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Constituting Over Constitutions

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ABSTRACT

In philosophy, legal theory and law, the *Grundnorm*, or basic norm, is often assumed to be the constitution, or that which overrides other norms. That is incorrect. This paper argues that the *Grundnorm* should be the norm which regulates human procreation. This norm must proceed from the theoretical absence of human power, or a zero baseline. This essay attempts to correct the *Grundnorm* fallacy with what will be called the Zero-Baseline Model. The correction reorients our human rights regimes and family planning systems, in ways that lead to an inevitable list of specific policy reforms that largely invert current family planning models and policies in use at the United Nations, European Union, the United States, and elsewhere. Those reforms can all be described in a simple narrative of reorienting family planning laws and policies from what would-be parents desire, subjectively, towards what all future children need, objectively. And as the evidence shows, those reforms prove highly effective and much more efficient in promoting child welfare, reducing economic and other inequalities, mitigating the climate and other ecological crises, protecting non-humans, and building democracy, than their alternatives.

KEYWORDS

Constitutional Law; Public Policy; Grundnorm; Zero Baseline Model; Family Planning

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INTRODUCTION

This paper will invert what is commonly seen as an act of self-determination by parents, procreation, to reveal instead its true nature as an act of other-determination, on a massive scale more determinative of the future child's life and the communities future children will comprise than of the lives of the parents. This will lead to a revision of Hans Kelsen's *Grundnorm* theory, and in this revision, I will argue that polities, or ideally what will be legalities, form dynamically from the inside out via the norm that determines procreation, rather than I will argue that legalities form dynamically the norms which determines procreation from inside-out, rather than through traditional outward-facing borders defined by traditional Constitutions and defended by violence. We are constituting, not constituted, in the past. Or if put another way, the creation norm always precedes and overrides other norms which are wrongly perceived to be more fundamental, including rules of recognition and other seemingly constitutive norms. The practical revisions in law and policy to correct what we perceive to be fundamental will entail a special form of liberation. This revision raises key questions in the formation of any conception of liberal governance: If governance should create morally valuable options while treating all equally, must family planning systems be designed to give all kids a fair start in life, eliminating the arbitrary impacts of nurture that procreative autonomy would impose on future generations? Does that process include an ecological baseline, such that the future generations can self-determine free of all forms of oppression – including climate change – imposed by prior generations? Can states intervene in family planning decisions, as a matter of enforcing a peremptory norm and a child's human right to a fair start in life, to assure this? This revision is offered to inform the process, and to reverse a common misperception about what actions are personal versus interpersonal in nature in the context of procreation. That reversal could raise an impossibility theorem: That there is no way to make sense of liberation, empowerment, obligation, the rule of law, or legitimacy without accounting for the creation of persons, oriented from the zero-baseline discussed below, and determining how objective values in that process will inevitably enable or disable subjective choice.

In philosophy and law, the most basic norm, or *Grundnorm*, is usually assumed to be the superior norm guiding human behavior from which all inferior norms are derived.¹ That is incorrect. The fallacy is based on a series of mistakes, described in more

¹ See, e.g., Stanley L. Paulson, *The Neo-Kantian Dimension of Kelsen's Pure Theory of Law*, 12 OXFORD J. LEGAL STUD. 311 (1992); Brian H. Bix, *Kelsen, Hart, and Legal Normativity*, 34 REVISTA ZA USTAVNO TEORIJO IN FILOZOFIJO PRAVA [REVUS J. CONST. THEORY & PHIL. LAW], 25 (2018) (Spain); HANS KELSEN, REINE RECHTSLEHRE: EINLEITUNG IN DIE RECHTSWISSENSCHAFTLICHE PROBLEMATIK [PURE LEGAL DOCTRINE: INTRODUCTION TO THE LEGAL PROBLEM] (F.

detail below.² Instead, the most basic norm is that which ought to account for the creation of humans, or the creation norm. This is the norm that frames—in the realm of human rights—population ethics, going beyond quantities of persons and maximizing economic growth to deal with the unavoidable qualities, relative positioning of persons, relation of persons to their ecologies, etc., as we constitute legalities.³ It is lexically primary human right and correlative duty, the first and constantly recurring duty we face, as we reconstitute ourselves through children. If population ethics is about counting people, then the form referred to as constituting herein is about making people count – which is perhaps the core commitment of liberalism.

The mistake of not seeing the *Grundnorm* as creation norm is impeding family-planning policy reforms that are ten to twenty times more effective than their alternatives at promoting child welfare, reducing economic and other inequalities, mitigating the climate and other ecological crises, protecting non-humans, and building democracy.⁴

This inquiry began during the development of the deontological framework for population ethics and policies, as part of the Population Ethics and Policy Research Project, within the Future of Humanity Institute at Oxford University in 2014. The inquiry and the claims in this essay can be thought of in these simple terms: The fundamental idea of liberalism and the advent of human rights and democracy all rested on the necessary condition of people capable of self-rule, people who differed sharply from one another at the time, those born and raised under the preceding ideologies. Where did these new people come from? This essay will argue that, for the most part, they have yet to appear on earth.⁵

Deuticke ed., 1934); Miriam E. Oatman, *General Theory of Law and State* by Hans Kelsen, 40 AM. POL. SCI. REV. 131 (1946).

² See *infra* Part I.

³ See “How Important Is Population Ethics?”, *Practical Ethics* (blog), <http://blog.practicaethics.ox.ac.uk/2014/10/how-important-is-population-ethics/>.

⁴ Matthew Hamity et al., *A Human Rights Approach to Planning Families*, 49 SOC. CHANGE 469 (2019); Editorial, *Population Growth and Climate Change*, 337 BMJ (2008), <https://www.bmj.com/content/337/bmj.39575.691343.80>. M. Greenstone, A Looney, J Patashnik, and M Yu, *Thirteen economic facts about social mobility and the role of education*, Brookings Institution website, available at: <https://www.brookings.edu/research/thirteen-economic-facts-about-social-mobility-and-the-role-of-ed>; John Guillebaud, *There Are Not Enough Resources to Support the World’s Population*, Ockham’s Razor with Robyn Williams website, available at: <https://www.abc.net.au/radionational/programs/ockhamsrazor/there-are-not-enough-resources-to-support-the-worlds-population/5511900> published June 10, 2014; *Smaller families mean better lives for all*. Population Matters website. Available at: <https://populationmatters.org/smaller-families>. Accessed February 12, 2020; Paul A. Murtaugh & Michael G. Schlax, *Reproduction and the Carbon Legacies of Individuals*, 19 GLOB. ENV’T CHANGE 14 (2009); “Having Kids White Paper”, Having Kids website, <https://havingkids.org/faqs/white-paper-draft/>.

⁵ The inquiry could also be stated this way: What is the state’s interest in procreation? The answer disposes of the artifice of the state and becomes simply this: Being free and equal people.

This essay will describe the creation norm as a simple scale (0, 1, 2, . . .) in which: (1) all subsequent things being equal, self-determination should fall and being determined by others should rise, in linear form (given the political equality of persons), as people join the relevant polity (or “legality”, more accurately), which exists against a baseline of non-polity (or point zero). (2) Self-determination is maximized through unique, temporalized, and interlocking values as well as specific thresholds for the quantity, qualities, relative positioning of persons to one another and their ecologies, and formation of new legalities, described in detail below. These values and thresholds orient around zero as a balance point (for example, the baseline deviation of which is causing harms like climate change and induced a shortening of pregnancies⁶). These values and thresholds represent the objective frame that makes subjectivity possible and are an ideal balance between group security and personal independence. (3) Persons are positioned to convert the influence of others into norms through consent, i.e., we can imagine the positioning of the antecedent and decentralized “we” group of free and equal persons,⁷ the reference to which expressly or implicitly initiates and justifies modern Constitutions as in “we the people”. This means that, consistent with point (1) above, legalities become increasingly illegitimate⁸ because self-determination and personal sovereignty should give way to being determined by others, and the consent to others’ power—and hence inclusive normativity—become increasingly impossible. (4) Concentration of power in extant persons and institutions is transferred to future generations, to make them a sufficient antecedent group, or “we the people” in quantity, quality, and relative positioning as they enter the legality.⁹

The norm maximizes consent by balancing the positive freedoms to morally valuable options in life that come with children’s development and increased roles in self-governance, with the negative freedom of smaller and decentralized legalities and the restoration of nature.¹⁰ It re-orientes our current systems of socially and ecologically unsustainable human rights which give would-be parents the unfettered right to

⁶ See, e.g., “Many pregnancies are shorter as climate change causes more 90-degree days”, *UCLA Newsroom* (blog), <https://newsroom.ucla.edu/releases/shorter-pregnancies-climate-change>.

⁷ This differs from Rawls and others’ original positions approach. See Richard Dworkin, *The Original Position*, 40 UNIV. CHI. L. REV. 500 (1973).

⁸ For a more traditional take on illegitimacy see CARL SCHMITT, *LEGALITY AND LEGITIMACY* (Jeffrey Seitzer trans., 2004); see also, “Legal Theory Lexicon: Legitimacy”, *Legal Theory Blog*, at <https://lsolum.typepad.com/legaltheory/2018/05/legal-theory-lexicon-legitimacy.html>.

⁹ See GARY S. BECKER, *A TREATISE ON THE FAMILY* (2nd ed. 1991) (“[T]he interaction between quantity and quality explains why the education of children, for instance, depends closely on the number of children”.); Susan J. G. Alexander, *A Fairer Hand: Why Courts Must Recognize the Value of a Child’s Companionship*, 8 T.M. COOLEY L. REV. 273, 302 (1991). (“[W]hen people have fewer children, the value of each individual child increases enormously. Parents are willing to spend more on each child, e.g., by investing more in each child’s training”).

¹⁰ See Hamity et al., *supra* note 4.

proliferate, and would give future children have no right to guaranteed levels of welfare at birth, and would give humans no right to nature.¹¹ The norm pushes in the opposite direction of recent and blatant pro-natal moves by many governments to maintain population-driven economic growth despite the fact that it exponentially increases climate and other ecological impacts.¹² Thus, this norm is a necessary condition for any conception of human freedom, which makes the conception (4) dimensional, reforming former and relatively static conceptions, like Isaiah Berlin's.¹³ Freedom, in this sense, could be better referred to as our natural sovereignty; it values people, makes people count or matter, and extends liberalism beyond the state-subject paradigm to protect us from one another at an irreducibly fundamental level.

This essay refers to the creation of norm—which tries to constantly reconstitute the ideal antecedent “we”—as the “zero-baseline model”, or “constituting”, as in “constituting an inclusive legality”, as opposed to the relatively static, top-down, and enforced concept of a modern nation-state's constitution. Legitimacy derives from people, and people derive from the creation norm—that is the value and nature of constituting, as opposed to some historical document disconnected from the people to whom it refers. No country is constituted; if we take human rights and democracy seriously, there are groups of people who are either constituting or de-constituting relatively legitimate or illegitimate societies, or relatively consensual social organizations that are more or less legalities.¹⁴ *Constituting*, in this sense, means moving beyond being a people for whom a cessation of violence and settling of property rights in a top-down state structure suffices as freedom and toward being a people physically constituted into consensual and normative communities of free and equal people.

Through the lens of the zero-baseline model, things like the climate crisis and its impact on self-determination might take on a new significance, as we are forcibly subjected to the threatening power and influence of others. Things like recent pro-natal legislation in the United States, which will continue to exacerbate the crisis, also take on new meaning.

The creation norm has never existed in positive law or been practiced. Had it been, the world would look nothing like it does today. This essay will argue that the

¹¹ See Carter Dillard, *Comprehensive Animal Rights*, Having Kids website, <https://havingkids.org/comprehensive-animal-rights/>.

¹² See Dylan Matthews, “Mitt Romney and Michael Bennet just unveiled a basic income plan for kids”, Vox (blog), <https://www.vox.com/future-perfect/2019/12/16/21024222/mitt-romney-michael-bennet-basic-income-kids-child-allowance>; and Jeff McMahon, “The World Economy Is a Pyramid Scheme”, Forbes, April 5, 2019, at <https://www.forbes.com/sites/jeffmcmahon/2019/04/05/the-world-economy-is-a-pyramid-scheme-steven-chu-says/>.

¹³ See ISAIAH BERLIN, *LIBERTY* (2nd ed. 2002).

¹⁴ For a take on legality moving in this direction see SCOTT J. SHAPIRO, *LEGALITY* (2011).

creation norm is that which constitutes legalities, or legitimate social organizations, and if what this essay argues is true, the world remains in pre-constitutional states of illegitimacy. Establishing the norm as the foundation from which future generations are created, legitimating all forms of social organization would require radically rethinking population ethics, law, and family-planning systems from their current trajectories.

Establishing the norm would require moving from a subjective norm that protects what parents want, to an objective “child-centric” norm that prioritizes what children need (because having a child is more of an other-determining than a self-determining act), using the specific values and thresholds referred to above, for their creation. The shift would require recognizing the creation norm as a peremptory norm in international law and embracing it as a socially and ecologically regenerative—and hence central organizing principle—for new policies that could prove ten to twenty times more effective at mitigating the climate crisis, restoring our ecology, improving child welfare, reducing economic inequality and building democracy than current policies.¹⁵ The transition to this norm essentially entails us becoming sufficiently other-regarding, or child-centric, to reconstitute our polities into legalities, by changing the way we “make” people.

What does the transition look like in practice, and how feasible is it? In short, the transition involves a significant and worldwide transfer of resources—treated as fundamental decentralization of public and private power in the form of substantial future child entitlements that will merge the economic margins of rich and poor (or more accurately powerful and powerless)—in order to incentivize changes in the way we plan our families and have children. Given the current distribution of resources, the malleability of family-planning decisions, current fertility rates, shifting gender dynamics, the threat of the climate crisis, and the way the zero-baseline model unifies the many generations of human rights, liberalism, communitarianism, etc., this shift is feasible.

This essay will lay out the zero-baseline model and the assumptions it is based on and will begin to spell out a system and discourse for the model’s implementation in law and social praxis, including its potential role in specific campaigns developing international law and in pending federal climate litigation and proposed federal and state child welfare legislation in the United States. While the model is discussed in the familiar context of nation-states, it can be applied to the dynamics of any grouping of persons and forms of power (e.g. exemplification) that influence upon and within those groups.

¹⁵ See Hamity at al., *supra* note 4.

If there is one thing this essay should convey, and especially at the discussion of “pregnant pronouns” and the lesser power asymmetry below, it is that the way most of us experience and react to power is myopic, temporally and otherwise, and that we are capable of instead more broadly comprehending the dynamic social ought of constituting legitimate societies. Attacking the pregnant pronouns in any normative claim, with questions about how the claimant is accounting for values like wellbeing, equity, nature, and democracy in the creation of the persons to whom the pronouns refer, seriously problematizes the claims.

BACKGROUND AND THE LIMITS OF HUMAN COGNITION

As discussed above, creating a comprehensive liberal normative system, like a human-rights-based democracy,¹⁶ would first require an antecedent norm that accounts for the creation of the system’s members, the relations between them, and the degrees of power or influence (as opposed to specific forms of power or influence, like violence)¹⁷ they would exert upon one another. And, as discussed, this norm does not exist for many reasons and may have never so-far existed.¹⁸ These reasons include a series of mistakes in the development of liberalism in addition to the cognitive challenges discussed below.

This essay will not discuss these mistakes in detail, which are covered in a companion article.¹⁹ In short, liberal theory and practice (1) conceived power too narrowly, focusing on forms like violence, and ignoring subtleties like the conditions of child development and anthropogenic impacts on our ecology; (2) never seriously accounted for the birth of persons into the social contract and the way they inevitably exclude others from their sovereign role in that contract; (3) never seriously accounted the need to ensure that all persons are capable of being emancipated, or actually capable of participating in a social contract; (4) made the order error of conceiving freedom in

¹⁶ See MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2002).

¹⁷ “Power” or “influence” here is conceived of simply as a degree of any effect, consequence, influence, result, etc., the cause of which is a human. This includes the sort of subtle effects that collectively caused the climate crisis. That crisis threatens political structures, as well as our species, in ways never seen before, and it is proof that more-narrow conceptions of power—as authority, violence, control, etc.—should now be seen as dangerously myopic and as tied into the psychological limits of the way humans perceive. Power is about the capacity of each person to influence, and, therefore, it is about each person’s presence. Alexander Barker, St. Benets, University of Oxford, “What is Power?” (unpublished manuscript, Word file).

¹⁸ SARAH ONLY, *ONE CHILD: DO WE HAVE A RIGHT TO MORE?* (2016); Carter Dillard, *Antecedent Law: The Law of People-Making*, 79 *MISS. L.J.* 873 (2010).

¹⁹ Carter Dillard, *Illegitimacy*, *Willamette L. Rev.*, Forthcoming Spring 2020.

terms of what people can do without first accounting for who people are and first relate, in terms of their quantities, qualities, relative positioning, etc.; and (5) tried to seed an ideology of human liberation from a completely antithetical position: that of parents' property rights in their future children.²⁰ Perhaps the biggest mistake in all of this was relying on social processes, e.g. courts' interpretations of traditional constitutions, to subvert the *Grundnorm*. That is an order error; there is no social source or process that precedes the norm itself. Understanding that means taking rights seriously.

The absence of a theorized creation norm may account for the key conundrum in liberalism today: The average person has little influence over the forms of human power that influence him or her, like climate change and other environmental crises, global markets, risk of nuclear war, etc. A person most often lives under compulsory norms and social forms that do not reflect his or her deliberate input and will. How is that possible in an era defined by the supposed rise of human rights and democracy, which, by any interpretation, was meant to empower individuals and make them self-determining?

Could the absence of such a creation norm be accounted for by limits on human cognition, our temporal myopia, our tendency to notice and focus on obvious forms of influence, like violence, over subtle ones like greenhouse-gas emissions?

Accounting for political obligation and autonomy by temporally accounting for all the people with potential to influence our lives, in a world of close to 8 billion people, is not something our human brains can easily perceive.²¹ The dynamics of autonomy and self- versus other-determination in this sense, or the temporalized presence and interaction of the actual people in the social contract are not things we normally comprehend. Human brains readily focus more on the symbols of that power and contract, our elected representatives, the words of an ancient and property-based constitution,²² and violence and the threat of violence from law enforcement than focusing on the myriad ways we influence and define—and thereby limit—the lives of persons who do not yet exist.²³ We are more apt to see freedom in a myopic and downstream way (as exemplified by the notion of procreative autonomy), as if freedom

²⁰ *Id.*

²¹ Darrell A. Worthy, A. Ross Otto and W. Todd Maddox, *Working-Memory Load and Temporal Myopia in Dynamic Decision-Making*, 38 J. EXPERIMENTAL PSYCH.: LEARNING, MEMORY, AND COGNITION 1640 (2012); Bruno Goncalves, Nicola Perra, and Alessandro Vespignani, *Validation of Dunbar's Number in Twitter Conversations*, arXiv (2011): arXiv:1105.5170v2. The birth and development of humans—*qua* the addition of new members of a liberal normative system contingent on particular ecologies—simply happens too slowly and amorphously for humans to readily perceive and account for.

²² Carter Dillard, *Future Children as Property*, 17 DUKE J. GENDER L. & POL'Y 47 (2010).

²³ PHILIPPE JULIEN, JACQUES LACAN'S RETURN TO FREUD: THE REAL, THE SYMBOLIC, AND THE IMAGINARY (1994); *Id.*; Dillard, *supra*, note 18.

were some sphere that magically separates us in time and space from the rest of the universe.²⁴

This temporal error,²⁵ i.e., the difficulty of even conceiving of future humans, goes both ways: humans fail to account for how behaviors today determine the future as well as how social position or class is determined by past events. And that temporal error leads to a spatial one, a myopia, exemplified by H.L.A. Hart's famous statement of the basis for choice-rights theory (and a basis for many subsequent free-market theories and policies).²⁶ Hart's theory of choice-based rights begins with a minimal and subjectivist moral account of rights:

[I]f there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free. The moral justification [for the right] does not arise from the character of the particular action to the performance of which the claimant has a right; what justifies the claim is simply—there being no special relation between him and those who are threatening to interfere to justify that interference—that this is a particular exemplification of the equal right to be free.²⁷

Hart's account is myopic. How did the actors in this scene get to where they are? What is the context, historically, that accounts for their interaction? What form of limiting social organization has surrounded them and surrounds them now?²⁸ What accounts for any difference in the levels of influence they have over each other in that instance? This myopia has affected modern political discourse in what Nagle and Murphy called the "myth of ownership", or the perception that property rights and social positioning are naturally occurring phenomena,²⁹ as is an expectation that the state exists to protect them (through violence). Is there any reason to institutionalize this myopic notion of freedom as a value?³⁰

The zero-baseline model tries to account for these errors in the way humans perceive and process information about their environment and that interfere with

²⁴ Joseph Raz, *The Morality of Freedom* (1986).

²⁵ Worthy et al., *supra* note 21.

²⁶ See Walter E. Block, *Private Property Rights, Economic Freedom, and Professor Coase: A Critique of Friedman, McCloskey, Medema, and Zorn*, 26 HARV. J. L. & PUB. POL'Y 923,951 (2003).

²⁷ H. L. A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175,191 (1955).

²⁸ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Washington v. Glucksberg*, 521 U.S. 702 (1997).

²⁹ LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* (2002).

³⁰ See Philip Pettit, *The Instability of Freedom as Noninterference: The Case of Isaiah Berlin*, 121 ETHICS 693,716 (2011). To Raz and Pettit's critique, the zero-baseline model simply adds this: any sense of personal autonomy is an illusion that ignores the norm or norms which created the person in question and surrounds him or her, and his or her future, with other persons. The antecedent and external autonomy defined by the people with whom we share the world encompasses any subsequent and internal autonomy, or "personal sphere", we may misperceive as the exclusive form of autonomy.

achieving liberalism.³¹ The model requires and uses novel concepts, like the temporalizing verb-form conception of “constituting”, as opposed to the noun-form conception of a “constitution”, which will be unfamiliar to the reader, but are explained below, are necessary to account for the model of intergenerational consent and self-determination advocated for here. The model involves other concepts, like a spatial-temporal border that seeks to account for all ways humans might influence one another, as well as a duality, or pincer, described below, in which a non-human-centric ecological ethic is paired with a child-centric family-planning model.³²

This missing antecedent norm, or creation norm (*Grundnorm*³³), or the “zero-baseline model”, could hold the key to solving the conundrum and ensuring the special form of political evolution—the dynamic balance between community and autonomy—that liberalism always promised. The zero-baseline model contributes to the fields of population ethics, biopolitics, and legal theory by offering a new and comprehensive deontological framework, baseline, or point of orientation for evaluation,³⁴ discourse, praxis for family-planning and population policy reform that would be ten to twenty times more effective³⁵ at mitigating climate change, eliminating child poverty, improving economic inequality, and reaching other sustainable development goals than downstream approaches (i.e., norms that address behaviors after the creation of persons).³⁶ The model will be presented as a necessary, but not sufficient, condition of any reasoned conception of political obligation and self-determination/autonomy, and hence liberty and freedom.³⁷

³¹ See “What Is the Zero Baseline Model”, available at <https://fairstartmovement.org/what-is-zero-baseline-modeling-or-constituting-in-politics-and-law/>.

³² See Dillard, *supra*, note 11.

³³ Contrast traditional but relatively downstream conceptions of the *Grundnorm*. See HANS Kelsen, *PURE THEORY OF LAW* (Max Knight trans., 1967); Juan Carlos Riofrío, *Kelsen, The New Inverted Pyramid and the Classics of Constitutional Law*, 7 *RUSS. L. J.* 87,118 (2019), <https://doi.org/10.17589/2309-8678-2019-7-1-87-118>; Kelsen’s *Grundnorm* was subsequent. What norm accounts for the presence of the people in Kelsen’s systems? What norm should that be? Would a *Grundnorm* be normative without accounting for and aligning the fundamental values described below?

³⁴ See Legal Theory Lexicon 066: Baselines, https://lsolum.typepad.com/legal_theory_lexicon/2008/05/legal-theory-2.html.

³⁵ *Ibid.*, note 2.

³⁶ See The Fair Start Model of Family Planning, Having Kids website, accessed August 15, 2019, <https://havingkids.org/wp-content/uploads/2019/05/FairStartModel2019-1.pdf>.

³⁷ See Alex Cole, *Topics in Political Theory: Is Freedom from Power Possible?*, Discourses on Liberty (blog), February 3, 2012, <http://discourseonliberty.blogspot.com/2012/02/is-freedom-from-power-possible.html>.

THE ZERO-BASELINE MODEL

The zero-baseline model works by revising the consent-as-justification theory³⁸ of political obligation and autonomy by temporalizing it, de-abstracting its spatial component (accounting for actual people and their influence on the world), and expanding its perspective by three hundred and sixty degrees to account for all human influence.³⁹ It does so by first treating the relevant borders of human influence as starting at the pre-existence of future generations,⁴⁰ and ending with the edges of extant spheres of human influence.⁴¹

The perspective this model requires envisions, a four-dimensional social contract—or *Grundnorm*—requiring the consent or constructive consent of all extant and future persons⁴² and thus, their integration into human-rights-based democracy. The model accounts for the mutual consent between extant and future persons, through those persons' entry into, relationship to, norms of, and right to exit the human-rights-based democracy.⁴³ In this model, humans come together in social contract, constituting society from a state of nonpolity, thereby converting all actual and potential human influence into law through the consensual integration of extant persons. The model allows for the measuring and thus, the minimizing of the inevitable and linear loss of political autonomy and self-determinability that comes from adding new members to the human-rights-based democracy. It maximizes members' consent to the influence that results from the existence of the others.⁴⁴ The model is antecedent, or a *Grundnorm*, because it accounts for the capacity to influence simply by existing.

Conceptualizing the model begins with a series of assumptions derived from the conceptions of consent traditionally used in consent-as-justification theories.⁴⁵ These assumptions spell out the necessary conditions for the existence of consensual

³⁸ See Harry Beran, *In Defense of the Consent Theory of Political Obligation and Authority*, 87 *ETHICS* 260 (1977).

³⁹ See *supra*, note 17, for definition of “influence”.

⁴⁰ See Matthias Doepke, *Gary Becker on the Quantity and Quality of Children*, 81 *J. DEMOGRAPHIC ECON.* 59 (2015). See e.g. Eric A. Hanushek, *The Trade-off Between Child Quantity and Quality*, 100 *J. POL. ECON.* 84 (1992).

⁴¹ See Joel Feinberg, *The Rights of Animals and Future Generations*, in *PHILOSOPHY AND ENVIRONMENTAL CRISIS* 43 (William T. Blackstone ed., 1974). Carter Dillard, *The Primary Right*, 29 *PACE ENV'T. L. REV.* 860 (2012). See also, ALAN WEISMAN, *THE WORLD WITHOUT US* (2007).

⁴² Derek Parfit, *Future People, the Non-Identity Problem, and Person-Affecting Principles*, 45 *PHIL. & PUB. AFF.* 118 (2017).

⁴³ Dillard, *supra* note 41.

⁴⁴ The model could be represented in this way: 0 is nonpolity, 1 is absolute political autonomy or the individual sovereignty, and >1 begins the social contract with varying levels of political obligation and autonomy, depending in part on the application of the *Grundnorm*, relative to 0. With the zero-baseline model, systems remain pre-constitutional because they cannot account for the paradox of maximizing autonomy through the integration and obligation that happens between 1 and >1, for example, at the level of the townhall meeting hypothetical discussed below. The model thus acts as a measuring stick for the antecedent conditions of political obligation and autonomy.

⁴⁵ See Richard Dagger & David Lefkowitz, *Political Obligation*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (2021).

identities,⁴⁶ including the ways in which persons in a group themselves within society (i.e., how they form, or “constitute”⁴⁷). (The assumptions do not spell out the conditions for what those identities subsequently *do*; they are assumptions simply about the entities’ existence.) The model relies on the following assumptions:

- a. any theory of political obligation and autonomy must account for all forms of human influence, including the absence of human influence, or non-polity, as a point of orientation.⁴⁸
- b. because we *are* before we *do*, the norm that creates us is lexically primary.⁴⁹
- c. members of a human-rights-based democracy must be of certain constitutive quality,⁵⁰ i.e., capable of consenting,⁵¹ reasonable,⁵² emancipated,⁵³ able to communicate with each other at a constitutive level,⁵⁴ etc.

⁴⁶ In case it’s not readily apparent, “consenting identities” refers to those people capable of consenting, i.e., the actually emancipated adults, the adults who are at or above the constitutive quality threshold required to be met for membership into the society in the model.

⁴⁷ See “Reframing Population and Family Planning to Focus on Justice”, available at <https://fairstartmovement.org/reframing-population-and-family-planning-to-focus-on-justice/>.

⁴⁸ See Carter J. Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. L. J. 1, 10 (2007). The interplay between population growth and nonpolity is what drove the need for government, according to Locke. Or, as may be the case, the government was created by self-interested elites, with its creation leading to population growth:

The imperative of collecting people, settling them close to the core of power, holding them there, and having them produce a surplus in excess of their own needs animates much of early statecraft. Where there was no preexisting settled population that could serve as the nucleus of state formation, a population had to be assembled for the purpose.

From JAMES C. SCOTT, *AGAINST THE GRAIN: A DEEP HISTORY OF THE EARLIEST STATES* (2017).

⁴⁹ See JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (Erin L. Kelly ed., 2001).

⁵⁰ Some scholars have taken the perspective of current members and their willingness to admit and enter into contract with others, in some case with those who may be disabled or of another species. See, e.g., MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006). But what if the prospective members are not disabled or of another species but will simply lack some sort of minimum civic quality?

⁵¹ Contrast this with the constructive consent of the new parties themselves (i.e., offspring). See, e.g., John Lawrence Hill, *What Does It Mean to Be a “Parent”?* *The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 384 (1991). (“[T]he procreative right arguably is contingent upon the constructive consent of the resulting child”).

⁵² See Marilyn Friedman, *John Rawls and the Political Coercion of Unreasonable People*, in *THE IDEA OF A POLITICAL LIBERALISM: ESSAYS ON RAWLS* 16 (Victoria Davion & Clark Wolf eds., 1999); see e.g., Carter Dillard, *Empathy with Animals: A Litmus Test for Legal Personhood?* 19 ANIMAL L. REV. (2012). Could certain meta-ethical positions, like subjectivism, be explained as simply lacking a constitutive perspective, and requisite qualities, like empathy? See also, Maxine Eichner, *Who Should Control Children’s Education?: Parents, Children, and the State*, 75 U. CIN. L. REV. 1339, 1361 (2007) (describing why a democracy requires critical thinking in its citizens), at 1341; see also JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 260, 276 (2d ed. 2011); see e.g., JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 144 (1975). Referring to the need for people of “sufficiently high quality” in democracies (quoting JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 290 (3d ed. 1950)).

⁵³ This term refers to a child we would accept into society who becomes mature enough to be considered an adult and who is free of the wardship of his or her parents. See DAVID ARCHARD, *CHILDREN: RIGHTS AND CHILDHOOD* (1993). Archard’s discusses that varying levels of peoples’ quality may be controversial, but that controversy disappears when parents are forced to explain why they put certain efforts (or any efforts) into rearing their children.

⁵⁴ For example, the United States Constitution says, “we the people”, and there is a common assumption that the whole document should represent a discourse all Americans can have. And this assumption includes in

- d. the constitutive quality requirement must be a part of the model that creates a human-right-based democracy because it is preferable to exclude merely possible people rather than extant people.⁵⁵
- e. each new member of a human-rights-based democracy is an equal individual sovereign who excludes (via things like majority rule) other members from the sovereignty equally,⁵⁶ and must account for and consent to each new member's capacity to influence, as well as their actual influence over themselves.⁵⁷
- f. because each member of a human-rights-based democracy retains ultimate political authority, the first would-be members must (in what might be called the "first election") constructively consent to become a new member of the democracy, consent to the addition of new members to the democracy, and must be free to reconstitute new human-rights-based democracies relative to the non-polity baseline.
- g. in an ideal human-rights-based democracy, the consensual addition of new members would be the only thing that reduces political autonomy and creates political obligation.⁵⁸

These assumptions could be summarized more simply: there is no law without obligation⁵⁹; no obligation without consent⁶⁰; no consent without accounting for the quantity, quality, and relative positions of the relevant entities; and no such accounting

"all Americans" those Americans who are illiterate or who cannot read English; the Constitution is still a means of common communication.

⁵⁵ See Dillard, *supra* note 22. See also Santosky v. Kramer, 455 U.S. 745, 789 (Rhenquist J., dissenting):

It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens. The same can be said of children who, though not physically or emotionally abused, are passed from one foster home to another with no constancy of love, trust, or discipline.

Consider John Stuart Mill's take on the circumstances one is born into:

Capacity for other nobler feelings is in most natures a very tender plant, easily killed, not only by hostile influences, but by mere want of sustenance; and in the majority of young persons it speedily dies away if the occupations to which their position in life has devoted them, and the society into which it has thrown them, are not favorable to keeping that higher capacity in exercise.

⁵⁶ Each member's role in a democracy is, *ceteris paribus*, inverse to the size of that democracy. See e.g., JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 50-51 (Donald A. Cress trans., Hackett Publishing Company 1988) (1762) at 50-51. Note that equality and egalitarianism, in this formulation, can simply be explained as comprehensively accounting for power. Anything other than equality would require an explanation of the power differential.

⁵⁷ This assumption, and the constitutive quality assumption, may have been why Mill seemed to think that procreation violated the harm principle in many cases. See e.g., (Elizabeth Rapaport ed., Hackett JOHN STUART MILL, ON LIBERTY Publishing Company 1978) (1859).

⁵⁸ Among the ways we commonly otherwise reduce it: delegation of authority to representatives, the use of sanctions or incentives to ensure compliance with norms, tolerating power not accounted for by its conversion into law, etc.

⁵⁹ See generally H.L.A. HART, THE CONCEPT OF LAW (3d ed., Oxford University Press 2012) (1961).

⁶⁰ Contrast this with others' take on the nature of law. See FREDERICK SCHAUER, THE FORCE OF LAW (2015).

without nonpolity, or the relative absence of human influence. Thus, nonpolity (to be contrasted with states of nature and original conditions in prior political-obligation models)⁶¹ is the zero-baseline from which quantity, quality, relative positioning, and the resulting loss of human autonomy must be measured; any other baseline would not be comprehensive. Just as we use total darkness as the implicit baseline to determine how bright a room is, we must use the total absence of human influence (nonpolity) to measure the influence resulting from a person's existence or actions.

Given these assumptions, the *Grundnorm* (the constituting norm) is comprised of four interdependent requirements: to minimize the loss of political autonomy in a human-rights-based democracy, and hence maximize consent, integration, and justified political obligation, would require, as a matter of lexical primacy, that (1) each new entrant be of a minimum constitutive quality or capable of constituting with others, (2) that there be a maximum number of members constituting the human-rights-based democracy, (3) that they enter relative to each other so that they exclude equally,⁶² and (4) that they are capable, given their quality, quantity, and relativity, of reconstituting their legalities relative to some level of nonpolity.

The existence of these four variables is inevitable in the act of procreating. The *Grundnorm*, thus, necessitates backdating the standards, e.g., requiring conditions of entry that ensure constitutive quality and emancipation,⁶³ rather than ignoring entry and subsequently excluding persons as insufficient in some way.

This model would alter common approaches in fields such as population ethics⁶⁴ that currently focus only on quantity and utility rather than accounting for the antecedent factors at play when we account for the constituting norm.⁶⁵

The constituting norm changes our perspective. Instead of a quantitative concept of population, the focus turns to the dynamic "we" that enables constitutions and the many values which that thick concept⁶⁶ implies. Instead of asking what role a given population or quantity of persons plays in a particular outcome,⁶⁷ e.g., the creation of greenhouse gas emissions, we can begin to evaluate how the four variables have and

⁶¹ See DAVID BOUCHER & PAUL KELLY, *THE SOCIAL CONTRACT FROM HOBBS TO RAWLS* (1994).

⁶² For example, each person gets equal time to speak in the townhall hypothetical, *infra*.

⁶³ Locke's infeasible solution was to prevent unreasonable people from ever leaving the wardship of their parents. See e.g., Dillard, *supra* note 48, at 40.

⁶⁴ What is being espoused here is to be distinguished from the field of philosophical inquiry currently known as "population ethics", which is dominated by utilitarians and largely focuses on how population and welfare relate. Population ethics will partly determine what the substantive content of post-constituting law should be, but this article raises legal and political questions beyond population ethics.

⁶⁵ See generally Hilary Greaves, *Climate Change and Optimum Population*, 102 *THE MONIST* 42 (2019).

⁶⁶ See "Thick concept", Wikipedia website, https://en.wikipedia.org/wiki/Thick_concept.

⁶⁷ See Paul R. Ehrlich & Anne H. Ehrlich, *Population, Resources and the Faith-Based Economy: The Situation in 2016*, *BIOPHYSICAL ECON. & RES. QUALITY*, Aug. 2016, at 1, 3.

will subject persons, who in liberal societies should be self-determining, to existential threats created by others, or in other words, having their lives and futures so determined by others.

Note also how equality or fairness as a value, or being what Rawls called “free and equal people”⁶⁸ is accounted for simply as a matter of power, or accounting for all human influence relative to nonpolity or a zero-baseline. Any power differential that would precede their coming together, or constituting, would mean we had not accounted for all the power people have had over each other. When we do so from a zero-baseline, we coincide with equality. Hence the phrase “free and equal” might actually be redundant.

This model uses eight ultimate and interdependent values (each of which can be pegged to existing positive law standards)⁶⁹ to set the minimum and maximum thresholds for the quality, quantity, relativity,⁷⁰ and nonpolity requirements. The model is put into action, as discussed below in Part II, by using the values to restructure the fundamental – and universal – human right to procreate as it currently appears in ethics, law, policy, and praxis and gearing all family planning around the restructured right.⁷¹ The model replaces the current value at the core of the structure of the right, which is “procreative autonomy”, a contradiction in terms that beautifully exemplifies human temporal myopia,⁷² and that seems to have been designed to alleviate collective obligations to future children.⁷³ How can the act of creating another person be autonomous and self-determining, as opposed to inter-relational and other-determining?⁷⁴ The mode replaces procreative autonomy with the eight values in the *Grundnorm*.⁷⁵

⁶⁸ Claus Dierksmeier, “John Rawls on the Rights of Future Generations”, in *HANDBOOK OF INTERGENERATIONAL JUSTICE* (2006).

⁶⁹ Backdating existing positive law standards can convince skeptics to accept the zero-baseline model, but these standards should not supplant our ideals when using the model to develop policies.

⁷⁰ That is, the relative position of the people created, for example, how they relate to each other in terms of, say, access to healthcare?

⁷¹ See Dillard, *supra* note 48.

⁷² See Martin Held, *Sustainable Development from a Temporal Perspective*, 10 *TIME & SOC’Y* 351 (2001).

⁷³ See Dillard, *supra* note 22. Parental procreative autonomy may also be a way in which parents’ guilt about having brought a being into existence who was bound to suffer and to die, experiencing harms that would not have befallen the being had he or she not come into existence, an existence that was solely created by an action of his or her parents. Some see this creation of life as unethical regardless of the child’s status, health, or place in the world. See DAVID BENATAR, *BETTER NEVER TO HAVE BEEN: THE HARM OF COMING INTO EXISTENCE* (2006).

⁷⁴ See Dillard, *supra* note 48.

⁷⁵ U.N. Secretary General U Thant famously stated that “the Universal Declaration of Human Rights describes the family as the natural and fundamental unit of society. It follows that any choice and decision with regard to the size of the family must inevitably rest with the family itself, and cannot be made by anyone else”. See also Proclamation of Teheran, Final Act of the International Conference on Human Rights, A/CONF.32/41 at 3 (April 22 to May 13, 1968) (“Parents have a basic human right to determine freely and responsibly the number and spacing of their children”). Thant’s statement makes no sense. The choice and decision should

Is there an analogy for this move? Speech norms (which are based on self-expression rather than autonomy) are a much better model for the values that might underlie a creation norm. Speech norms are also nuanced, with clear limiting duties, to ensure human-rights-based democracies function. Why wouldn't the creation norm that preceded speech norms be as well?

The values that comprise the *Grundnorm*, which try to maximize obligation and autonomy through entry, role, and exit are the following: Treating procreation as the improved continuation of the parent's life ("improved continuity", or I.C.),⁷⁶ a minimum level of welfare at entry, the nexus or zero-baseline point at which the values are first determined, fairly defined by the welfare⁷⁷ of other entrants (> M.W.(F)), a qualitative threshold of a minimum quality of equitable individual sovereignty defined by the standard for emancipation, or reason (> E); a quantitative threshold of a maximum number of individual sovereigns defined by a minimum of individual sovereign roles in their democracy (< R);⁷⁸ and finally, a quantitative threshold of a maximum number of individual sovereigns defined by nature (< N), the nexus or zero-baseline point or balance point at which the values are last determined.

The zero-baseline model can be illustrated and supports intuitions triggered by examining the pronouns, which might be called "pregnant pronouns",⁷⁹ in any abstract normative claim. The claimant should be asked to de-abstract their usage, which will be relatively contextual and atemporal to specify the people to whom the pronouns refer, taking into account (1) the dynamic nature of those pronouns (temporalizing them to account for various relevant slices of time, using the preexistence and nonpolity borders discussed above), (2) the quantity, quality, and relative positions of the people in those pronouns, and (3) the relation of those people to their physical environment or relative states of nonpolity. Requiring temporalizing and specification should (1) require the

follow a norm that is consonant with the declaration and as such should reconstitute human-rights-based democracies, a third form of social organization, beyond families and the state, that Thant may not have been able to envision.

⁷⁶ See Tehran Proclamation; See Carter Dillard, *Valuing Having Children*, 12 J. L. & FAM. STUD. 151 (2010) (arguing that rather than procreative autonomy, the objective value at the base of the right to procreate is the values of continuing one's life, but making it better). Improving continuity, as a value, structures the relationship between constituting, eugenics, and what might be called "euphenics" in a neologism. In short, the three overlap.

⁷⁷ Despite the political framing of the model, this value is highly material because humans use objects to orient their relations with one another. See Julien, *supra* note 23; see also Dillard, *supra* note 22. The unique position of homeless persons is a poignant example of this. We identify, categorize, and treat them differently based on the specific form of property they lack.

⁷⁸ The model, especially through the value of one's individual sovereign role, implies a fundamental human right to be heard and to matter and a correlative duty to listen. Ideally our dominant norms, or laws, are normative because they reflect our input and, as such, our consent.

⁷⁹ See, e.g., <https://havingkids.org/what-are-pregnant-pronouns-the-key-to-a-better-future-and-consensual-and-legitimate-governance/>.

claimant to move toward the zero-baseline model in the specification or the contextualizing of claims (contravening commitments to things like procreative autonomy⁸⁰ or representative democracy) and (2) insisting the claimant prioritize applying the model before making his or her initial claim as a necessary condition and a more effective means of achieving his or her outcomes.

After defining the pregnant pronouns, we can begin to sharpen the impact of specification and measure the loss of political autonomy by examining the pregnant pronouns for what might be called the “lesser-power asymmetry”. In the ascertainable set of persons to whom the pregnant pronoun is referred, can we identify persons that the claimant, after careful consideration of commitments might be making in their claim or elsewhere, be required to exclude from the set of persons to which they are referring? Through the discourse and by examining the claimant’s own behavior relative to the eight values in how she or he constitutes and reconstitutes her or his various social groups, are there people the claimant would not reasonably trust with a particular power, duty, privilege, etc., upon which their claim relies and that is implied in it?⁸¹ Moreover, is that particular power, duty, or privilege one that is lesser, included in the set of powers, duties, privileges, etc., in those granted by membership in the human-rights-based democracy? If we do not trust our fellow citizens with custody of our children, why do we elect them in the first election of citizenry,⁸² i.e., trust them in the democratic rule-making process?

In other words, by generalizing about the actual persons in our normative claims, we allow ourselves to ignore the actual implications of their quantity, qualities, relative positioning, and positioning relative to their ecology. Pushed to actually specify, we will find the pregnant pronouns are often the key variable in our claims and are not who we need them to be. Moreover, when we look at the asymmetry of how we would exclude people from lesser-included powers that those excluded people should have as members of whatever democracies we share, we find disturbing things about our own place in those democracies.

How can we account for that asymmetry? One answer could be that the human-rights-based democracy either excludes all members equally from their sovereign role, in a variety of ways (crowding out voices and the value of each vote, the use of representatives, the use of procedural limitations, etc.) or does so in ways that exclude some more than others. In other words, we tolerate sharing our democracies with people whom we don’t really trust, because neither they, nor we, play a role in the

⁸⁰ See Sarah Conly, *supra* note 18.

⁸¹ See Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L. J.* 16 (1913).

⁸² See Dillard, *supra*, note 19.

democracy, or because we believe we can exclude those persons from any role while maintaining our own. The presence of those persons who we would exclude from the lesser rights but not greater rights drives home the point: we disempower or are disempowered by others.⁸³

The pregnant pronouns and lesser-power asymmetry, as well as concepts like constituting, integrating, and constitutive identities help overcome the cognitive dissonances and other limitations on how we perceive and process information by pushing us toward what might be called a “liberal” or “constituting” perspective. That perspective simply requires accounting for the people who influence and thus have power over your life. But unlike Rawls’ model, wherein a particular perspective or sense of justice was a precursor of being reasonable,⁸⁴ this constituting perspective comprehensively accounts for how those people, and hence their forms of organization and normativity, came to be and are coming to be. The lesser-power asymmetry forces us away from seeing future children as economic persons,⁸⁵ whose creation is geared around filling shopping malls, toward whom it would be necessary for the functional town hall that precedes and regulates the shopping mall. Contrary to Rawls, from this perspective, future generations are not some amorphous entity, they are instead a vulnerable class of people to be protected by the sort of concrete policies and praxis described below.

Five additional aspects of the model are worth noting.

First, the values and dynamics addressed by the model apply to any social grouping and system of norms. We should resist the tendency to think in the framework of existing nation states, though that framework will be useful for the praxis and policies that will implement the model.

Second, the zero-baseline model, or constituting and integrating *Grundnorm*, requires the explicit decentralizing of power—in its many forms—into future generations. For instance, the California Legislature could enact statutes that require persons with an amount of wealth above a certain threshold to pay the State, in the form of a tax, money that will then be used for “baby bonds”, in which low-income babies receive a set amount at birth and more each year. Such “baby bonds” would transfer power (in the form of wealth) to those born without power. Under this scheme, existing

⁸³ Obviously, this is a way of demonstrating the differences in the world today between pre-constitutional systems and an ideal human-rights-based democracy in which the consensual addition of new members would be the only thing that reduces political autonomy.

⁸⁴ See Friedman, *supra* note 52, in *AUTONOMY, GENDER, POLITICS*, ch. 8 (2003).

⁸⁵ See generally Having Kids, letter, <https://havingkids.org/wp-content/uploads/2019/07/Wajahat-Ali-letter-final.pdf>.

power is decentralized into future generations and allows the entry (via birth) of a baby in a low-resource family to meet the consent requirement for all relevant entities.⁸⁶

Third, although the model may look minimal, it is merely initial. It is limited to the distinct work of accounting for constitutive identities, rather than accounting for what they subsequently do.

Fourth, zero-baseline modeling and the internationally coordinated intensive family-planning interventions it requires was not feasible until recently and certainly was not at the mid-millennial advent and early development of liberalism. Humans simply did not have the international law,⁸⁷ reproductive technology,⁸⁸ knowledge of child development, rise of gender equity, etc., necessary for this modeling. But there are many pressing consequential reasons (beyond the sufficient reason of legitimating our human-rights-based democracies with a *Grundnorm*), including climate change, rising inequality, the need to meet sustainable-development goals, rising automation of labor, the rapid development of gene-editing technology—for why we should implement this model today.

Last, from the constitutive perspective, hierarchy, in any form, including representative democracy or celebrityism,⁸⁹ may be accounted for as the pre-constitutional and de-constituting normative push in directions away from the zero-baseline model and its values. Social hierarchy is the institution of the chaos and cacophony that invites top-down solutions and orientation around objects rather than interpersonal relations between free and equal subjects.⁹⁰ The hierarchists will use de-constitution to make orienting from the liberal or constitutional perspective infeasible, while also propagating Hart’s illusion of autonomy, because it supports their

⁸⁶ See “The Right to Have Children”, *Having Kids* (blog), available at <https://havingkids.org/wp-content/uploads/2018/06/The-Right-to-Have-Children-What-is-the-best-account-and-how-do-we-implement-it-in-law-and-practice.pdf>.

⁸⁷ Consider how foreign threats have justified things like pro-natalism and other degradations of democracy. https://www.independent.org/pdf/tir/tir_20_02_03_howden.pdf. Pre-constitutionalism abroad, as an existential threat, justifies pre-constitutionalism at home. But what if we could apply the model universally, targeting pre-constitutionalism everywhere, in ways the world could not in the early days of liberalism?

⁸⁸ See generally <https://www.nature.com/articles/d41586-019-01906-z>. Could we realistically control things like human gene editing in a top-down fashion, or does the history of things like the enforcement of abortion prohibitions show the need for a truly integrated norm?

⁸⁹ “Celebrityism” refers to the political commitment of celebrities. Lena Partzsch, *The Power of Celebrities in Global Politics*, 6 *CELEBRITY STUD.* 178 (2015).

⁹⁰ See Julien, *supra* note 23.

hierarchy, or what some call a population pyramid Ponzi scheme.⁹¹ As a result, subjects become lost in a sea of people.⁹²

The lived experience of political obligation, autonomy and a reconciliation of seemingly conflicting fundamental modes of positive communitarian freedom and negative liberal freedom could come in the dynamism of the values that compose the zero-baseline model. The model is essentially emancipatory, aligning the positive freedom to and the negative freedom from with the emancipation that comes from a spatial-temporal model that maximizes universal consent.

To illustrate, we can apply the thresholds described above to a simple hypothetical of the scenario that must precede all liberal collective action (including the decision to minimize the collective and separate off into a free-market or comparable system): A town hall meeting in which members of the town must agree on a plan.

In this scenario, each additional member that joins the town hall meeting excludes other members, e.g., through time at the podium, of the possibility that the plan will reflect the will of another. That inevitable exclusion is reduced or exacerbated contingent upon the constitutive qualities of each member and whether they are reasonable, e.g., respecting limits on their time at the podium, calling for an unreasonable plan, etc.⁹³ Whether the town hall meeting actually involves free and equal people engaged in collectively making the rules under which they will live, depends on the relative positioning of the members to each other and the power differentials that existed before they entered the meeting. It also depends on the relation of the members to the natural ecology surrounding the process (e.g., are members preoccupied with some existential ecological crisis?). As the town grows, a negative feedback loop (a self-exacerbating collective-action problem) develops, with each member having less of a role and less incentive to have a role as the learned helplessness of being lost in the crowd sets in.⁹⁴ The speed with which that loop develops depends on the quantity, qualities, relative positioning of the members to each

⁹¹ See Jeff McMahon, *The World Economy Is A Pyramid Scheme*, Steven Chu Says, *Forbes*, April 5, 2019, available at <https://www.forbes.com/sites/jeffmcMahon/2019/04/05/the-world-economy-is-a-pyramid-scheme-steven-chu-says>. See also, *Santosky v. Kramer*, 455 U.S. 745, 790 (1982) (Rehnquist, J., dissenting) (“Few could doubt that the most valuable resource of a self-governing society is its population of children”.); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (referring to education as “perhaps the most important function of state and local governments”); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (“[D]emocratic society rests, for its continuance, upon the healthy, well rounded growth of young people into full maturity as citizens, with all that implies”).

⁹² See <https://havingkids.org/wp-content/uploads/2019/07/Wajahat-Ali-letter-final.pdf>.

⁹³ The Supreme Court has addressed “constituting” in a sense in *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens”) (quoting *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).

⁹⁴ See Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government Is Smarter* (Stanford University Press, 2016).

other and their ecology of the members, i.e., whether the group is relatively constituting or de-constituting before they even begin the process of collective rulemaking. All of this becomes more complex as we account for intergenerationality.

Minimizing the loss of social self-determination in the planning process requires that each new entrant be of a minimum constitutive quality. It requires there be a maximum number of entrants. It requires they be arranged relative to each other and their ecology in particular ways.

The model leads to a specific confluence of values. For example, the autonomy would-be parents gain through self-development and meeting a standard of readiness to parent, aligns with objective, constitutive and naturalistic reasons for having children, the diminishing interest in having additional children,⁹⁵ and the quality-quantity tradeoff of a smaller family. These things align with the autonomy of a highly developed child and the morally valuable options and equality of opportunities in life they will have, which further aligns with the autonomy created by gender equity, cooperativeness within groups like our town hall scenario above, a level of inherent security in groups that avoids the need for top-down limitations on autonomy, as well as fluidity among groups.

The resulting smaller populations and high levels of development align with one's having a meaningful voice in public affairs and the rules under which one must live. This participatory agency aligns with the autonomy created by fulfilling one's need for meaningful group membership, which in turn aligns with reduced consumption and property-oriented around nonpolity, rather than group belonging or power and ranking over others. One's consumption and property orient around nonpolity instead of one using those things to relate to other people. And that re-orientation supports the decentralization of concentrations of power into future generations, discussed below.

And all of these align with a healthy and safe environment and the freedom—or autonomy—from others that is only possible through interaction with the non-human world. This in turn aligns with the autonomy the animal liberation movement advocates for.⁹⁶ Note that this alignment spans many types of freedom, from communitarian to libertarian, that might be seen as conflicting, were we not temporalizing our perspective.

The model is unique, particularly in one important regard. The thresholds above can be set using existing legal standards we claim to already adhere to, like basic parental fitness, the Children's Rights Convention, biodiversity and wilderness restoration targets, education benchmarks, federalism and representative ratios, redistribution

⁹⁵ See Dillard, *supra* note 76.

⁹⁶ See Dillard, *supra* note 11.

policies that attempt to create equality of opportunity, etc. The model will show that, by our own standards, we are not who we should be or who we claim to be.⁹⁷

Also, because the schema above represents the standard for political obligation and autonomy by maximizing consent, it also represents the *Grundnorm* for truly integrating (by their own true will) members into a legality. Hence, it serves as a human-rights-based criterion for evaluating the legitimacy of legal systems.

In summary, how can human-rights-based democracies solve the democratic dilemma of making good choices while being integrative and inclusive?⁹⁸ How do we ensure freedom, or the balance between community and autonomy, inherent in concepts like unified independence and ordered liberty?⁹⁹ We must understand that we cannot include persons in any type of grouping without excluding persons, in some way, and as such, constitute ourselves in quality, quantity, relative arrangement, and, relative to our ecology, to maximize consent and obligation and thereby minimize the loss of political autonomy. In contrast, we ensure that we never meet the political ideals of liberalism by ignoring procreation, seeing birth positioning as a matter of random fortune, and pretending the people with whom we share the world just fell from the sky (or were delivered by a stork).

A comprehensively normative system¹⁰⁰ requires that we create normative people. When people say “there ought to be a law”, there should be an antecedent norm that makes the statement meaningful. At its base, democracy involves the capacity to influence, which in turn begins with the existence of the person. If we take democracy (or individual sovereignty, from the appropriate and more compelling individualized perspective) seriously, we must focus on the creation of individuals and thereby unravel the age-old legal conundrums of balancing community and autonomy, unified independence, and ordered liberty.¹⁰¹

⁹⁷ See Rawls, *supra* note 49. A rational person could not honestly conclude that their being wealthy is a good reason to accept a system that only favors the wealthy.

⁹⁸ See Robert A. Dahl, *A Democratic Dilemma: System Effectiveness Versus Citizen Participation*, 109 POL. SCI. Q. 23 (1994). https://www.jstor.org/stable/2151659?seq=1#page_scan_tab_contents, accessed August 15, 2019.

⁹⁹ See *e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); see also *Washington v. Glucksberg*, 521 U.S. 702 (1997).

¹⁰⁰ See RONALD DWORKIN, *LAW'S EMPIRE* (1986).

¹⁰¹ See *Washington v. Glucksberg*, 521 U.S. 702 (1997).

THE PRAXIS OF CONSTITUTING

Modifying political obligation and autonomy models is complex. For that reason, and because the new modeling requires the cooperation of prospective parents across the globe, this article provides a useful heuristic throughout: Remodeling family planning means changing from a parent-focused and subjective family planning model to a child-focused and objective “Fair Start” family planning model,¹⁰² as well as specific actions to ensure that change, messaged through an operational non-profit that has begun the discourse, Having Kids.¹⁰³ A simple test for the change in perspective is to ask whether we can seed resource transfers through universal basic income laws that provide resource-poor children with money that has been collected in the form of taxes paid by the wealthy, as cooperative entitlements owned by future children, or whether those resource transfers are seen as ethically suspect incentives aimed at parents.

In essence, our reliance on future generations as economic inputs and non-humans and their habitats as resources, keeps us in a state of pre-constitutionality. We can invert the population pyramid to change this and target those with the most resources in order to fund the transition.¹⁰⁴

The Fair Start model (which is the public branding for the zero-baseline model) requires (1) parental readiness before procreating; (2) a transfer of resources to would-be parents designed to decentralize influence *into* future generations, using the heuristic of “giving each child a fair start in life”; and (3) a norm, for all, of smaller families who can invest more in each child.¹⁰⁵ By focusing on the objective needs of future children, parents and communities are forced to abandon the myth of procreative autonomy. They must replace it with objective reasons for having children, which must align with other aspects of the model to maximize consent and thereby maximize political obligation and autonomy. Practically speaking, Fair Start modeling involves (1) reforming the interpretation and practice of the fundamental right to have children as it exists in the Universal Declaration of Human Rights and implementing conventions¹⁰⁶ and (2) intensive family-planning incentives (which are actually entitlements held by the

¹⁰² The model, and the ability to operate a child-first normative framework, would be a useful litmus test for whether a person is acting with the minimum level of empathy and helping behavior, or constitutive quality, necessary to constitute.

¹⁰³ <https://havingkids.org/>. The use of a possessive verb with the creation norm is inconsistent, but the organization adopts common parlance for pragmatic reasons.

¹⁰⁴ See <https://havingkids.org/protect-future-ivanka-trump-marco-rubio/>; See also <https://www.vox.com/future-perfect/2019/12/16/21024222/mitt-romney-michael-bennet-basic-income-kids-child-allowance>.

¹⁰⁵ See Doepke, *supra* note 40.

¹⁰⁶ See Dillard, *supra* note 48.

future child),¹⁰⁷ administered by the U.N.F.P.A. and U.N.I.C.E.F. using the Children's Rights Convention as one initial baseline.¹⁰⁸

The zero-baseline model accounts for the loss of autonomy and the liberating confluence of smaller families that develop each child, ensuring children play a meaningful role in their democracies, and lower population variants that match the natural ecologies in which democracy was born and that best promote human flourishing. Sovereignty requires that democracies be small, dynamically forming and reforming, and populated by highly developed people. This is consistent with the healthy, safe, and biodiverse ecologies in which they exist. In other words, the values above align under the zero-baseline model as iterations of human autonomy or freedom and enable a dynamic of group formation and reformation and of balancing values while minimizing the loss of autonomy. This view of democracy, focused on the people that actually compose it, looks nothing like modern, static, and bloated nation states.

There are reasons to consider the zero-baseline model as the dominant preemptory norm, including the need to preserve the model simply as a hedge against the harm being done to the values today (e.g., the destruction of the non-human world), as well as the efficacy of the model in furthering agreed-upon outcomes like the Paris Accord and the Sustainable Development Goals.¹⁰⁹ The zero-baseline model proves to be ten to twenty times more effective at mitigating climate change, improving child welfare and equity, building democracy, reaching other development goals—and avoiding unacceptable ecological and social risks—than any downstream efforts.¹¹⁰

But one reason that the model becomes the dominant preemptory norm, overriding all conflicting interests, including property rights claims against the demand for resource transfers outlined above, stands out in particular. Because we are before we do, the creation norm is lexically prior, and therefore overrides conflicting norms, including public and private property rights that might be asserted against the transfer of resources described here. There can be no justification for the inequity and centralization of power in some extant persons, relative to the creation-norm based claims of incoming children, and Murphy provides a useful analogy: They challenge the

¹⁰⁷ See The Fair Start Model of Family Planning, Having Kids website, at <https://havingkids.org/wp-content/uploads/2019/05/FairStartModel2019-1.pdf> (last visited Aug. 15, 2019).

¹⁰⁸ See Ashley Berke, "Dear UN: We Can Do Better for Kids", *Having Kids* (blog), July 31, 2019, 2019, at <https://havingkids.org/uncandobetter/> (last visited Aug. 15, 2019).

¹⁰⁹ See, e.g., "Paris Agreement", *Wikipedia*, https://en.m.wikipedia.org/wiki/Paris_Agreement (last visited Aug. 15, 2019); see also <https://sustainabledevelopment.un.org/?menu=1300>; <https://havingkids.org/fair-start-research/>.

¹¹⁰ See Hamity at al., *supra* note 4; The Fair Start Model of Family Planning, Having Kids website at <https://havingkids.org/wp-content/uploads/2019/05/FairStartModel2019-1.pdf> (last visited Aug. 15, 2019).

assumption that we own property in a meaningful way that can be separated from taxes and other public obligations we owed relative to that property.¹¹¹ But have they in turn assumed we are properly constituted in any meaningful way and can assess public and political obligations without first accounting for the borders of human power, without a way for electing one another, without a way to actually emancipate citizens? Is there an antecedent myth of a human-rights-based democracy that legitimates downstream norms without a truly constituting and legitimating *Grundnorm*?

The overriding nature of the zero-baseline model means that any person may further the *Grundnorm* by any means effective, regardless of any contravening norms. Constituting is analogous to self-defense against the aggressive and non-consensual invasion of our world by others. This means securing guaranteed minimum incomes for children (or “baby bonds”) pegged to family-planning reform (including through things like zero-interest family-planning loans),¹¹² enabling legislation for no-procreation probation and parole orders for abusive and neglectful parents, expediting approval of long-acting male contraceptives for market, incorporating a “smaller family” policy into UN sustainable-development goals, and undertaking a variety of other measures.¹¹³

A key question remains as to how to choose which concentrations of power, both public and private,¹¹⁴ to prioritize the decentralization required for universal basic income measures for poorer children. The applicable types of concentrations of power include any resources currently used to incentivize large or unprepared families, and the resources of individuals and organizations that pose acute threats to nonpolity through things like the exacerbation of climate change. Those concentrations of power would be targeted for downstream welfarist redistribution, through taxes and other measures. Why these resources? These resources should be targeted because they pose the greatest threats to the legitimate obligation and autonomy the model seeks to promote.

Our framing of the praxis and constitutive discourse employs three different narratives. Fair start family planning and the zero-baseline model ensure the following:

(1) The simultaneous liberation of future children and non-humans (the most vulnerable and numerous moral entities we can conceive) from property hood and constant colonization at the spatial-temporal border discussed above. The praxis of the model targets the hegemony of a small group of living persons over an untold number of vulnerable moral entities.

¹¹¹ See MURPHY & NAGEL, *supra* note 29.

¹¹² See [kiva.org](https://www.kiva.org) as a possible vector. See also, Byrd Pinkerton, Jillian Weinberger, and Amy Drozdowska, “Free college tuition helps, but it’s not a silver bullet”, *Vox* (blog), at <https://www.vox.com/2020/2/12/20997880/free-college-tuition-kalamazoo-promise-the-impact>.

¹¹³ See generally <https://havingkids.org/>.

¹¹⁴ This distinction conflicts with the model but is used here for the sake of ease.

(2) The unification of child welfare, environmental and animal protection, and human rights and democracy movements around this new modeling, given the model's comprehensive and superior efficacy.¹¹⁵

(3) The manifestation of a real (spatial-temporal) social contract that can be used as a model agreement between would-be parents and concentrations of power that satisfies disparate and competing political perspectives and excludes unreasonable or pre-constitutional people.

Given climate change, the need for an immediate, conscious, and accelerated move toward United Nations low-variant world-population projections, sustainable-development goals, and the meeting of the obligations of the Children's Rights Convention,¹¹⁶ all facilitated by the specific wealth transfers and new family-planning incentives (which are actually entitlements held by future children) that will be most effective at minimizing human suffering in the future.¹¹⁷

Part of the praxis involves two actual social justice initiatives: The first is a lawsuit recently filed against the United States for how its actions and inactions regarding climate change have violated the constitutional right to privacy in wilderness (nonpolity), by degrading conditions in that wilderness,¹¹⁸ and the second is a legislative initiative that would authorize family courts to impose "no procreation" orders against persons convicted of felony child mistreatment.¹¹⁹ Together, these concrete actions begin the tasks of redefining political autonomy and obligation by illuminating the bookends of political obligation and autonomy: the preexistence of future generations and nonpolity. These bookends apply the zero-baseline model to initiate the constitutive discourse through a simple question:

How can freedom deprive children of minimum levels of welfare at entry, e.g., the right of parents to create additional children who will be kept and raised in the horrific conditions of state custody because the parents previously abused or neglected their first child, but not the right to simply be left alone—free from the life-threatening impacts of climate change—in the solitude of wilderness? Such a state of affairs is not freedom; it is pitting extant and future people against each other for the benefit of elites and others

¹¹⁵ "The Fair Start Model of Family Planning", *Having Kids*, <https://havingkids.org/wp-content/uploads/2019/05/FairStartModel2019-1.pdf> (last visited Aug. 15, 2019).

¹¹⁶ *See id.*

¹¹⁷ *See Hamity at al., supra note 4.*

¹¹⁸ *See Karen Savage, Judge Dismisses "Right to Wilderness" Climate Suit Against U.S. Government*, *Climate Liability News*, August 1, 2019, <https://www.climateliabilitynews.org/2019/08/01/right-to-wilderness-climate-lawsuit/> (last visited Aug. 15, 2019).

¹¹⁹ *See Ashley Berke, "Ask Florida Senator Lauren Book to Prevent Child Abuse With SB90"*, *Having Kids* blog, March 14, 2019, <https://havingkids.org/florida-senator-lauren-book-prevent-child-abuse-sb-90/> (last visited Aug. 15, 2019).

above them in the social hierarchy. It is using people to disempower one another and ignoring the simple truth that we need to create free people before they even begin to socially self-determine and regulate their own affairs.

This discourse requires people to de-abstract their normative claims and account for the quantity, quality, relativity, and ecological positioning of all of the people upon which their claims rely and the values at stake and dynamics at play. This would in turn push people toward accepting constituting (which is essentially a thick conception of a constitution) as a fundamental normative framework. Constitutive discourse, the discourse around the values and process of the model, assesses the relative illegitimacy of systems of social organization, combining the subjective exercise of all forms of human influence with the objectivity of the model and its irrefutable basic values, starting from and ending with the touchstone of nonpolity.

Quite simply, we can only reduce the age-old tensions between the individual and the collective and between freedom and security and thereby further human autonomy by creating sufficiently capable people (in terms of quantity, constitutive qualities, relative positioning, and ecological positioning) who may reconstitute their legalities at will.¹²⁰ Families cannot create that capability in isolation.¹²¹ We create capable people by overcoming the cognitive dissonances and misperceptions we carry regarding the nature of human autonomy and decentralizing concentrations of human power (governmental, corporate, oligarchical, prospective parental, etc.) into future generations through zero-baseline modeling and its layperson translation, Fair Start family planning. Because, as a preremptory norm, the model overrides all conflicting norms, all may engage in its praxis by any means effective. And because of the nature of the model, those who oppose it can be classified, treated as pre-constitutional, and as a threat to the autonomy of the model would further.

A simple analogy: a river with future children on one side and would-be parents on the other. The parents are pulling the kids across, acting in isolation from one another. As such, some kids cross in turbulent parts of the river and are washed downstream, or come across harmed for life, while others wade through ankle-deep parts with all the resources they need. As the mass pulling-across happens, the ecology of the river is trampled and destroyed. The process has resulted in our side of the river looking like chaos, inequity, and ecological collapse. Our challenge is to build a bridge in the middle of the river that

¹²⁰ How close a particular polity is to being able to subdivide and reconstitute into legitimate legalities could be assessed, initially, by examining how the lesser power asymmetry applies there.

¹²¹ See "Marshmallow Test" Redux: New Research Reveals Children Show Better Self-Control When They Depend on Each Other", Association for Psychological Science website, <https://www.psychologicalscience.org/news/releases/marshmallow-test-redux-new-research-reveals-children-show-better-self-control-when-they-depend-on-each-other.html>.

can bring the children over in a way that emancipates them and ensures they are agents that can consent to the power of others. Is that simple ask—to work together to give all kids a fair start in life—something around which we can build revolutionary action?¹²²

CONCLUSION

The zero-baseline model derives from irrefutable truths about how freedom requires limiting the total amount of human power (or “influls”) present in the world, inherent limits on human cognition and processes for determining rules, minimum levels of human development to determine those rules, etc. The model provides a liberal or constitutive perspective and tool for a specific spatial-temporal cognition to help overcome the psychological limitations discussed above, those that hide the inevitable first behaviors and dynamics that promote or degrade human autonomy. This cognition goes well beyond Rawls’ prerequisite “sense of justice” and looks to actually exclude pre-constitutional people. This modeling could prove the key to solving many of today’s social and ecological crises through a concrete praxis that is emancipatory, effective, and designed to appeal across the political spectrum.

Again, the only way to be free from human power is to consent to it, via norms. That requires accounting for certain first and inevitable dynamics in the process and reflecting that accounting in a first norm, or *Grundnorm*, that should constitute us.¹²³ There is no person, no realm of human experience, including freedom, outside of the realm of a creation norm. The zero-baseline model is a candidate for this first norm and, hence, a necessary condition of political obligation and autonomy. If we want free people, we have to secure the resources necessary to do so. They will not fall from the sky.

¹²² See generally Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1997).

¹²³ This interpretation of legal systems, which follow the *Grundnorm*, would comprise a fourth version of the conception of “law as a seamless web”. see Lawrence Solum, “Legal Theory Lexicon: The Law Is a Seamless Web”, *Legal Theory Blog* (blog), October 1, 2006, https://lsolum.typepad.com/legaltheory/2006/10/legal_theory_le.html.