mar. 28, 2015).

<sup>55</sup> Patricia Hill Collins, *Producing the Mothers of the Nations: Race, Class and Contemporary US Population Policies*, in *WOMEN, CITIZENSHIP AND DIFFERENCE* 118 (Nira Yuval-Davis & Pnina Werbner eds., 1999).

<sup>56</sup> *Id.* at 120-26.

### C. The Feminist Approach

Unlike liberals, whose individualistic conception of autonomy and suspicion of government lead them to adhere to a strict separation between the public and the private spheres, most strands of feminist theory evaluate the desirability of fertility policies from quite a different perspective.<sup>57</sup> For feminists, the separation between the public and the private spheres is central to women's oppression and subordination.<sup>58</sup> Feminists argue that patriarchal societies confine women to the private sphere, where they are expected to take unremunerated care of the family and the children, as part of their duties of love.<sup>59</sup> Unlike the public sphere where principles of justice and the rights discourse prevail, the family is often perceived to be beyond justice.<sup>60</sup> Professor Michael Sandel warns that applying the principles of justice within the family will result in the loss of "nobler virtues,"<sup>61</sup> such as affection, self-sacrifice, and generosity.

These views of women's place in the family and the practices that they legitimate serve as the practical, as well as the normative, basis for women's oppression. Societies and states need children in order to ensure their continuation and use women, without remuneration, in order to give birth to children and to raise them.<sup>62</sup> This releases men, as well as the state, from the demanding duties of care involved in the rearing of children, and the public-private divide conceals this unjust exploitation.<sup>63</sup> Other means through which this concealment is achieved are the ideology of motherhood and the myth of love.<sup>64</sup> These portray motherhood as a woman's vocation and convey a powerful message that a mother's love requires that a woman sacrifice all her wants and needs for the benefit of her family and children.<sup>65</sup> Furthermore, women's equal rights in the polity are sometimes seen as stemming from and predicated on their fulfillment of their roles as mothers.<sup>66</sup>

The exploitation of women for childbearing and rearing occurs both in traditional and

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<sup>57</sup> On the individualistic nature of the traditional conception of autonomy, see Catriona Mackenzie & Natalie Stoljar, *Introduction* to RELATIONAL AUTONOMY FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 3, 5-6 (Catriona Mackenzie & Natalie Stoljar eds., 2000).

<sup>58</sup> Stopler, *supra* note 28, at 6. While there are multiple feminist approaches and their analyses of women's subordination vary, I use "feminist theory" in the singular to indicate the basic agreement that exists between these approaches with regard to the claims that I discuss.

<sup>59</sup> Dana Freibach-Heifetz & Gila Stopler, *On Conceptual Dichotomies and Social Oppression*, 34 PHIL. & SOC. CRITICISM 515, 520-21 (2008).

<sup>60</sup> See SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* 25-40 (1989).

<sup>61</sup> MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 34 (2d ed. 1998).

<sup>62</sup> Stopler, *supra* note 28, at 6.

<sup>63</sup> Stopler, *supra* note 28, at 6; Freibach-Heifetz & Stopler, *supra* note 59, at 520.

<sup>64</sup> Stopler, *supra* note 28, at 6.

<sup>65</sup> *Id.*; see Freibach-Heifetz & Stopler, *supra* note 59, at 520; see generally Gila Stopler, *Gender Construction and the Limits of Liberal Equality*, 15 TEX. J. WOMEN & L. 43 (2005); see also Nitza Berkovitch, *Motherhood as a National Mission*, 20 WOMEN'S STUD. INT'L F. 605, 605-10 (1997) (discussing the construction of womanhood in Israel); JACQUELINE PORTUGESE, *FERTILITY POLICY IN ISRAEL: THE POLITICS OF RELIGION, GENDER, AND NATION* 2 (1998).

<sup>66</sup> *E.g.*, Berkovitch, *supra* note 65, at 615.

religious communities, as well as in liberal capitalist societies.<sup>67</sup> The structure of the liberal capitalist state is “predicated on leaving the duty to care for children in the hands of the family, i.e., with the mother, and on freeing the state, society, the market, and men from any obligations in this respect.”<sup>68</sup> The ideology of choice that has been the basis for the *Roe* decision serves the liberal capitalist structure as an important justification for women’s exclusive responsibility for their children. As West argues, since *Roe* gives women the right to choose to enter into a contractual obligation to perform an abortion, a woman who chooses to forgo the opportunity to abort and decides to give birth and to parent the child is seen as making her own private choice, which there is no reason to publicly subsidize, no matter how costly it is.<sup>69</sup> The liberal portrayal of childbearing and rearing as an activity which the state does not have and cannot have any interest in, further strengthens the argument that the state has no responsibility to assist with it. Nevertheless, as we have seen, all governments have an interest in the number of children born in their countries, but liberal capitalist governments are satisfied to leave the task of persuading people to bear children to religious communities while leaving the duties of care to the parents, and especially to mothers.<sup>70</sup>

*How does all this affect the feminist perspective on fertility policies?* Theoretically, feminist awareness of the ways in which states and communities exploit women’s reproductive roles might result in their adamant rejection of states’ right to set and implement fertility policies. Another reason for feminists to reject state involvement in matters of reproduction is the value that feminists place on choice and autonomy. Although most feminists perceive autonomy as a positive relational right, while liberals understand it as a negative individualistic one, both feminists and liberals posit that free choice is fundamentally important, and are concerned that women might be coerced into having children by their states or communities.<sup>71</sup> Consequently, all strands within feminist theory seem to agree that the lack of reproductive choice is a central means for the oppression of women.<sup>72</sup> Thus, just as the rallying cry “government, stay out of my uterus” suggests, a complete withdrawal of the state from any and all reproduction issues may seem the most conducive to the protection of women’s rights.

Nevertheless, as I have already argued, a complete withdrawal of the state from all reproduction issues is not possible. There are two interrelated reasons why feminists should support some forms of fertility policies—and should even regard them as indispensable to equality for women.<sup>73</sup> The first reason is that feminists, above all others, understand that in order to achieve equality for women, “the perception that raising children is a woman’s job, to which

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<sup>67</sup> Stopler, *supra* note 28, at 6-7. See Gila Stopler, *Countenancing the Oppression of Women: How Liberals Tolerate Religious and Cultural Practices That Discriminate Against Women*, 12 COLUM. J. GENDER & L. 154 (2003), for a discussion of a woman’s role in traditional and religious societies.

<sup>68</sup> Stopler, *supra* note 28, at 7; see Stopler, *Gender Construction and the Limits of Liberal Equality*, *supra* note 65, at 70; OKIN, *supra* note 60.

<sup>69</sup> See West, *supra* note 21, at 1410-11.

<sup>70</sup> Freibach-Heifetz & Stopler, *supra* note 59, at 519-20.

<sup>71</sup> Stopler, *supra* note 28, at 7. On the differences between the feminist and the liberal conceptions of autonomy, see Mackenzie & Stoljar, *supra* note 57, at 5.

<sup>72</sup> Stopler, *supra* note 28, at 7; PORTUGESE, *supra* note 65, at 1.

<sup>73</sup> The discussion of these two reasons, which follows, is adapted from Stopler, *supra* note 28, at 7-8.

she must dedicate herself with no remuneration and no help, must fundamentally change.”<sup>74</sup> There should be recognition of the fact that raising children is the duty of both parents and that they must share the care duties that this important task involves.<sup>75</sup> If parenting is shared by both parents, and the constraints that arise from the care duties towards children affect both men and women, then the labor market would have to adapt to these constraints by implementing parent-friendly policies—such as flexible working hours.<sup>76</sup> The state would facilitate and enforce this adaptation through protective legislation.<sup>77</sup> Furthermore, the state would be obliged to support parents’ efforts to combine their care duties with participation in the job market by supplying low-cost, high-quality day care and tax-deductible care services.<sup>78</sup>

The second reason why feminists should support fertility policies despite their intervention in the private sphere is that much of the oppression of women by individuals and communities occurs in this sphere.<sup>79</sup> Liberals prefer to turn a blind eye to the fact that in some communities, women are expected to give birth to a large number of children without having any meaningful choice in the matter.<sup>80</sup> While according to liberal myth, by staying clear of the private sphere, “the state allows everyone the freedom to choose and to act out of their own free will,” the reality is that by staying clear of the private sphere “the state facilitates the continued existence of private power over women’s bodies and procreative abilities.”<sup>81</sup> Thus, as will be discussed below, feminists may, under certain conditions, support fertility policies that are aimed at reducing fertility rates in religious communities that pressure women into having an inordinately high number of children.<sup>82</sup>

Even in the United States, where the individualistic, negative rights, choice-based, *Roe*-inspired understanding of reproductive rights prevails, some feminist legal scholars, such as Professor Reva Siegel, have for years been advocating a positive rights, equality-based analysis of reproductive rights.<sup>83</sup> These scholars have even been supporting government regulation of reproduction that is compatible with the Equal Protection Clause and with the guarantee of equal sexual freedom.<sup>84</sup> A detailed list of positive reproductive rights that should be protected through expansive fertility policies is provided by West, who posits that:

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<sup>74</sup> Stople, *supra* note 28, at 7.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 7-8.

<sup>77</sup> *Id.* at 8.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Stople, *supra* note 28, at 8.

<sup>81</sup> *Id.*

<sup>82</sup> *See infra* Part III.B.

<sup>83</sup> *See, e.g.*, Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 842 (2007).

<sup>84</sup> For examples of such writings supporting the equality analysis, see Symposium, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007); Lilith, *supra* note 52. *See generally* PORTUGESE, *supra* note 65.

Reproductive justice requires a state that provides a network of support for the processes of reproduction: protection against rape and access to affordable and effective birth control, healthcare, including but not limited to abortion services, prenatal care, support in childbirth and postpartum, support for breastfeeding mothers, early childcare for infants and toddlers, income support for parents who stay home to care for young babies, and high quality public education for school age children.<sup>85</sup>

Clear support for the setting of fertility policies that advance both women's rights and the legitimate interests of states can be found on the international level. International law recognized that states have the right to establish population and fertility policies. The United Nations International Conference on Population and Development held in 1994 in Cairo adopted a feminist position,<sup>86</sup> and its Programme of Action ("Cairo Plan of Action") states that the empowerment of women and gender equality are cornerstones of policies related to development and population.<sup>87</sup> Thus, according to the Cairo Plan of Action, states have both the right and the duty "to implement population policies that strive to ensure women's full and equal participation in both public and private life, their full equality in education, in economic life, in employment, in decision making and in household responsibilities, and their full access to and autonomy with respect to reproductive health."<sup>88</sup>

#### *D. How to Assess the Legitimacy of Fertility Policies*

The above discussion has identified three types of interests that fertility policies may serve: legitimate state and group interests, individual liberty interests, such as autonomy and privacy, and individual equality interests. On the basis of the above discussion, I claim that the legitimacy of a given fertility policy should be assessed by examining it against these interests, and that two rules should guide this examination. First, similar to any other government policy, fertility policies can only be based on a state's need to promote legitimate interests (the "legitimate interests prong"). As will be further discussed below, this rule leads me to oppose both fertility policies that are aimed at promoting clearly illegitimate interests, and fertility policies that promote interests that may upon first glance seem facially legitimate, but a closer examination would reveal that they cannot be deemed legitimate in a democratic society that respects human rights.<sup>89</sup> This would lead me to reject fertility policies such as the Chinese one-

<sup>85</sup> West, *supra* note 21, at 1425.

<sup>86</sup> See Int'l Conference on Population & Dev., Cairo, Egypt, Sept. 5-13, 1994, *Report of the International Conference on Population and Development* U.N. Doc. A/CONF.171/13/Rev.1 [hereinafter ICPD REPORT]; *Programme of Action of the International Conference on Population and Development*, in ICPD REPORT, 1-115 [hereinafter Cairo Plan of Action].

<sup>87</sup> Cairo Plan of Action, *supra* note 86, at 12 (Principle 4).

<sup>88</sup> Stopler, *supra* note 28, at 8; see Cairo Plan of Action, *supra* note 86, at 22, 40.

<sup>89</sup> See Pildes, *supra* note 44, at 750 (explaining exclusionary reasons which governments can never use as justification for limiting individual rights). For examples or interests that cannot be deemed legitimate in a democratic society that respects human rights, see European Convention on Human Rights, art. 8, Nov. 4, 1950, 213 U.N.T.S. 222 (stating that "[e]veryone has the right to respect for his private and family life" and that "[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society" (emphasis added)).

child policy<sup>90</sup> as well as various restrictions on abortion.<sup>91</sup> Second, due to the primacy of individual rights, even legitimate state and group interests in fertility can only be realized while respecting and promoting individual rights, especially individual women's liberty and equality rights (the "liberty and equality prong"). Since, as I have shown, fertility policies focused on nonintervention and motivated solely by liberty concerns are insufficient to ensure women's rights, any fertility policy should simultaneously protect both women's liberty interests and women's equality interests. Furthermore, any policy should satisfy both prongs of the test—the legitimate interest prong and the liberty and equality prong—concurrently, in order to be considered a legitimate fertility policy.

The test just described is mainly motivated by feminist concerns. However, feminist theory, as a humanist theory that is acutely aware of the need to secure equal rights not only for women but also for other oppressed minorities, is highly sensitive to the fact that by shaping fertility policies according to ethnic, racial, religious, or class parameters, states and communities can ensure not only the continued control of men over women, but also the continued control of other dominant groups over minority groups.<sup>92</sup> A liberal might argue that this problem should persuade us to adopt the liberal stance shunning state involvement in fertility, as the cost of such involvement exceeds its benefit. Nevertheless, because of the clear need for fertility policies in order to ensure women's liberty and equality rights, discussed above, feminists would reject this position and posit that the proper solution for the need to prevent abuse of government's power to set fertility policies is for courts to apply close scrutiny to government fertility policies, and especially those that seem to differentiate between groups on the basis of race, religion, ethnicity, and the like. Such careful scrutiny can expose the illegitimate motivations behind fertility policies where they are present, and may result in their invalidation.

In the remainder of the Article, I will describe various fertility policies that exist in different parts of the world and assess their compatibility with the suggested test. I will begin by describing pronatalist fertility policies, aimed at increasing fertility rates, move on to discussing antinatalist fertility policies, aimed at decreasing fertility rates, and end with a discussion of eugenic fertility policies.

## II. PRONATALIST FERTILITY POLICIES AND THEIR LIMITS

### *A. The Rationale for Pronatalist Fertility Policies*<sup>93</sup>

Throughout history, large populations were considered necessary to ensure national strength and economic growth.<sup>94</sup> Consequently, states' fertility policies were pronatalistic. Religious ideologies—such as Christianity, Islam and Judaism—which believed procreation to be a sacred duty, as well as ethnic and nationalistic ideologies, also encouraged procreation. Thus, for example, contraception and abortion are opposed by the Catholic Vatican because of the

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<sup>90</sup> For history and analysis of China's one-child policy, see Xizhe Peng, *Population Policy and Program in China: Challenge and Prospective*, 35 TEX. INT'L L.J. 51 (2000); *infra* Part IV.

<sup>91</sup> For examples of restrictions on abortion, see Nash et al., *supra* note 54; *infra* Part III.

<sup>92</sup> PORTUGESE, *supra* note 65, at 2; *see infra* Part IV.A.

<sup>93</sup> This Subpart relies primarily on arguments put forth in Gila Stopler, *Women as Bearers of the Nation: Between Liberal and Ethnic Citizenship*, in DEMOCRATIC CITIZENSHIP AND WAR, 164, 168 (Yoav Peled et al. eds., 2011).

<sup>94</sup> Stopler, *supra* note 93; Finkle & McIntosh, *supra* note 24, at 3; Demeny, *supra* note 16, at 752.



sanctity of procreation.<sup>95</sup> Islam encourages procreation as well as early motherhood and sees women's role as bringing children into the world.<sup>96</sup> Traditional Judaism restricts the use of contraception and abortion and holds that the duty to procreate is of the highest order.<sup>97</sup>

In times of ethnic and national conflicts, ethnic and national communities measure women's contribution to the community through their ability to reproduce the members of the struggling community.<sup>98</sup> What makes women's reproductive role so important is that "the 'common origin' of the community members, whether true or imagined, is the central criterion for belonging."<sup>99</sup> Lastly, in recent years, the shrinking of the population in many countries in Europe and its changing age composition have triggered more modern concerns such as public spending on elderly care, pensions and health care, and the size of the workforce.<sup>100</sup> Consequently, the European Commission's Green Paper on the demographic change transforming Europe posits that influencing women's fertility and control over immigration are the central means states have for influencing their demographic compositions.<sup>101</sup> For national, ethnic, and religious communities, control over women's fertility is even more important, since these communities do not usually have control over immigration into the state in which they reside.<sup>102</sup>

If raising fertility rates can be so important to states and communities, the question that needs to be examined is which pronatalist fertility policies can be considered legitimate and which cannot. Pronatalist fertility policies can range from restrictive, punitive measures such as criminal

<sup>95</sup> Stopler, *supra* note 93; see Charles B. Keely, *Limits to Papal Power: Vatican Inaction after Humanae Vitae*, in *THE NEW POLITICS OF POPULATION: CONFLICT AND CONSENSUS IN FAMILY PLANNING* 220, 222 (Jason L. Finkle & C. Alison McIntosh, eds., 1994).

<sup>96</sup> Stopler, *supra* note 93; see Ali A. Mazrui, *Islamic Doctrine and the Politics of Induced Fertility Change: An African Perspective*, in *THE NEW POLITICS OF POPULATION: CONFLICT AND CONSENSUS IN FAMILY PLANNING* 121, 121-22 (Jason L. Finkle & C. Alison McIntosh, eds., 1994).

<sup>97</sup> Stopler, *supra* note 93; see PORTUGESE, *supra* note 65, at 46-47.

<sup>98</sup> Stopler, *supra* note 93; see Floya Anthias & Nira Yuval-Davis, *Introduction to WOMAN—NATION—STATE*, 1, 6-10 (Nira Yuval-Davis & Floya Anthias, eds., 1989). According to Yuval-Davis and Anthias, women participate in ethnic and national processes in five major ways:

- (a) as biological reproducers of members of ethnic collectivities;
- (b) as reproducers of the boundaries of ethnic [or] national groups;
- (c) as participating centrally in the ideological reproduction of the collectivity and as transmitters of its culture;
- (d) as signifiers of ethnic [or] national differences—as a focus and symbol in ideological discourses used in construction, reproduction and transformation of ethnic [or] national categories;
- (e) as participants in national, economic, political and military struggles.

*Id.* at 7. For historical examples of the effects of nationalism and ethnic conflict on state reproductive policies, see Patrizia Albanese, *Abortion & Reproductive Rights under Nationalist Regimes in Twentieth Century Europe*, *WOMEN'S HEALTH & URB. LIFE*, May 1, 2004, at 8.

<sup>99</sup> Stopler, *supra* note 93 (citing NIRA YUVAL-DAVIS, *GENDER & NATION* 26-27 (1997)).

<sup>100</sup> See OECD, *supra* note 43, at 1; see also Comm'n of European Communities, *supra* note 43.

<sup>101</sup> Comm'n of European Communities, *supra* note 43, at 5-6; Stopler, *supra* note 93.

<sup>102</sup> For a discussion of modern Protestant pronatalism in the United States, see John McKeown, *Receptions of Israelite Nation-building: Modern Protestant Natalism and Martin Luther*, 49 *DIALOG* 133 (2010).

prohibitions on abortion and on the use of contraception, to supportive measures such as free high quality day cares and flexible job markets.<sup>103</sup> In what follows, I will discuss several examples of pronatalist fertility policies adopted in different countries, including various restrictions on abortion, ideological pronatalist propaganda, and supportive measures aimed at alleviating the burdens of childbearing and rearing. I will examine these policies against the suggested test for evaluating the legitimacy of fertility policies.

### B. Restrictions on Abortion

There is a range of restrictions that governments can set on abortion.<sup>104</sup> In this Article, I will focus on a few examples ranging from total prohibitions on abortion, through the requirements of state authorization for abortion and pre-abortion counseling, to the refusal to fund abortion. While this is merely a partial list of the many possible restrictions, it is sufficient to demonstrate the way in which the analysis of such restrictions should be made using the test suggested in this Article.

#### 1. Bans on Abortion

Throughout most parts of the twentieth century, a nearly complete ban on abortion existed in many countries around the world with different ideological leanings, including, for example, the Soviet Union, France, Germany, Romania, Japan and the United States.<sup>105</sup> If we examine these strict bans on abortion according to the two-pronged test suggested here, such bans fail both the legitimate interest prong and the liberty and equality prong. While the interest of increasing a state's population cannot be considered illegitimate in and of itself, the interest of increasing a state's population as quickly as possible and without regard to the rights of individuals involved, which has motivated at least some of the countries mentioned, cannot be considered a legitimate interest in a democratic society that is sensitive to individual rights. Of course, many of the countries mentioned here were not democratic countries that respected human rights at the time they pursued these policies, and this may be one reason they adopted such policies. However, this should not exempt fertility policies in these countries from being assessed from a human rights perspective and found wanting. Thus, In Nicolae Ceaușescu's Romania, the "need to obtain quick results with a minimal economic cost" in the effort to increase the population is what motivated the regime to opt for a strict ban on abortion and for limitation and marginalization of contraception and of sexual education, instead of choosing to increase fertility

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<sup>103</sup> For examples of supportive measures that will be further discussed below, see Comm'n of European Communities, *supra* note 43 (describing the measures taken to promote natality in the European Union).

<sup>104</sup> For a range of recent restrictions various state governments in the United States are placing on abortion, see Nash et al., *supra* note 54. See also Katie McDonough, *The 5 Most Dangerous Abortion Restrictions of 2013*, SALON (Dec. 19, 2013, 7:44 AM), [http://www.salon.com/2013/12/19/the\\_5\\_most\\_dangerous\\_abortion\\_restrictions\\_of\\_2013](http://www.salon.com/2013/12/19/the_5_most_dangerous_abortion_restrictions_of_2013).

<sup>105</sup> On the Soviet Union, France, and Germany, see David L. Hoffmann, *Mothers in the Motherland: Stalinist Pronatalism in Its Pan-European Context*, 34 J. SOCIAL HIST. 35, 38-40 (2000). On Romania, see Soare, *supra* note 15. On Japan, see Miyazaki, *supra* note 15, at 794-95. On the United States, see Christopher Z. Mooney & Mei-Hsien Lee, *Legislating Morality in the American States: The Case of Pre-Roe Abortion Regulation Reform*, 39 AM. J. POL. SCI. 599, 602-03 (1995). For a history of perspectives on abortion in the United States, see Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

rates through economic incentives, as was suggested by some.<sup>106</sup> When a state defines its interest in a manner that completely disregards its adverse effects on human rights, that interest cannot be considered legitimate.

Another central interest motivating bans on abortion, which at first glance appears legitimate, is the interest in protecting the life of the fetus. However, a closer look at this interest reveals that its legitimacy is questionable. First, as a matter of law, fetuses were not recognized as persons except for very specific circumstances.<sup>107</sup> Second, and more importantly, as Professor Judith Jarvis Thomson shows in her classical defense of abortion, even if we assume that the fetus is a person and has a right to life from the moment of conception, which it cannot realize without the help of its mother, it does not follow that the woman has an obligation to sacrifice nine months of her life in order to help the fetus realize this right.<sup>108</sup> In fact, in no other context, except pregnancy, are people considered as having a legal obligation to sacrifice anything in order to help others realize their right to life.<sup>109</sup> This is a clear indication that such demands—that women sacrifice their privacy, autonomy, bodily integrity and health for the sake of the fetus—are motivated first and foremost by stereotypical perceptions of women's roles and their obligations of love and sacrifice, and much less by a genuine and general concern in law and morality for the right to life.<sup>110</sup> Consequently, the interest of a state in the right to life of the fetus, if unaccompanied by a similarly deep interest in the right to life in other contexts, is an interest motivated by biases and stereotypical views of women and is therefore illegitimate.

Even if fertility policies banning abortion could survive the legitimate interest prong of the test suggested here, the policies would fail the liberty and equality prong. Prohibiting abortion violates women's rights to privacy and autonomy over their own bodies and over their most important life decisions. At the same time, a ban on abortion violates women's right to equality since it imposes gender-differentiated burdens on women, which are not imposed on men. Forcing women to carry a pregnancy to term and give birth to a child whom they do not want deprives them of dignity, health, happiness, and freedom in a manner in which men are not deprived.<sup>111</sup> As Siegel explains:

Control over whether and when to give birth is practically important to women for reasons inflected with gender-justice concern: It crucially affects women's health and sexual freedom, their ability to enter and end relationships, their education and job training, their ability to provide for their families, and their ability to negotiate work-family conflicts in institutions organized on the basis of traditional sex-role assumptions that this society no longer believes fair to enforce, yet is unwilling institutionally to redress.<sup>112</sup>

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<sup>106</sup> Soare, *supra* note 15, at 75-76.

<sup>107</sup> Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 600-04 (1986).

<sup>108</sup> Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 57-59, 64-65 (1971).

<sup>109</sup> *Id.* at 63.

<sup>110</sup> See Siegel, *supra* note 83, at 817.

<sup>111</sup> See *id.* at 817-19.

<sup>112</sup> *Id.* at 819.

## 2. State Authorization of Abortion and Pre-Abortion Counseling

Somewhat less restrictive ways to decrease the number of abortions are to take the control over the decision to abort out of the hands of the woman, as is done in Israel, or to subject her to requirements that would weaken her resolve to abort, as is done in Germany.

### i. Israel

From early on, the state of Israel has been concerned with the need to increase fertility rates in order to ensure the survival of the Jewish people. This concern has led the government to establish a Center of Demography and to entrust it with carrying out the government's fertility policies.<sup>113</sup> The government's policy on abortion was influenced by a report (the "Beky Report") of a special Commission for Natality Problems that was appointed by the government.<sup>114</sup> Although at the time Israeli law criminalized all abortion, it was not being enforced and illegal abortions were being carried out freely.<sup>115</sup> The commission, which concluded that abortion constituted a serious demographic concern, recommended the enactment of a new law that would criminalize all abortions unless they were approved by a special committee, and would be strictly enforced.<sup>116</sup> The committee would only approve a minimal number of abortions, and approval would be granted "only after an attempt was made to persuade the woman to carry the pregnancy to term."<sup>117</sup> Subsequently, Israeli law was amended in 1977 to allow only abortions that are approved by special pregnancy termination committees, which are authorized to permit the abortion only if certain conditions stipulated in the law are met, such as that the pregnancy constitutes a risk to the mother or that it was conceived out of wedlock.<sup>118</sup> After the law was amended, the Center of Demography, together with the Health Ministry, initiated a policy stipulating that before filling a request to a pregnancy termination committee for an authorization of abortion, a woman is required to attend mandatory counseling with a social worker whose job

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<sup>113</sup> Government Decision Number 428, 9.4.67 (1967) (Hebrew). The decision includes, among other things, the following "[s]uggestions regarding the demographic policy":

The Government recognizes the need to act systematically in order to implement a demographic policy targeted at creating an atmosphere that will encourage natality, considering its importance to the future of the Jewish people. . . . For that purpose: [] Constant advertising campaigns will be held, efforts will be made to curb economic and social barriers will be removed and incentives will be given, in the fields of education, housing, insurance and so on, within the scope of the state's ability, in order to encourage families to increase their number of children. [] efforts will be made to curb artificial abortions will be curbed as their high rate is cause for concern, in both national-demographic terms, and in terms of women's health.

*Id.*

<sup>114</sup> The Report of the Commission for Natality Problems, Jerusalem, 1966 [hereinafter Beky Report] (Isr.) (Hebrew) (on file with author).

<sup>115</sup> Stopler, *supra* note 93, at 169; *see* Criminal Code Ordinance: An Ordinance to Provide a General Penal Code for Palestine (1936), 16 Geo. 6, c. 17, § 175 (Eng.).

<sup>116</sup> Stopler, *supra* note 93, at 169 (citing Beky Report, *supra* note 114, at 19-20, 44).

<sup>117</sup> *Id.* (citing Beky Report, *supra* note 114, at 44).

<sup>118</sup> Penal Law, 5737-1977, 31 LSI 84, §§ 312-21 (1976-1978) (Isr.); An Act Amending the Penal Laws (Termination of Pregnancy), 1977, SH No. 842 (Isr.).

it is to try to persuade her to forgo the request and carry the pregnancy to term.<sup>119</sup> This policy is still in force today.<sup>120</sup>

If we examine the Israeli abortion policy according to the test suggested in this Article, it seems to fail both the legitimate interest prong and the liberty and equality prong. Israeli government decisions regarding Israel's demographic policy plainly state that Israel's fertility policies are motivated by the government's concern with Jewish population growth.<sup>121</sup> While it is legitimate for a particular ethnic or religious group to be interested only in its own growth, and not in the growth of other groups, it is highly questionable whether such an interest is legitimate for a state, which should be neutral towards all its citizens and equally interested in the welfare of

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<sup>119</sup> MINISTRY OF HEALTH, CIRCULAR 43/88, PREGNANCY TERMINATION COMMITTEES (1988) (Isr.) (Hebrew); MINISTRY OF HEALTH, CIRCULAR 64/90, INSTRUCTIONS REGARDING INFORMATION PROVIDED TO WOMEN APPLYING TO PREGNANCY TERMINATION COMMITTEES AND COMMITTEE PROCEDURES, § 2(b) (1990) (Isr.) (Hebrew); MINISTRY OF HEALTH, CIRCULAR 23/93, EXECUTION OF THE LAW AND REGULATIONS BY THE PREGNANCY TERMINATION COMMITTEES (1993) (Isr.) (Hebrew), *available at* [http://www.health.gov.il/hozer/mk23\\_1993.pdf](http://www.health.gov.il/hozer/mk23_1993.pdf); *Planned Termination of Pregnancy (Abortion)*, ISRAEL MINISTRY OF HEALTH, <http://www.health.gov.il/English/Topics/Pregnancy/Abortion/Pages/default.aspx> (last visited Mar. 28, 2015).

<sup>120</sup> *See Planned Termination of Pregnancy (Abortion)*, ISRAEL MINISTRY OF HEALTH, <http://www.health.gov.il/English/Topics/Pregnancy/Abortion/Pages/default.aspx> (last visited Mar. 28, 2015).

The importance of the meeting with the social worker stems from the fact that if the woman files a request and meets the criteria stipulated by law for allowing abortions, such as that the pregnancy is out of wedlock, the committee will most likely approve the abortion. The social worker's job is to both to alert women to the fact that they do not meet the criteria and should therefore not file a request, and even more importantly to persuade those women that do meet the criteria not to file the request and to carry the pregnancy to term. It should be noted that the committee does not require a woman who claims that the pregnancy is out of wedlock to prove her claim and thus potentially, almost any woman can obtain an abortion by stating that the pregnancy is out of wedlock.

Stopler, *supra* note 93, at 177 n.14.

<sup>121</sup> In addition to the 1967 decision quoted in note 113 above and the Beky Report, *supra* note 114, the Israeli government made another decision regarding its demographic policy in 1986, which reads as follows:

1596. The demographic trends among the Jewish people Decision:

- a. The government is concerned by the demographic trends in Israel and the Diaspora and is particularly worried about the slow-down of population growth in Israel, the decreasing Aliyah, and the rate of emigration as well as by the increase in assimilation and in mixed marriages in the Diaspora.
- b. The government decides to establish a comprehensive, coordinated, long-term demographic policy, that will strive inter alia to achieve a proper level of Jewish population growth and in order to achieve this goal it encourages cooperation with organizations representing the Jewish people and the Diaspora Jews.
- c. The policy will be based on direction, coordination and the implementation of measures that can affect population growth such as: encouraging the creation of families and their desire for children, strengthening families and removing barriers in their way, preventing unnecessary abortions—through proper information and guidance; welfare assistance for families who have difficulties in raising their children, encouraging Aliyah; and taking steps to stop the emigration and to encourage Israelis living abroad to return to Israel.

Government Decision Number 1596, 18.5.86 (1986) (Hebrew).

all groups under its purview. It seems that when a government declares that it is only interested in increasing the birth rates of the majority ethnic group, it violates the equality rights of minority groups, even if the policies adopted to achieve its purpose are applied equally to all.<sup>122</sup> The mere knowledge that the state is more interested in the welfare of one group over the welfare of another denigrates the members of the second group and violates their dignity.<sup>123</sup>

Another problem with the interests behind the Israeli abortion law is that the conditions under which it allows abortion are clearly crafted according to the dictates of Jewish religious law. Thus, the law authorizes pregnancy termination committees to approve abortion under very limited conditions, including where there is a valid medical or psychological concern that may affect the woman or the fetus, where the woman is under the age of marriage or over the age of forty, and where the pregnancy is out of wedlock.<sup>124</sup> While the first two conditions are standard and highly restrictive, the last condition for approving an abortion—that the pregnancy is out of wedlock—may be religiously motivated.<sup>125</sup> Under Jewish religious law, a child born out of wedlock to a married mother is considered religiously illegitimate, and even if the mother is unmarried, there is a relatively high risk that the child would be religiously illegitimate because its father may be unknown. Consequently, Israeli law allows women to abort if the fetus was conceived out of wedlock, and many of the abortions approved in Israel are approved under this section.<sup>126</sup> No exception exists for abortion requested due to financial or social hardship.<sup>127</sup> Thus, the interest motivating Israel's restrictive abortion policy is the increase in the number of births of religiously legitimate Jewish children. Here, again, while such an interest may have arguably been considered legitimate for a religious group, it cannot be considered legitimate for a state, which, at least according to liberal and human rights perceptions, is not allowed to impose religiously motivated restrictions on its population.<sup>128</sup>

In addition to failing the legitimate interest prong, Israel's restrictive abortion policy fails the liberty and equality prong of the test suggested in this Article. Israeli law takes the power to decide whether to abort entirely out of the woman's hands, entrusting it to a committee of experts who are themselves bound by the strict requirements of the law and cannot, for example, approve an abortion on financial grounds such as that the woman is financially incapable of taking care of

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<sup>122</sup> When the Center of Demography was charged with being racist because its mandate is to promote an increase in Jewish birth rates alone, the chairman of the Center responded that all policies decided by the Center will be applied equally to all citizens. Stopler, *supra* note 15, at 509-10.

<sup>123</sup> *Id.* at 511-12.

<sup>124</sup> Sections 312-321 of the Israeli Penal Act, 1977, stipulate the conditions for the operation of the Termination of Pregnancies Committees and specify the exact instances in which a committee is authorized to approve an abortion. Penal Law, 5737-1977, 31 LSI 84, §§ 312-21 (1976-1978) (Isr.).

<sup>125</sup> Stopler, *supra* note 15, at 488-89.

<sup>126</sup> See *id.* at 489; *Press Release, Application for Pregnancy Termination in 2009, and Temporary Data 2010*, CENT. BUREAU STAT., 1, 6-8 (Sept. 20, 2011) (Isr.) (Hebrew), [http://www.cbs.gov.il/reader/newhodaot/hodaa\\_template.html?hodaa=201105237](http://www.cbs.gov.il/reader/newhodaot/hodaa_template.html?hodaa=201105237) (stating that 51.4% of approved abortions involved an out-of-wedlock pregnancy).

<sup>127</sup> *Id.* at 488. Such a provision existed in the original law but was removed because of objections from anti-abortionists and religious political parties. *Id.*

<sup>128</sup> See JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, 191-92 (Erin Kelly ed., 2001) (positing that a political doctrine is unreasonable when it forces people to accept rules that give them fewer rights than others, such as when one faith is protected and another is not).

a child.<sup>129</sup> The usurpation of a woman's control over her body, the demand that she expose the most intimate details of her life before a committee of strangers and entrust her well-being, her health and her entire future in their hands, and her ultimate coercion, in some instances, into carrying the pregnancy to term, all constitute severe infringements of women's fundamental right over their bodies as well as their fundamental rights to liberty, dignity, privacy, and equality. Furthermore, by compelling the woman to meet with a social worker whose aim is to persuade the pregnant woman not to file a request for abortion and to carry the pregnancy to term, the state exercises an unfair influence on women in their toughest moments, while demeaning them and showing disrespect for their capacity as moral agents.<sup>130</sup> Moreover, unless there are exceedingly good reasons to believe otherwise, every human being should be regarded as an independent moral agent, capable of weighing all the relevant factors and making her own decisions, in light of her best interests. Israel's refusal to view Israeli women as independent moral agents and to entrust women with the decision to abort, and even the decision to file a request for an approval of abortion, is a violation of their fundamental rights to autonomy and to dignity.

## ii. Germany

This last point, criticizing the state's clear disrespect for women as moral agents, is similarly applicable to the German abortion scheme. German law declares abortion to be illegal.<sup>131</sup> However, if the woman undergoes counseling before the abortion, and the abortion is carried out by a doctor during the first twelve weeks of pregnancy, and no less than three days after the counseling, then the abortion is not punishable.<sup>132</sup> The German Penal Code declares that the interest motivating the restrictions on abortion, as well as the counseling requirement, is the right to life of the fetus.<sup>133</sup> The wording of section 219 explicitly states the biased assumptions regarding women's duty to sacrifice on which the mandatory counseling is predicated:

The counselling serves to protect unborn life. It should be guided by efforts to encourage the woman to continue the pregnancy and to open her to the prospects of a life with the child; it should help her to make a responsible and conscientious decision. The woman must thereby be aware that the unborn child has its own right to life with respect to her at every stage of the pregnancy and that a termination of pregnancy can therefore only be considered under the law in exceptional situations, when carrying the child to term would give rise to a

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<sup>129</sup> Stopler, *supra* note 15, at 488-90; Penal Law, 5737-1977, 31 LSI 84, §§ 312-21 (1976-1978) (Isr.).

<sup>130</sup> See Nanette Funk, *Abortion Counselling and the 1995 German Abortion Law*, 12 CONN. J. INT'L L. 33, 58 (1996).

<sup>131</sup> STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT, Teil I [BGBl. I] 3322, as amended, § 218 (Ger.), English translation *available* at [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html).

<sup>132</sup> *Id.* § 218a. See also Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court] May 28, 1993, 88 ENTSCEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 203, 1993 (Ger.) (abortion decision of the German Constitutional Court).

<sup>133</sup> STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT, Teil I [BGBl. I] 3322, as amended, § 219 (Ger.), English translation *available* at [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html).

burden for the woman which is so serious and extraordinary that it exceeds the reasonable limits of sacrifice. The counselling should, through advice and assistance, contribute to overcoming the conflict situation which exists in connection with the pregnancy and remedying an emergency situation.<sup>134</sup>

Thus, the restrictions placed on abortion by Israel and Germany, though differently fashioned and differently motivated, are both based on illegitimate interests and violate women's rights to liberty and equality. It is interesting to note that the recent restrictions which many states in the United States are placing on abortion, including mandatory counseling and mandatory ultrasounds, are closely associated ideologically and practically with the German scheme. While each scheme of restrictions pursued by a state should be analyzed individually in order to establish its validity according to the suggested test, it seems safe to say that, at least as far as requirements such as mandatory ultrasounds that include the duty of the provider to display and describe the image to the woman are concerned, such schemes would violate women's rights as much as the German restrictive abortion policy does.<sup>135</sup>

### 3. State Refusal to Fund Abortion and to Guarantee Access to Them

Unlike the restrictions on abortion discussed thus far, where governments actively restrict women's right to abortion, refusals to fund abortions and to guarantee access to them constitute a different kind of restriction, since the government merely refuses to help women abort, but does not actually prevent them from doing so, or even regulate the process. In the United States, these types of restrictions have been affirmed by the Supreme Court as early as 1977, four years after *Roe*, when the Court held that states are not obligated to cover abortions that are not necessary for health reasons under state Medicaid programs.<sup>136</sup> These rulings were later expanded in *Harris v. McRae*, where the Court upheld restrictions that prevented any federal funding for abortions, except for those that were "required because a woman's life was endangered or if the pregnancy resulted from rape or incest."<sup>137</sup> The court reasoned that not funding abortion for indigent women does not create an obstacle to access to abortion, since the obstacle is created by their own indigence and not by the government's refusal to fund abortion.<sup>138</sup> In the wake of *Harris*, these restrictions have been expanded to include a myriad of other abortion restrictions, and lately, some states are working to further expand them to cover private insurance health policies and clinics that include any abortion services through the Affordable Care Act.<sup>139</sup>

The refusal to fund abortions for indigent women and to guarantee access to abortion violates both prongs of the test suggested in this Article. It violates the legitimate interest prong

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<sup>134</sup> *Id.*

<sup>135</sup> On state requirements for ultrasound see GUTTMACHER INST., STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND (Mar. 1, 2015), [http://www.guttmacher.org/statecenter/spibs/spib\\_RFU.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf).

<sup>136</sup> *Beal v. Doe*, 432 U.S. 438, 444-46 (1977); *Maher v. Roe*, 432 U.S. 464, 465-66, 478 (1977); Soohoo, *supra* note 19, at 395-96.

<sup>137</sup> Soohoo, *supra* note 136, at 396; *Harris v. McRae*, 448 U.S. 297, 326 (1980).

<sup>138</sup> *Harris v. McRae*, 448 U.S. at 316-17.

<sup>139</sup> See Soohoo, *supra* note 19, at 417-18; Nicole Huberfeld, *With Liberty and Access for Some: The ACA's Disconnect for Women's Health*, 40 *FORDHAM URB. L.J.* 1357, 1382-83 (2013).



since it is based on the interest of preserving the right to life of fetuses. As already discussed, a comparison of the extensive protection afforded to the right to life of fetuses against their mothers, with the legal protection given to the right to life in all other contexts, clearly exposes that the defense of the fetus's right to life is based on biased assumptions regarding women's duties towards their fetuses, and not on a genuine concern with the right to life.<sup>140</sup> As for the liberty and equality prong, preventing indigent women from having abortions by preventing funding for abortion is every bit as restrictive of these women's rights to liberty and equality as state bans on abortion discussed above.<sup>141</sup> Furthermore, the Court's reasoning in *Harris* clearly exposes how inadequate *Roe*'s concept of freedom of choice as a negative right is to ensure reproductive justice for all women. As the *Harris* Court explains: "[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."<sup>142</sup> Clearly, restricting the right to abortion only to those women who can afford it is incompatible with the duty to respect the rights of all women with respect to liberty and equality, both because it discriminates against indigent women and because it denies them the minimal conditions required to enable them to make a truly autonomous choice whether to continue their pregnancy.<sup>143</sup>

### C. Ideological Propaganda

The question whether ideological propaganda is a legitimate means for achieving an increase in fertility is an intricate one. For example, was it legitimate for the Israeli Center of Demography to announce in the 1970s that "feminine wholeness combines fertile motherhood with social and professional status" and that any family should have at least four or five children?<sup>144</sup> Similarly, was it legitimate for the French government in the 1920s to bestow medals on women with five or more children?<sup>145</sup> While ideological propaganda is undoubtedly less coercive than bans and restrictions on abortion and contraception, the propaganda described here would still seem to be incompatible with the test suggested in this Article. In terms of the legitimate interest prong, I would argue that although a state may have a legitimate interest in generally encouraging an increase in fertility rates, it is questionable whether an interest in encouraging women to have at least four or five children can be considered legitimate in a democratic society that respects individual rights. In a society that respects individual rights, government must accept that different people will make different choices with regard to whether they are interested in having children and how many children they want. The government may not promote a certain number of children as the desired norm.

A similar problem arises in terms of the liberty and equality prong. Arguably, there is no harm in propaganda promoting the importance of large families and a woman's joy in motherhood. If all adults are free and autonomous moral agents, then they should all be capable of

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<sup>140</sup> See *supra* Part II.B.1.

<sup>141</sup> See Moshe Cohen-Eliya, *Is Conditional Funding a Less Drastic Means?*, 1 L. & ETHICS HUM. RTS. 354, 373-74 (2007).

<sup>142</sup> *Harris v. McRae*, 448 U.S. at 316.

<sup>143</sup> See Soohoo, *supra* note 19, at 397, 402.

<sup>144</sup> See Stopler, *supra* note 15, at 487.

<sup>145</sup> See Hoffmann, *supra* note 105, at 42.

assessing the validity of the propaganda and can act according to their best judgment. However, ideological propaganda is not a benign phenomenon. According to Foucault, ideology is the apparatus that allows the powerful to exercise power while at the same time masking it and legitimating its existence.<sup>146</sup> The power exercised through ideology is masked by creating an illusion of free choice.<sup>147</sup> The person whose actions are ideologically determined appears to be operating freely and under no coercion.<sup>148</sup> In this manner, the powerful maintain control over the less powerful while masking the coercive and oppressive nature of their actions.<sup>149</sup> As already discussed, states and communities have a significant interest in encouraging women to give birth and a tendency to view them as a means to that end and not as full human beings entitled to absolute respect for their human rights.<sup>150</sup> Thus, in light of the common use of religious and national ideologies which emphasize a woman's vocation as a mother, urging her to give birth to as many children as possible and perpetuating her subordination, any ideological propaganda persuading women to procreate in order to promote ethnic, religious, or national goals should not be permissible.

Thus I would argue that although a state may and should create a supportive environment in which parents can raise their children in the best conditions while at the same time developing their own skills and pursuing careers, it should not use ideological propaganda to encourage procreation. Presumably, creating a supportive environment for families would increase birth rates without any need for ideological pressures, since at least some of the people who have refrained from having more children due to the difficulties in raising them would decide to have them, if given the appropriate support.<sup>151</sup>

#### D. Support for Families

According to the test suggested in this Article to determine the legitimacy of various fertility policies, such policies would be legitimate if they are aimed at realizing an interest that can be considered legitimate in a democratic society that respects human rights, and if they promote women's liberty and equality rights. Generally speaking, policies that support families meet both prongs of this test.

A survey done in twenty-three European countries in 2006 revealed that in all of the countries surveyed, people wanted more children than they actually had.<sup>152</sup> Another survey revealed similar results in the United States.<sup>153</sup> In Organisation for Economic Co-operation and Development ("OECD") countries that are concerned with their falling fertility rates, increases in

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<sup>146</sup> See Shane Phelan, *Foucault and Feminism*, 34 AM. J. POL. SCI. 421, 424 (1990).

<sup>147</sup> Stopler, *supra* note 28, at 12.

<sup>148</sup> *Id.* (citing Phelan, *supra* note 146, at 425).

<sup>149</sup> *Id.*

<sup>150</sup> See *infra* Part III.

<sup>151</sup> For example, according to surveys done by the Israeli Center of Demography, while the average birth rate in the Jewish population in Israel in the 1990s was around 2.6 children per family, the average number of children that people wanted was 3.5. Stopler, *supra* note 15, at 488.

<sup>152</sup> See OECD, DOING BETTER FOR FAMILIES 109 fig.3.9 (2011).

<sup>153</sup> See OECD, *supra* note 43, at 3 fig.2.

fertility are not promoted through direct interference with fertility.<sup>154</sup> Instead, they are promoted through a range of family policies which are aimed at achieving several objectives that are, at least facially, all legitimate interests in democratic societies that respect human rights. These policies aim to:

reconcile work and family responsibilities; increase parental employment and combat poverty; mobilise female labour supply and promote gender equality; promote conditions in which families can have the number of children they desire at the time of their choice; and, promote child development and equal opportunities among children for the future.<sup>155</sup>

The increase in the cost of raising children is considered a key reason for falling fertility rates.<sup>156</sup> These costs include both direct costs, such as child care, education, housing, food and clothing, and indirect costs, which are the costs of opportunities that the parents, mostly mothers, had to forgo in order to invest the necessary time in caring, educating, and raising the children.<sup>157</sup> One way of measuring the opportunity costs for mothers is to compare the total earning forgone by mothers during their career after childbirth with the earnings of childless women during the same period.<sup>158</sup> The difference between the accumulative earnings of these two groups is termed the “family gap.”<sup>159</sup> The size of the “family gap” varies between countries—women with children stand to accumulate between 42% and 89% of the earnings of otherwise similar childless women, depending on the country.<sup>160</sup>

Through the use of appropriate family policies, governments have the power to both promote reproductive justice for women, and increase fertility rates. Studies show that different family policies have different impacts on fertility rates. Financial transfers such as baby bonuses have only a limited impact on fertility, as do the duration and payment of maternity (and paternity) leave.<sup>161</sup> Formal childcare services have the clearest positive effects on fertility.<sup>162</sup> Nevertheless, according to research done in OECD countries:

[I]t is the package of policies which helps reconcile work and family commitments (including flexible workplace practices, parental leave arrangements and early childhood education and care services) rather than each single component which exerts a positive influence on fertility outcomes and

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<sup>154</sup> See OECD, *supra* note 152, at 109.

<sup>155</sup> OECD, HOW CAN WE DO BETTER FOR OUR FAMILIES?: ISSUES, OUTCOMES, POLICY OBJECTIVES AND RECOMMENDATIONS 1-2 (2011), *available at* [www.oecd.org/els/soc/47701128.pdf](http://www.oecd.org/els/soc/47701128.pdf); see OECD, *supra* note 152, at 107.

<sup>156</sup> OECD, *supra* note 152, at 101.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 105.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 110-13.

<sup>162</sup> *Id.* at 113-15.

intentions, and helps maintain total fertility rates close to two children per woman in France, New Zealand and the Nordic countries.<sup>163</sup>

While governments do not have a duty to pursue specific policies merely because they promote a particular interest, such as increased fertility rates, they should be regarded as duty-bound to pursue policies that promote women's liberty and equality rights. For example, all member states of the European Union and the union itself are subject to the duty to integrate gender equality into all their actions and policies.<sup>164</sup> Similarly, all states which are parties to the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") are bound to "pursue by all appropriate means and without delay a policy of eliminating discrimination against women" and to "ensure, through law and other appropriate means, the practical realization of [the principle of the equality of men and women]."<sup>165</sup> In the absence of policies such as paid maternity leave, the provision of high quality subsidized child-care, or protection of a mother's right to express breast milk at work, women continue to suffer losses and discrimination as a result of using their reproductive capacities.<sup>166</sup> Thus, not only are fertility policies that support families and alleviate the costs that women have to pay for bearing children legitimate policies, they are also an essential means of promoting reproductive justice.<sup>167</sup>

### III. ANTINATALIST FERTILITY POLICIES AND THEIR LIMITS

#### A. *The Rational of Antinatalist Fertility Policies*

The global opinion on population and fertility policy has changed dramatically in the last several decades. The realization that military strength is dependent on the technological and economic superiority of the state, and not on the size of its population—and the recognition that the rapid increase in world population needs to be curbed—have resulted in the adoption of an antinatalist population agenda.<sup>168</sup> The origin of antinatalist population and fertility policies can be found in the Malthusian population theory suggested by the Reverend Thomas Malthus, who claimed as early as the eighteenth century that the growth rate of the world's population should be curbed or the population would outrun the world's resources.<sup>169</sup> The antinatalist position was

<sup>163</sup> *Id.* at 90.

<sup>164</sup> See Teresa Rees, *Reflections on the Uneven Development of Gender Mainstreaming in Europe*, 7 INT'L FEMINIST J. POL. 555-56 (2005).

<sup>165</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, art. 2. Unfortunately, the United States has not signed the CEDAW. For an argument that signing the CEDAW would require the United States to ensure a far wider range of reproductive rights than it currently ensures, including positive reproductive rights, see Barbara Stark, *The Women's Convention, Reproductive Rights, and the Reproduction of Gender*, 18 DUKE J. GENDER L. & POL'Y 261 (2011).

<sup>166</sup> See Bhushan, *supra* note 19, at 677, 683, 689; Elissa Aaronson Goodman, *Breastfeeding or Bust: The Need for Legislation to Protect a Mother's Right to Express Breast Milk at Work*, 10 CARDOZO WOMEN'S L.J. 146, 150-152 (2003).

<sup>167</sup> See discussion *infra* Part III.C.

<sup>168</sup> See Finkle & McIntosh, *supra* note 24, at 3-4.

<sup>169</sup> THOMAS MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION 40-41, 44 (Electronic Scholarly Publishing Project 1998) (1798), available at <http://www.esp.org/books/malthus/population/malthus.pdf>.

adopted by the international community in the last several decades, first by the developed countries towards the developing countries, and then by the developing countries as well.<sup>170</sup> Interestingly, despite its liberal sensibilities, which allegedly prevent it from engaging in fertility policies within its own borders, the United States is considered the world leader in global population stabilization efforts, and the single largest contributor of population and family-planning funds among industrialized countries.<sup>171</sup>

Perhaps the most striking example of an antinatalist fertility policy is the Chinese one-child policy. This policy, which was initiated by the Chinese government in 1979, was aimed at radically reducing the fertility rate in China.<sup>172</sup> While the general goal of reducing fertility rates is a legitimate one, the goal of reducing fertility rates to one child per family cannot be considered a legitimate goal in a society that respects human rights; it completely disregards the reproductive autonomy of individual women and men to decide on the number of children to have. Furthermore, although officially the policy was not meant to be coercive, in practice it involved serious violations of rights, especially women's rights, that were carried out at the local and provincial levels, including forced abortion and sterilization, severe monetary fines, and denial of public benefits.<sup>173</sup>

### *B. Antinatalist Fertility Policies and the Rights of Women in Traditional Communities*

As the Cairo Plan of Action demonstrates, antinatalist fertility policies do not necessarily have to be restrictive and disrespectful of women's rights, but can be supportive and conducive to the advancement of women's reproductive rights.<sup>174</sup> Supportive antinatalist fertility policies are fertility policies that aim to improve women's reproductive rights by giving them the means to make free and informed choices, and the ability to lower their fertility rates. The Cairo Plan of Action has made this the stated goal of fertility and family-planning policies, and the international community has been promoting this goal in developing countries since 1995.<sup>175</sup> Much less attention has been given to the fact that even in developed countries there are cohesive communities which deny women access to family planning for religious and ideological reasons, resulting in inordinately high birth rates. One example of such a community is the ultra-Orthodox Jewish community in Israel, whose average fertility rate is 6.5 children per woman.<sup>176</sup> I will use the example of the ultra-Orthodox community to discuss whether a state is allowed, or perhaps even required, to try to find ways to ensure that women in the such communities are given full knowledge and access to all methods of family planning to better control their own fertility. I will

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<sup>170</sup> Finkle & McIntosh, *supra* note 24, at 3-4.

<sup>171</sup> Craig Lasher, *U.S. Population Policy Since the Cairo Conference*, ENVTL. CHANGE & SECURITY PROJECT REP., Spring 1998, at 16, 16-17.

<sup>172</sup> See Peng, *supra* note 91, at 53. In 1979, the fertility rate in China was 2.8%, down from 5.8% in 1970. This sharp decline was achieved through the implementation of a two child policy starting in 1973, but the Chinese government felt that this decline was insufficient. *Id.* at 52-53.

<sup>173</sup> Savanyu, *supra* note 15, at 18-20.

<sup>174</sup> See Lasher, *supra* note 171, at 16.

<sup>175</sup> See *id.* at 21.

<sup>176</sup> Ahmad Hleihel, *Fertility among Jewish and Muslim Women in Israel, by Level of Religiosity, 1979-2009*, at 12 Cent. Bureau of Statistics, Working Paper No. 60, 2011) (Isr.) (Hebrew).

argue that such a fertility policy will satisfy both prongs of the test suggested in this Article, since the interest in securing for women full knowledge and access to family planning is a legitimate interest in a democratic society that respects the individual rights of all those residing within it. Moreover, realizing this interest would promote women's liberty and equality rights.

It is well established that "there is a strong correlation between high birth rates and the scarcity of rights and opportunities for women, lack of representation for women, their exclusion from the public sphere, and higher risks for the health of both women and children."<sup>177</sup> In addition, belonging to a large family might be detrimental to children, as very often large families lack the means to provide their children with sufficient material and emotional resources necessary for their proper development.<sup>178</sup> As I explained elsewhere:

The correlation between high fertility rates and women's low status has two interrelated explanations. Often the high number of children is not a result of a woman's free choice but the result of societal pressures and of a lack of access to family planning. Additionally, the need to give birth to, and take care of, a large number of children makes it very difficult for a woman to develop herself, and her independence and autonomy. Moreover, in patriarchal societies . . . such as the ultra-Orthodox Jewish community in Israel, [compelling women to give] birth to large numbers of children and dedicate their time to fulfilling [their] children's needs, serves as an important control mechanism meant to ensure that women are too busy to revolt against their own subordination.<sup>179</sup>

Ultra-Orthodox women are compelled to give birth through the control and manipulation of meaning and knowledge, and not through the use of physical force.<sup>180</sup> There are three ways in which this control is achieved: control over the creation of social meaning; control over education; and control over access to outside sources of information.<sup>181</sup> This is a classic example of Foucault's insight, mentioned above, that ideology allows the powerful to exercise power while at the same time masking it and legitimating its existence.<sup>182</sup> First, the social and ideological

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<sup>177</sup> Stopler, *supra* note 28, at 11(citing Nancy E. Riley, *Gender, Power, and Population Change*, POPULATION BULL., May 1997, at 2).

<sup>178</sup> See Sonalde Desai, *When Are Children from Large Families Disadvantaged? Evidence from Cross-National Analyses*, 49 POPULATION STUD. 195 (1995).

<sup>179</sup> Stopler, *supra* note 28, at 11-12 (footnote omitted). See Diana D.M. Babor, *Population Growth and Reproductive Rights in International Human Rights Law*, 14 CONN. J. INT'L L. 83, 93-95 & nn.43, 48-49 (1999); Alice Shalvi, 'Renew Our Days as of Old': Religious Fundamentalism and Social Change in the Modern Jewish State, in THE FREEDOM TO DO GOD'S WILL: RELIGIOUS FUNDAMENTALISM AND SOCIAL CHANGE 75, 75-80 (Gerrie ter Haar & James J. Busuttill eds., 2003); Ronit Ir-Shay, *Family Planning: A Halakhic-Gender Perspective*, 12 NASHIM 95, 96 (2006). Ir-Shay provides as an example the response of one of the most influential rabbinic decisors (poskim) of contemporary ultra-Orthodoxy, Rabbi Joshua Neuwirth: "According to [Neuwirth], for the woman to place her own wishes before the obligation to procreate, even if having children is merely postponed, is equivalent to the couple 'living like animals.'" Ir-Shay, *supra*, at 115.

<sup>180</sup> Stopler, *supra* at 28, at 12.

<sup>181</sup> *Id.* at 12-13; Dorothy E. Roberts, *Rust v. Sullivan and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587, 617 (1993).

<sup>182</sup> See Phelan, *supra* note 146.

discourse which motivates the closed patriarchal community and determines the meaning of the social reality within which the woman understands her life and her vocation is created exclusively by its male leaders.<sup>183</sup> Contemporary ultra-Orthodox Halachic rulings almost invariably present constant pregnancies and large families as mandatory religious norms.<sup>184</sup> Thus, for example, the male spiritual leaders of the community bestowed a rare honor on a mother of eighteen children by defining her as a “righteous woman” because of her high number of children.<sup>185</sup> This is a clear message to women in the community that giving birth to as many children as possible is the only path to righteousness for a woman. The results of this hegemonic rabbinical discourse are described by one of the rabbis who object to it as follows:

[T]here are families that are larger than their physical, mental, economic and educational capacities allow and that are on the verge of disaster. The mother can no longer keep herself going, they cannot take care of the children . . . and it is a big blasphemy to think that the situation is mandated by the Halakhic norms and that nothing can be done to change it.<sup>186</sup>

Second, “the main objective of the ultra-Orthodox women’s education system is to instill in girls a complete identification with the oppressive social system to which she belongs, and to her subordinated status and procreative role within it.”<sup>187</sup> A good example of that is the credo of the founder of the Beit-Ya’akov College for Girls in Bnei Brak, who explained that “[i]f we succeed in instilling in our girl students that the purpose of their studies is to aspire to emulate our matriarchs, who did not study, then we have succeeded in educating our daughters.”<sup>188</sup> The socialization process of ultra-Orthodox women, which is focused on modesty, silence, and obedience,<sup>189</sup> makes it very hard for them to voice any objections to the religious and communal dogma they are taught, or even to conceptualize such objections.<sup>190</sup>

Proverbs such as “The daughter of the king is all dignified within[]” and “A woman’s voice is *ervah* (impure)” in their orthodox interpretations restrict women to the private sphere, and enjoin them from having any voice in the public sphere—both metaphorically and literally—and from participating in any

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<sup>183</sup> Stopler, *supra* at 28, at 13.

<sup>184</sup> *Id.* (citing Ir-Shay, *supra* note 179).

<sup>185</sup> *Id.*; Tamar Rotem, *How Many Children Does It Take to Be Righteous*, HAARETZ.COM, (Nov. 20, 2006, 12:00 AM), <http://www.haaretz.com/print-edition/features/how-many-children-does-it-take-to-be-righteous-1.205533>. The article discusses a mother of eighteen children who was described as a “righteous woman” for having so many children by a rabbi mourning her premature death. *See also* Ir-Shay, *supra* note 179, at 112, 119.

<sup>186</sup> Ronit Ir-Shay, “*Be Fertile and Increase and Fill the Earth*”—*Between Hegemonic Discourse to Subversive Discourse in the Halakhic Rulings on Procreation*, 31 *OPINIONS* 35, 37 (2007) (Hebrew).

<sup>187</sup> Stopler, *supra* at 28, at 14; *see* TAMAR EL’OR, *EDUCATED AND IGNORANT: ULTRAORTHODOX JEWISH WOMEN AND THEIR WORLD* 89 (Haim Watzman trans., 1994).

<sup>188</sup> TAMAR EL’OR, *supra* note 187, at 65.

<sup>189</sup> *See* Rachel Elijor, “*A Beautiful Woman with No Eyes*,” in *BLESSED THOUGH FOR MAKING ME A WOMAN? THE WOMAN IN JUDAISM FROM THE BIBLE TO MODERN TIMES* 37, 48-49 (D. Joel et al. eds., 1999) (Hebrew).

<sup>190</sup> Stopler, *supra* note 28, at 15.

form of policy setting or decision making. Any woman who defies these rules is considered immodest, impure, and promiscuous.<sup>191</sup>

Thirdly, another important means for achieving high fertility rates is the prohibition on the use of contraception without prior rabbinical authorization.<sup>192</sup> Moreover, even when a woman is given permission to use contraceptives, she is forbidden from discussing their use with her friends, so as not to tempt other women to use them.<sup>193</sup>

Just as the correlation between high fertility rates and women's low status is clear, so too a clear correlation has been found between advancing women's status and decreasing fertility. There is general agreement that the best way to decrease fertility within populations in which fertility is too high is by empowering women, strengthening their social status, and enabling them to resist the dictates of traditional communities which demand that they give birth to large numbers of children.<sup>194</sup> Nevertheless, two interrelated objections can be raised against allowing the state to take any steps to decrease fertility rates in traditional communities. One is the liberal objection, a variant of which was already discussed at some length and rejected, which precludes state involvement in the private sphere and especially in procreation decisions.<sup>195</sup> The liberal objector would posit that community, just like family, is part of the private sphere and that therefore the state has no business intervening in it. Such intervention infringes on the individual right to privacy, freedom of association, and freedom of religion.<sup>196</sup> As already discussed, from a feminist perspective, intervention in the private sphere, including in procreation decisions, is sometimes necessary to protect women's rights, since much of women's subordination occurs in the private sphere and involves control over procreation.<sup>197</sup> Because in these cases freedom of association and freedom of religion are used to subordinate women by controlling and exploiting their procreative powers, the state has a legitimate interest to intervene to both ensure women's knowledge and access to family planning, and to prevent their exploitation.

A related objection would posit that by taking such measures, the state infringes on the community's right to culture, threatening its unique values and ways of life. In recent years, rights and identity claims of cultural communities have come to the forefront of the social and political discourse and of the discourse of rights.<sup>198</sup> The dilemmas that arise from the need to combine the liberal state's commitment to universality, equality, and neutrality between various conceptions of the good, with traditional communities' demand to preserve their unique ways of life, boundaries, and culture, are at the heart of the multicultural discourse.<sup>199</sup> Advocates of multiculturalism posit

<sup>191</sup> Stopler, *supra* note 28, at 15 (footnotes omitted); see Elijor, *supra* note 189, at 43-44, 48-50.

<sup>192</sup> Stopler, *supra* note 28, at 14.

<sup>193</sup> *Id.* (citing *The Prevention of Pregnancy*, in 6 HALACHIC MEDICAL ENCYCLOPEDIA (Avraham Steinberg ed., Jerusalem 1996), available at <http://www.daat.ac.il/daat/refua/encyc/menia.htm>; Ir-Shay, *supra* note 179, at 119).

<sup>194</sup> See Babor, *supra* note 179, at 93-94 & nn.43, 48-49.

<sup>195</sup> See *supra* Part I.A.

<sup>196</sup> See Chandran Kukathas, *Are There Any Cultural Rights?*, 20 POL. THEORY 105 (1992) (discussing liberal arguments against intervention in traditional communities).

<sup>197</sup> See *supra* Part I.C.

<sup>198</sup> See SEYLA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA*, at viii (2002).

<sup>199</sup> See generally *id.*; WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY*



that the community to which a person belongs, with its specific culture, language and practices, provides the necessary context within which she can develop and exercise her autonomous capacity to choose her values and her way of life.<sup>200</sup> Alternatively, it provides the necessary context within which her identity is formed and within which she understands herself.<sup>201</sup> Consequently, it is argued that the preservation of the community can justify according preferential treatment to communities that will allow them to preserve their cultures, and may even justify permitting communities to restrict some of their members' rights, though not the most fundamental ones.<sup>202</sup>

Following this line of thinking, the leaders of the ultra-Orthodox community could claim that not only should the state refrain from interfering with the ultra-Orthodox procreation practices, but also that the state should actively support these practices as they are an essential component of their culture and should therefore be preserved and supported. I would posit that although the right to culture is an important right that must be respected, the argument for the preservation of culture can justify neither support for, nor noninterference with, the inordinately high fertility rates in the ultra-Orthodox community and the manner in which they are achieved. The preservation of a culture is not an interest that can justify the grievous violation of women's fundamental rights to equality, autonomy, and bodily integrity that occurs as a result of the procreative practices of the ultra-Orthodox community. Demands for cultural accommodation should only be met if they promote what Professor Nancy Fraser terms "parity of participation," both within the group and between groups, i.e., if they promote the ability of all adult members of the society to interact with one another as peers by ensuring their independence and "voice" on the physical, as well as on the symbolic level.<sup>203</sup> The ultra-Orthodox procreation practices have the exact opposite effect on women.

Another reason to not accommodate ultra-Orthodox procreation practices is that, in fact, the high fertility rates of the ultra-Orthodox are not an age-old cultural practice, but a relatively new phenomenon resulting from a combination of religious indoctrination with the structure of child allowances in Israel favoring families with four children or more.<sup>204</sup> Thus, the current fertility rates of the ultra-Orthodox community are not an age-old practice that has formed the backbone of communal existence for generations; its preservation is therefore not essential to the

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RIGHTS (1995); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); CHARLES TAYLOR ET AL., MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (Amy Gutmann ed., 1994).

<sup>200</sup> See, e.g., KYMLICKA, *supra* note 199, at 126.

<sup>201</sup> See TAYLOR ET AL., *supra* note 199, at 61, 63-65.

<sup>202</sup> *Id.* at 59, 61; KYMLICKA, *supra* note 199, at 126, 152, 164-70. Although Kymlicka distinguishes between a community's right for external protections, which he supports, and its right to place internal restrictions on its members, which he rejects, he nevertheless would not intervene in internal cultural practices that violate human rights unless these practices constitute systematic and grave violations of rights such as slavery, genocide, or torture. See KYMLICKA, *supra* note 199, at 126, 152, 164-70.

<sup>203</sup> Nancy Fraser & Alex Honneth, REDISTRIBUTION OR RECOGNITION?: A POLITICAL-PHILOSOPHICAL EXCHANGE 36-41 (Joel Golb, James Ingram & Christiane Wilke trans., 2003); see also Chaim Gans, *Individuals' Interest in the Preservation of Their Culture*, 1 L. & ETHICS HUMAN RTS. 6, 16 (2007) (positing that measures for cultural preservation are only legitimate as long as they do not significantly violate the human rights and freedoms of both members and non-members of groups.); Stopler, *supra* note 28, at 33 n.98.

<sup>204</sup> MORIA AVNIMELECH & YOSSI TAMIR, A SOCIAL TIME BOMB: ECONOMICS AND POLITICS OF WELFARE IN ISRAEL, 81-82, 86-88 (2002) (Hebrew).

continued existence of the community. Consequently, I would argue that Israel should educate ultra-Orthodox girls and women, disseminate information to them, and guarantee free access to family-planning services in order to allow them to gain more control over their procreative practices.

#### IV. EUGENIC FERTILITY POLICIES

##### A. Types of Eugenic Fertility Policies

Unlike pronatalist and antinatalist fertility policies that focus on fertility as a means for increasing or decreasing the size of the population, eugenic fertility policies focus on control over fertility as a means for improving the quality of the population. Sir Francis Galton has defined eugenics as “the science which deals with all influences that improve the inborn qualities of a race . . . [and] develop them to the utmost advantage.”<sup>205</sup> Because eugenic fertility policies rationalize disparate treatment of different population groups according to their alleged aptitude, they justify the imposition of disparate fertility policies on disempowered minorities on an allegedly scientific basis, and bring to the forefront the inextricable links between women’s rights and the rights of other disempowered minorities. The eugenic approach to fertility had gained popularity at the close of the nineteenth century. Thus, in 1907, United States President Theodore Roosevelt had warned that the upper-class white women’s tendency to have small families constituted “race suicide” because it resulted in “a tendency to the elimination instead of the survival of the fittest.”<sup>206</sup> A similar concern for the quality of the “British stock” was raised in Britain due to the high fertility rates among the lower class and the decreasing fertility rates among the middle and upper classes.<sup>207</sup> On the basis of eugenic principles, in 1927 the United States Supreme Court approved the forced sterilization of the mentally challenged, reasoning that sterilization was necessary in order to avoid a world “swamped with incompetence.”<sup>208</sup> In Justice Holmes’s infamous words: “Three generations of imbeciles are enough.”<sup>209</sup> This decision has never been overturned, and it was not until 1974 that the federal government banned sterilization without consent in hospitals that receive federal funds.<sup>210</sup> The eugenic approach also served to justify anti-miscegenation laws in the United States,<sup>211</sup> and immigration policies that gave priority

<sup>205</sup> Francis Galton, *Eugenics: Its Definition, Scope, and Aims*, 10 AM. J. SOC. 1 (1904).

<sup>206</sup> Dennis Hodgson & Susan Cotts Watkins, *Feminists and Neo-Malthusians: Past and Present Alliances*, 23 POPULATION & DEV. REV. 469, 473 (1997) (quoting Theodore Roosevelt) (internal quotation marks omitted).

<sup>207</sup> Francesca Klug, ‘Oh to Be in England’: *The British Case Study*, in WOMAN—NATION—STATE 16, 21 (Nira Yuval-Davis & Floya Anthias eds., 1989).

<sup>208</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927). Justice Holmes further reasoned that it is better to prevent those who are clearly incompetent from having children than to have to kill those children because of crimes they will commit or to watch them starve in the streets due to their lack of competence. *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Powell, *supra* note 15, at 484.

<sup>211</sup> On eugenics as the basis for anti-miscegenation laws, see Paul Lombardo, *Eugenic Laws against Race Mixing*, IMAGE ARCHIVE ON AM. EUGENICS MOVEMENT, <http://www.eugenicsarchive.org/html/eugenics/essay7text.html> (last visited Mar. 28, 2015). An example of such a law is the Virginia Racial Integrity Act of 1924, which forbade marriage between a white person and any person who had a trace of non-white blood in order to prevent watering down of the white race. Virginia Racial Integrity Act of 1924, ch. 371, 1924 Va. Acts 534 (repealed 1975).

to Anglo-Saxon immigrants to the United States and Britain.<sup>212</sup> After eugenic principles formed the basis for Nazi Aryan race theory and served as an impetus for mass exterminations during the Second World War, eugenics has fallen into disrepute.<sup>213</sup> Nevertheless, it continued to serve as the covert basis for population policies in various countries.<sup>214</sup> One example of an implicitly eugenic fertility policy in the United States is the family cap for welfare recipients, which is aimed at discouraging childbirth among welfare recipients by failing to increase benefits when an additional child is born while a parent is receiving income support.<sup>215</sup> This program targets mostly poor African-American women.<sup>216</sup>

### *B. Restrictions on Interracial and Interreligious Marriages as Eugenic Fertility Policies*

In addition to controlling women's fertility rates, states and communities control women's reproductive capacity by controlling whom they can marry, in what may be seen as a eugenic attempt to maintain the purity of racial or religious communities and their boundaries.<sup>217</sup> For example, during Apartheid, South African law prevented women from becoming sexually involved with men from different racial groups than their own.<sup>218</sup> In the United States, anti-miscegenation state laws that criminalized interracial marriage were only struck down by the Supreme Court in 1967, when it held in *Loving v. Virginia* that such laws were unconstitutional.<sup>219</sup> The act that served as the basis for the statutory scheme under which the Lovings were convicted was the Virginia Racial Integrity Act of 1924, which forbade marriage between a white person and any person who had a trace of non-white blood, in order to prevent watering down of the white race.<sup>220</sup> Accordingly, section 5 of the Act stated that "the term 'white person' shall apply only to the person who has no trace whatsoever of any blood other than Caucasian."<sup>221</sup> The trial judge who convicted the Lovings reasoned that:

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<sup>212</sup> On British immigration policy and its relation to eugenics, see Klug, *supra* note 207, at 25.

On U.S. immigration policy and its relation to eugenics, see Paul Lombardo, *Eugenics Laws Restricting Immigration*, IMAGE ARCHIVE ON AM. EUGENICS MOVEMENT, <http://www.eugenicsarchive.org/html/eugenics/essay9text.html> (last visited Mar. 28, 2015).

<sup>213</sup> See Hodgson & Cotts Watkins, *supra* note 206, at 478.

<sup>214</sup> See, e.g., Jana Grekul, Harvey Krahn & Dave Odynak, *Sterilizing the "Feeble-minded": Eugenics in Alberta, Canada, 1929-1972*, 17 J. HIST. SOC. 358 (2004) (discussing sterilization of the feeble minded that continued in Canada until 1972); Klug, *supra* note 207, at 26 (regarding an immigration policy guided by eugenic principles in Britain).

<sup>215</sup> See Powell, *supra* note 15, at 490-91; see also Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J.L. & GENDER 151 (2006).

<sup>216</sup> See Powell, *supra* note 15, at 490; see also JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* 210-14 (2014).

<sup>217</sup> Stopler, *supra* note 93, at 170.

<sup>218</sup> *Id.* (citing Anthias & Yuval-Davis, *supra* note 98, at 9).

<sup>219</sup> *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

<sup>220</sup> *Id.* at 6-7; Virginia Racial Integrity Act of 1924, ch. 371, 1924 Va. Acts 534 (repealed 1975).

<sup>221</sup> Virginia Racial Integrity Act of 1924, ch. 371, § 5, 1924 Va. Acts 534,535 (repealed 1975).

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And, but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.<sup>222</sup>

Anti-miscegenation laws constituted fertility policies because preventing the birth of children of “mixed” race was a central purpose of these laws.<sup>223</sup> There can be no doubt that the desire of a state to maintain racial purity is a clearly illegitimate interest. A tougher question arises with regard to laws that restrict interreligious marriages for the purpose of preserving the boundaries of religious communities, as is the case in Israel. Interreligious marriages are not prohibited under Israeli law. However, because Israeli law recognizes only religious marriages conducted by religious tribunals of recognized religious communities, people of different religions cannot marry each other in Israel.<sup>224</sup> Thus, Israel has transformed religious prohibitions that aim “to protect the boundaries of the various religious communities by prohibiting [religiously mixed] marriages . . . into compulsory state laws that apply to all, regardless of their religious convictions.”<sup>225</sup> A desire to maintain the boundaries of the Jewish community, and especially to prevent the loss of Jews to other religions, has played a major role in the legislature’s decision to adopt this statutory scheme.

When introducing the Rabbinical Courts Jurisdiction (Marriage and Divorce) Act in 1953[,] the Deputy Minister for Religious Affairs explained that one of the purposes of granting legal recognition exclusively to religious marriages was to exclude the possibility of mixed marriages that might result in the conversion of Jews to other [religions]. Similarly, when it became known that the Muslim Sharia court[] . . . [is] willing to marry Muslim men to Jewish women, the Ministry for Religious Affairs instructed the Sharia courts to refrain from conducting such marriages.<sup>226</sup>

Can a distinction be made between a statutory scheme that prevents interracial marriages, such as the historic anti-miscegenation laws in the United States, and a statutory scheme that

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<sup>222</sup> *Loving v. Virginia*, 388 U.S. at 3 (quoting trial judge) (internal quotation marks omitted).

<sup>223</sup> An additional purpose of such laws was to prevent black men who were deemed inferior and animalistic from having sexual relations with idealized pure white women. See DAVID A. J. RICHARDS, *WOMEN, GAYS, AND THE CONSTITUTION: THE GROUNDS FOR FEMINISM AND GAY RIGHTS IN CULTURE AND LAW* 222 (1998).

<sup>224</sup> Stopler, *supra* note 93, at 170; see British Order in Council Making Provision for the Administration of the Mandated Territory of Palestine, Aug. 10. 1922, 116 B.S.P. 204, 215 (1922); Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, 7 LSI 139 (1952-1953) (Isr.).

<sup>225</sup> Stopler, *supra* note 93, at 170.

<sup>226</sup> Stopler, *supra* note 93, at 170 (footnote omitted) (citations omitted); see Zvi H. Triger, *There is a State for Love: Marriage and Divorce between Jews in Israel*, in TRIALS OF LOVE 173, 204 (Orna Ben-Naftali and Hannah Naveh eds., 2005) (Hebrew); PINHAS SHIFFMAN, *CIVIL OR SACRED: MARRIAGE AND DIVORCE ALTERNATIVES IN ISRAEL—A NECESSARY AND FEASIBLE CHANGE* 12 (2001) (Hebrew), available at <http://www.acri.org.il/he/wp-content/uploads/2011/07/kadat-o-kadin.pdf>. “It is interesting to note that although according to Islam the Sharia courts can marry Muslim men to non-Muslim women, they cannot marry Muslim women to non-Muslim men, most probably because of the assumption that the woman will eventually convert to the man’s religion, and thus become non-Muslim.” Stopler, *supra* note 93, at 177 n.20.

prevents inter-religious marriages, such as the Israeli marriage laws? One clear distinction between the two schemes is the degree of coercion that is involved. While the American scheme criminalized interracial marriages, the Israeli scheme merely prevents interreligious marriages within state borders, while recognizing interreligious marriages that have been conducted legally in a foreign country. Another important distinction that might be offered pertains to the motivations underlying the two schemes. One could argue that there is a substantial difference between a scheme that prevents interracial marriages due to the belief that the white race is superior and should therefore not interbreed with the black race, and one that prevents interreligious marriages in order to preserve communities and prevent their extinction. While the former is motivated by sheer racism, the latter can presumably be justified using communitarian and multicultural arguments.<sup>227</sup> Such arguments are often found compelling in the arena of family law since “[f]amily law in particular is regarded as having a crucial role in the preservation of the community and the demarcation of its borders, and it has even been argued that the function of family law vis-à-vis the community is parallel to the function of citizenship law vis-à-vis the sovereign state.”<sup>228</sup> Consequently, one could argue that the need of the various religious communities in Israel to preserve and demarcate their boundaries constitutes a legitimate interest that justifies a legal scheme that recognizes only religious marriages between community members.<sup>229</sup> I disagree. Protecting the boundaries of religious communities through restrictions on intermarriage may be a legitimate interest for communities themselves, who may try to achieve it through private means such as teaching and persuasion. However, protecting religious communities through restrictions on marriages cannot be considered a legitimate interest for a state that must remain neutral with respect to its citizens’ religious affiliation and may not allocate or deny rights according to religious affiliation.<sup>230</sup>

Thus, Israel’s restrictions on interreligious marriages do not meet the first prong of the test suggested in this Article—the legitimate interest prong. Furthermore, they do not meet the second prong of the test—the liberty and equality prong. The preservation of community boundaries in this manner results in serious violations of the rights of individuals within and outside the communities: women’s right to equality which is violated by the imposition of patriarchal and discriminatory religious laws; individuals’ right to family life which is denied because religious restrictions prevent them from marrying each other; and individuals’ right to freedom of conscience and freedom from religion which is violated by the imposition of religious laws on people who are not religious.<sup>231</sup> Thus, if, as already argued, measures for cultural

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<sup>227</sup> See discussion of such arguments in Part IV.B of this Article.

<sup>228</sup> Stopler, *supra* note 93, 176 n.10 (citing AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN’S RIGHTS 45-47 (2001)).

<sup>229</sup> Thus, for example, the former Chief Justice of the Israeli Supreme Court, Aharon Barak, has expressed the opinion that the limitation of marriages of Jewish Israelis to religious marriages held before the rabbinical courts can be justified on the basis of Israel’s character as a Jewish and democratic state. Ruth Gavison, *A Jewish and Democratic State: Challenges and Risks*, in MULTICULTURALISM IN A DEMOCRATIC AND JEWISH STATE 213, 273-74 (Menahem Mautner, Avi Sagi, & Ronen Shamir, eds., 1998) (Hebrew).

<sup>230</sup> See STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN FIVE DEMOCRACIES 6-10 (2d ed. 2009); see generally CHURCH AND STATE IN CONTEMPORARY EUROPE: THE CHIMERA OF NEUTRALITY (John T. S. Madeley & Zsolt Enyedi eds., 2003) (discussing church-state relations in contemporary Europe).

<sup>231</sup> See SHIFFMAN, *supra* note 226, at 5-9.

preservation are only legitimate as long as they promote parity of participation, or at least as long as they do not significantly violate the human rights and freedoms of both members and non-members of groups,<sup>232</sup> then a statutory scheme allowing only for religious marriages within recognized religious communities is illegitimate and must be altered.

Furthermore, one must not forget that the preservation of culture and community argument may serve as a pretext for racism. For example, while many countries in Europe claim that their recent immigration and naturalization restrictions are the result of the need to preserve their national cultures, some regard these restrictions as manifestations of covert racism.<sup>233</sup> Others see additional support for this view in the fact that at the same time that these countries restrict immigration, they enact proactive fertility policies aimed at increasing the local population's under-replacement fertility rates.<sup>234</sup> Similarly, the strict preservation of community boundaries through religious marriages often stems from racism and from the belief that one's religion and co-religionists are chosen and superior to others. The Israeli Ministry for Religious Affairs's instruction to the Sharia courts not to marry Muslim men to Jewish women may suggest such a line of thinking.<sup>235</sup>

## V. CONCLUSION

The liberal assumption that governments must not set fertility policies is flawed in both theory and practice. It is flawed in practice because whether intentionally or not, and whether they admit to it or not, governments set policies that directly and indirectly affect fertility. It is flawed in theory because the government must take reproduction into account in order to ensure women's rights to liberty and equality. Thus, when a government does not fund abortion and does not guarantee free and easy access to it, the government prevents low-income women from obtaining abortions, and condemns them to a life of hardship and misery. When a government does not guarantee paid maternity leave, it makes it impossible for women to compete in the job market on an equal footing with men. When a government refuses to intervene in the private sphere to ensure that women in traditional communities have full information on and access to family planning, it allows for their continued exploitation by their community. At the same time, past and present experience has taught us that fertility policies initiated by states and communities to respond to their population needs have, more often than not, ignored the rights of the women recruited to carry them through, and have used women as a means to an end, rather than as an end in themselves.

Consequently, while Foucault's aversion to biopolitics is understandable, those who are concerned with women's rights to liberty and equality have no choice but to acknowledge that biopolitics occurs all around us, and to try to offer ways in which it can be harnessed to advance women's rights rather than to exploit women. This Article has attempted to do just that by suggesting a test for assessing the legitimacy of fertility policies. It has identified three types of interests that fertility policies may serve: legitimate state and group interests; individual liberty

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<sup>232</sup> See Fraser & Honneth, *supra* note 203, at 36; Gans, *supra* note 203.

<sup>233</sup> Klug, *supra* note 207, at 25-26; see also Jean Hampton, *Immigration, Identity, and Justice*, in JUSTICE IN IMMIGRATION 67, 84 (Warren F. Schwartz ed., 1995) (discussing generally how state justifications of immigration restrictions on the grounds of preservation of national cultures are in fact a cover for racism).

<sup>234</sup> Klug, *supra* note 207, at 32.

<sup>235</sup> See SHIFFMAN, *supra* note 226.

interests, such as autonomy and privacy; and individual equality interests.

The validity of a given fertility policy should be assessed by examining it against these interests, and two rules should guide this examination. First, similar to any other government policy, fertility policies should only be based on a state's need to promote legitimate interests (the "legitimate interests prong"). Second, due to the primacy of individual rights, even legitimate state and group interests in fertility can only be realized while respecting and promoting individual rights, especially individual women's rights, to both liberty and equality (the "liberty and equality prong"). Any policy should satisfy both prongs of the test concurrently in order to be considered legitimate. Fertility policies are here to stay, and they hold both a threat and a promise. It is our task to demand their transparency and to carefully scrutinize them in order to ensure that they are used to promote, rather than to obstruct, rights.