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## The New Biopolitics: Autonomy, Demography, and Nationhood

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## The New Biopolitics: Autonomy, Demography, and Nationhood

*Jedediah Purdy\**

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## I. INTRODUCTION

Political thinkers have long worried that freedom might be self-undermining, tending to erode the liberal rights and democratic politics that form its foundations.<sup>1</sup> The argument has ancient and modern versions, versions of the political left and of the right.<sup>2</sup> No

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1. Throughout this article, I use “liberal” to refer to a commitment to autonomy-protecting personal rights as a basic normative principle of political and legal order. I use “democratic” to refer to a commitment both to majoritarian government through elections and, more broadly, the idea that the collective self-government of political communities is a basic normative principle of political and legal order.

2. Anxious liberals like John Stuart Mill and meliorist conservatives like Alexis de Tocqueville worried that democracy threatened to swamp freedom under the “tyranny of the majority” or “democratic despotism.” See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 690–95 (J.P. Mayer ed., George Lawrence trans., Perennial Library 1988) (1850) (describing a despotism of innumerable small forms of interference with personal liberty); *id.* at 246–61 (describing “the tyranny of the majority,” a more direct application of power by a regnant majority over a vulnerable minority); JOHN STUART MILL, *ON LIBERTY* 71–74 (Geraint Williams ed., Everyman 1993) (1859) (describing evolution of the idea of the tyranny of the majority from the simple version of electoral domination to the more complex idea of the subtle limitation on the freedom and judgment of each by the opinions as well as the political power of all). These grim warnings carried very old political arguments into the democratic era. Thinkers as eminent and diverse as Plato and the English monarchist Robert Filmer (John Locke’s target in the *Two Treatises on Government*) have argued that a society dedicated to personal freedom and collective self-government would degenerate into personal self-indulgence and political mob rule. See ROBERT FILMER, *PATRIARCHA AND OTHER WRITINGS* 2 (Johann P. Sommerville ed., Cambridge Univ. Press 1991) (1680) (identifying the wish for self-government with original sin); *id.* at 28–29 (summarizing a long history of attacks on the character of democracies as violent, unstable, and tending to elevate selfish and sadistic leaders over nobler characters); 7 PLATO, *THE REPUBLIC* 240–43 (Allan Bloom ed. & trans., 1991) (examining the argument that unbalanced devotion to personal freedom and relativism among desires and opinions undermine liberty and self-government, so that “[t]oo much freedom seems to change into nothing but too much slavery, both for private man and city” and “tyranny is probably established out of no other regime than democracy . . . the greatest and most savage slavery out of the extreme of freedom”). After the liberal and democratic revolutions in France, the United States, and elsewhere, radicals on both the left and the right took up the same arguments. Arch-reactionary Joseph de Maistre proclaimed that the French Revolution’s defiance of established authority would bring anarchy and drown Europe in seas of blood. For an introduction to de Maistre’s thought, see ISIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS* 91–174 (Henry Hardy ed., 1990). See *id.* at 111, 117, and 163 for particularly vivid examples of de Maistre’s worldview, in which human existence is soaked in blood and all violence and suffering are punishment for the sin of an inherently debased human nature. The leftists of the Frankfurt School argued that the liberal doctrine of personal autonomy found its perfection in the cruel nihilism of the Marquis de Sade and Friedrich Nietzsche. See MAX HORKHEIMER & THEODOR W. ADORNO, *DIALECTIC OF ENLIGHTENMENT* 81–119 (John Cumming trans., Herder & Herder 1972) (1947). The twentieth century produced a new genre of anxious liberal. European fascism and post-colonial nationalism both suggested that free men and women would flock to doctrines that made them unfree: promises of ethnic unity, moral clarity, and

doubt the only adequate answer is the sum of the answers to many particular questions: whether and when popular elections undermine liberal rights, how free markets enhance or undermine democracy, and so forth. In this article, I address an emerging problem in a central area of contemporary freedom: reproductive autonomy. I ask whether reproductive autonomy can undermine the political conditions that sustain it: a political and legal culture committed to individual rights and the stability of the political order across generations. The possibility that reproductive freedom might be self-undermining arises from two demographic crises. In Europe and Northeast Asia, fertility rates—the number of children the average woman will bear in her lifetime—have fallen well below the level needed to replace the existing population.<sup>3</sup> Meanwhile, in the largest and more important developing countries, India and China, young men outnumber young women by scores of millions, and the gap between the sexes is growing.<sup>4</sup>

Each trend is the aggregate result of hundreds of millions of increasingly autonomous reproductive decisions. When I refer to “reproductive autonomy,” I do not mean exclusively or even primarily the legally protected access to abortion and/or contraception that United States commentators tend to designate by

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impeccable authority. One can find versions of this anxiety on left and right alike. *See, e.g.*, FOUAD AJAMI, *THE DREAM PALACE OF THE ARABS* 233 *passim* (1998) (describing the rise of nationalism in post-colonial Arab politics as destructive of customs of tolerance and pluralism); V.S. NAIPAUL, *AMONG THE BELIEVERS* 261, 297–305 (1981) (describing the development of a popular Islamic political identity in newly self-governing countries as pathological and violent); ASHIS NANDY, *THE ILLEGITIMACY OF NATIONALISM: RABINDRANATH TAGORE AND THE POLITICS OF SELF* 89–90 (1994) (discussing the recapitulation of colonial violence and submission in the politics of post-independence nationalism). The same question has re-emerged in Iraq, where political chaos implies that no democratic center can hold, and across the Arab world, where pessimists predict that democracy would mean the end of already scant liberal rights and, in time, of elections as well. *See, e.g.*, James Glanz, *A Little Democracy or a Genie Unbottled?*, N.Y. TIMES, Jan. 29, 2006, at 4.1 (discussing the victory of the Islamist party Hamas in Palestinian elections and asking whether political self-government is consistent with either liberty or order in illiberal settings). For a major recent statement of this concern, see FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* (2003) (arguing that transitions from non-democratic to democratic rule are hazardous to liberal freedoms unless independent institutions have emerged to protect such freedoms, including civil society, reliable laws and courts, and orderly economic structures).

3. *See, e.g.*, *Europe's Population Implosion*, ECONOMIST, July 19, 2003, at 42. I discuss this trend and present sources at *infra* Part II.A.

4. *See, e.g.*, VALERIE M. HUDSON & ANDREA M. DEN BOER, *BARE BRANCHES: THE SECURITY IMPLICATIONS OF ASIA'S SURPLUS MALE POPULATION* 65, 131–32 (2004). I discuss this trend and present sources at *infra* Part II.B.

the term. I am deliberately referring to the whole suite of factors that make women and families inclined and able to exercise self-conscious agency in whether and when to bear children. In expanding the term, I am not trying to make any normative point about the desirability or adequacy of uses of the term that focuses on legal protections (although I have liberal views about the rights of contraception and abortion). I use the term analytically to describe autonomy in the substantive sense of the measure of control women and families can and do exercise over reproduction, as distinct from a focus exclusively on what they are legally permitted to do.<sup>5</sup> Fertility rates are below replacement level where legal, economic, and social equality between the sexes and increasingly individualistic values induce people to choose careers and non-traditional intimate relationships over childrearing, and legal contraception and abortion enable them to enforce those choices.<sup>6</sup> Asia's sex disproportion comes from parents' growing technological power to select their children's sex through pre-natal testing and abortions of female fetuses, a preference that arises from both cultural attitudes and economic incentives.<sup>7</sup>

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5. My discussions of freedom and autonomy throughout this article use a substantive rather than a legally formal sense of these terms, not because I reject the formal version, but because I find the substantive versions helpful in a productive engagement with the questions that drive the article.

6. See, e.g., Johan Surkyn & Ron Lesthaeghe, *Value Orientations and the Second Demographic Transition (SDT) in Northern, Western and Southern Europe: An Update*, DEMOGRAPHIC RESEARCH (SPECIAL COLLECTION 3), Apr. 17, 2004, at 62–75. I develop this dimension of the argument throughout the article.

7. The knottiest part of my formulation is the characterization of sex-selective abortion as an expression of autonomy in China, where reproductive decisions are taken under the pressure of the state's notorious population-control policies. For an introduction to the policy backdrop of this problem, see SUSAN GREENHALGH & EDWIN A. WINCKLER, *GOVERNING CHINA'S POPULATION: FROM LENINIST TO NEOLIBERAL BIOPOLITICS 19–44* (2005) (describing the interaction of demographics and political power in China); *id.* at 166–201 (presenting relevant policy developments under the present Hu government). It would have been possible to avoid this problem by simply cordoning off China from my discussion. India, Taiwan, and other Asian countries have sufficiently dramatic sex ratios that China is not an analytically necessary part of the story. However, I have chosen to include it for several reasons. First, it is in many respects, including differential cultural valuation of sons and daughters and the respective economic incentives to bear boys and girls, the same story as in non-authoritarian regimes. Second, the sense in which I am using “freedom” or “autonomy” is not restricted to legal permission to act but includes the broader set of determinants of what one is, in fact, able to do with oneself and one's life, which human potential one is able to realize in action. In this respect, the availability of the same sex-selection-enabling technologies in China, as in India and elsewhere, is an increase in autonomy, and the effect of that increase under relevant constraints is precisely what interests me. I draw this way of thinking about freedom

Both trends may have serious consequences for political order. Sub-replacement fertility threatens to cripple public pension systems by burdening shrinking numbers of working adults with the support of growing numbers of retirees.<sup>8</sup> The one sure way to avoid this result—liberalizing immigration laws to let foreign-born workers replace never-born native workers—would be such a goad to xenophobic and nationalist politics that most observers regard it as politically impossible.<sup>9</sup> Moreover, declining population historically inspires reactionary politics, with particular hostility toward women’s autonomy, in settings as diverse as Augustan Rome and eighteenth-century France.<sup>10</sup>

The other trend—disproportionately male populations, which implies large numbers of unmarried young men—is historically associated with growth in armies, military adventurism, and organized crime and social disorder. It is also allied with authoritarian and illiberal politics.<sup>11</sup> Unmarried young men are the engines of nationalist and fundamentalist movements, which pose a threat to liberal and democratic prospects in the places where sex disproportion is most pronounced.<sup>12</sup> In both cases, then, individual autonomy has systemic consequences that threaten to undermine the very features of political order that sustain autonomy.<sup>13</sup>

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from the work of Amartya Sen, which I briefly discuss at *infra* Part VI. Third, while political authoritarianism is a distinctive kind of evil—and I make no apologies for such a statement—it is my argument that reproductive decisions are made under a variety of constraints, some subtler than others, which interact with political freedom or repression in influencing the consequences of reproductive choice for demographics. Thus, I am interested in all the constraints that bear on reproductive decisions and on ways to overcome or mitigate them, not just in the decisions people make under “optimally free” or even approximately free circumstances.

8. See, e.g., *Europe’s Population Implosion*, *supra* note 3. I discuss this phenomenon much more fully at *infra* Parts II.A and V.

9. See, e.g., JONATHAN GRANT ET AL., *LOW FERTILITY AND POPULATION AGEING* 135 (2004), [http://www.rand.org/pubs/monographs/2004/RAND\\_MG206.pdf](http://www.rand.org/pubs/monographs/2004/RAND_MG206.pdf) (“The sheer numbers of immigrants that are needed to prevent population ageing [sic] in the EU and its Member States are not acceptable in the current socio-political climate prevailing in Europe.”). I address this issue further at *infra* Part II.

10. See CAROL BLUM, *STRENGTH IN NUMBERS: POPULATION, REPRODUCTION, AND POWER IN EIGHTEENTH-CENTURY FRANCE* 1–4 (2002); TIM G. PARKIN, *DEMOGRAPHY AND ROMAN SOCIETY* 111–21 (1992) (outlining this perception, the evidence bearing on it, and the legal response).

11. I present this argument in full at *infra* Part III.C.

12. See *id.*

13. Having laid out the general shape of my argument, I owe the reader a word on why I say virtually nothing about the United States in an article aimed primarily at an American

These troubling paradoxes suggest that a picture of freedom's prospects today requires an understanding of biopolitics. Biopolitics comprises the relationship between individuals' control over their bodies and the power the political community may exercise over them: both the demands it may make (that they bear children, that they fight and die) and the prohibitions it may impose (no abortions, no second children). For the last sixty years, biopolitics has mainly concentrated on personal autonomy vis-à-vis state power, with signal examples being (in the direction of greater autonomy) abortion rights in the North Atlantic countries and reproductive freedom, and (in the direction of greater state coercion) authoritarian population control in China.<sup>14</sup> The two trends that occasion this article differ in that they concern what might be called micro-politics: relations of relative power in spheres often regarded as peripheral to politics, particularly the family, which redound to more traditionally political problems. These trends are particularly ominous because they might be interpreted as reasons to condemn reproductive autonomy, the main focus of the last several decades of biopolitics in the West and, indeed, in much of the world. Sub-replacement fertility may be construed as evidence that the state should demand childbearing to avoid falling population—and, as my historical instances show, has been so construed in the past. Skewed sex ratios, similarly, may be offered as proof that certain populations are “not ready” to make

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legal audience. The United States displays none of the trends I discuss here in any neat form. The country's overall fertility rate is ever so slightly below the replacement rate, but the population continues to expand because of rapid immigration that has been relatively uneventful politically. See U.N. DEP'T OF ECON. & SOC. AFFAIRS, POPULATION DIV., WORLD POPULATION PROSPECTS: THE 2004 REVISION 71 (2004) [hereinafter WORLD POPULATION PROSPECTS]. For the time being, that is, modestly more traditional family practices than Europe's, combined with a significantly greater openness to immigration, seem to have enabled the United States to dodge the demographic bullet. American readers should nonetheless be interested in the argument here for several reasons: the future of the United States depends on the future of the rest of the world; neither our openness nor our relative fertility is irreversible; and, more optimistically, something like the American openness to immigration may be part of an optimistic medium-term to long-term scenario for third-generation biopolitics. I resist simply prescribing that open attitude to relative xenophobic societies in this article simply because long-distance exhortations to change basic attitudes tend to fall on deaf or resentful ears. In the meantime, a comparative examination of fertility in the United States and Europe would be extremely interesting but would bulk up this article well beyond reasonable length.

14. I describe the development of biopolitics over the past several centuries in much greater detail at *infra* Part IV.

responsible reproductive choices and so should not enjoy reproductive autonomy.

Against these anti-autonomy positions, I argue for an approach to biopolitics that is committed to deepening and extending women's substantive freedom. This approach, which I outline in Part V, is oriented to solutions that acknowledge and, where possible, take advantage of new biopolitical realities. An approach committed to women's substantive freedom seeks to ensure that women enjoy all dimensions of autonomy: literacy, workforce participation, empowerment in household decision-making, and capacity to reconcile childrearing and career. As I argue, these multiple dimensions of freedom interact in complementary fashion to mitigate troubling demographic trends and make reproductive freedom less disruptive of social order and intergenerational continuity.

The two demographic crises demonstrate that the commitment to autonomy makes broader demands on the social order than has seemed clear before now. If my argument is right, that commitment should imply further commitment to creating and sustaining conditions in which reproductive autonomy is not self-undermining. Evidence from both Europe and Asia suggests that one variable that increases fertility rates in highly developed societies and improves the sex ratio of children in less developed societies is "women's substantive freedom": the set of choices available to women and the range of capabilities they can exercise. In Europe particularly, increases in substantive freedom come mainly through social policies that enable women to reconcile commitment to careers with commitment to childrearing.<sup>15</sup> In developing countries, women's literacy and workforce participation are the aspects of substantive freedom that bring improvements in sex ratios. More autonomy rather than less is the best answer to the threat that autonomy may undermine its own foundations.<sup>16</sup>

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15. The formulation is not gender-neutral, but neither is the social reality.

16. This article extends the themes of two previous papers that deal with the relationship between freedom and property. In the first, I drew on the capabilities-oriented welfare economics of Nobel laureate economist Amartya Sen, the reform proposals of political economist Hernando de Soto, law professor Yochai Benkler, and economist Robert Shiller to develop what I called a freedom-promoting approach to property reform. I argued that property regimes should maximize freedom, defined as capabilities: the power to make good one's potential to act along all dimensions of human capacity. I filled out this prescription by proposing to give priority to two types of capabilities: *foundational* capabilities on which many others supervene, such as physical mobility; and *meta-capabilities*, such as literacy, which

Part II describes in detail the two demographic crises I have already sketched: the decline of fertility rates to well below replacement level in Europe and some other developed nations, and a disproportion in numbers of young women and men already totaling as many as one hundred million in India and China alone. I emphasize the practical social problems that these trends imply: the first, a vastly increased ratio of retirees to productive workers; the second, a large population of unmarried young men. Part III discusses the potential political implications of these demographic trends. In Part IV, I put the discussion in a historical frame, providing a brief history of modern biopolitics, beginning with Thomas Malthus and the eugenics movements of the nineteenth and early twentieth centuries—exemplars of the long-held premise that the state had a legitimate interest in reproductive decisions. I then sketch the twentieth-century North Atlantic commitment to biopolitical autonomy with its origins in the horrors of the Second World War and pseudo-scientific racism, and in the rise of sex equality.

I then turn to solutions. In Part V, I describe a model of “biopolitical public policy,” which both addresses the crises of biopolitics and seeks in its solutions to acknowledge and take advantage of biopolitical reality in novel ways. Specifically, I suggest that novel financial arrangements for international and intergenerational burden-sharing can mitigate the consequences of

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enable one to revise or expand one’s capabilities. In the second article, I enriched this account by developing an analysis of property regimes as the architecture of social relations, setting the terms on which people recruit one another to pursue ends ranging from survival and prosperity to more subtle forms of flourishing such as intimate relationships. The aim of that argument was to take seriously the fact that people’s capabilities are not monadic: what we can do depends on our power to recruit others to our ends, and on our susceptibility to others’ recruitment of us. Thus, to understand how a property regime shapes capabilities, it is necessary to appreciate the relationships of recruitment that it sets up, and so to think of freedom in a relational manner. The major innovation of that article was the argument that people display a double character in relations of recruitment. On the one hand, we are resources for one another’s projects, the objects of their enlistment and deployment. On the other hand, we are all bearers of our own purposes, wishes, and aims. Property regimes help to define the boundary between the ways others may recruit us as resources and the ways they are obliged to respect us as ends. The normative kernel of that article was that, to maximize freedom, property regimes should maximize reciprocity in interpersonal recruitment so that in enlisting one another to our aims, we must take account of others’ interests and commitments and envisage our own goals relative to theirs. This article extends the picture of people as both autonomous agents and resources for others’ ends by bringing in the perspective of the state and the imperatives of politics.

declining fertility and might greatly diminish them in combination with other responses. Part VI moves into the “core biopolitics” issues of reproduction and childrearing, arguing for the value of an enhanced conception of autonomy in addressing today’s demographic crises. Beginning with Europe, I present evidence suggesting that policies that increase substantive freedom by enabling women and families to reconcile commitment to work with the desire to rear children can raise fertility rates toward, if not to, the replacement level. Turning to India and China, I show that gains in women’s substantive freedom appear to be the only change that improves sex ratios. I also observe admittedly speculative, but nonetheless intriguing, reasons to hope that women’s substantive freedom might directly work against extremist politics. Part VII concludes.

## II. THE NEW BIOPOLITICS: TWO CRISES

### *A. Sub-replacement Fertility and Rising Dependency Ratios*

For several decades in the last century, many believed that global population trends pointed ineluctably upward and that the social and ecological problems of overpopulation were among the most significant facing the species.<sup>17</sup> At the beginning of the new millennium, the facts began to change rapidly. Global fertility, which in 1950–55 stood at about 5 children per woman, has fallen to 2.65.<sup>18</sup> In 2050 it is projected to be 2.05 children per woman, slightly below the replacement rate of 2.1.<sup>19</sup> According to the Population Division of the United Nations Department of Economic and Social Affairs, this trend would lead to a global population of 9.1 billion by 2050, at which time growth rates would have slowed considerably and population would be close to leveling off.<sup>20</sup> Estimates premised on a faster decline in fertility rates show

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17. See PAUL R. EHRLICH & ANNE H. EHRLICH, *THE POPULATION EXPLOSION 15–17* (1990) (arguing that exponential growth in population has set the species on a sure path to exhausting the planet’s resources); PAUL H. EHRLICH, *THE POPULATION BOMB* (1968) (arguing the same).

18. U.N. Dep’t of Econ. and Soc. Affairs, Population Div., *World Population Prospects: The 2004 Revision*, 79 *POPULATION NEWSL.*, June 2005, at 3.

19. *Id.*

20. *WORLD POPULATION PROSPECTS*, *supra* note 13, at vi.

population stabilizing before 2040 at under 8 billion and beginning to decline by 2050.<sup>21</sup>

For present purposes, the most interesting question is not global population but a pair of subsidiary trends: the geographic distribution of fertility decline and the ratio of working adults to dependents (children and the retired) in national populations. The fertility rate in developed countries now stands at 1.56 children per woman, significantly below the replacement rate.<sup>22</sup> Moreover, fertility levels in all the world's forty-four developed countries (except Albania) are below replacement rate, and those in fifteen countries (mainly in Southern and Eastern Europe) have fallen below 1.3, a level "unprecedented in human history."<sup>23</sup> Even assuming continuing immigration and a substantial rebound in fertility rates (partly on the assumption that today's low levels reflect a generational decision to delay childbearing rather than reject it outright), these figures will have such countries' populations declining in absolute terms between now and 2050: by more than thirty million in Russia, over seven million in Italy, nearly four million in Germany, almost sixteen million in Japan, and over three million in South Korea.<sup>24</sup> The projected decline for these countries ranges from over 20 percent of today's population in Russia, through more than 10 percent for Italy, to around 5 percent in Germany.<sup>25</sup>

Declining fertility may reflect the economic incentives of a system that expects parents to absorb most of the cost of raising children (in contrast to retirement, which is publicly subsidized). According to one recent estimate, the cost of raising a middle-class child in the United States is over a million dollars in the first

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21. *Id.* at vii.

22. *Id.*

23. *Id.* at viii. South Korea lies at 1.23, Poland at 1.26, Spain at 1.27, Italy at 1.28, Germany at 1.32, and Russia and Japan at 1.33. *Id.* at 67-70. By contrast, nine countries with high fertility and immigration rates are expected to account for more than half the world's population increase before 2050. These include the political flashpoints of Pakistan, Nigeria, Congo, and Ethiopia, as well as India and China. The concentration of population growth in countries with unstable and potentially significant politics is itself an important and troubling matter, although outside the scope of this Article.

24. *Id.* at 35-37.

25. I have provided these numbers in round terms because so much uncertainty is absorbed into such estimates that rough magnitudes are more honest than an exaggerated precision premised on speculation.

seventeen years of life.<sup>26</sup> More than 80 percent of that figure comes from forgone parental wages on the assumption that one parent gives up a \$45,000 salary at the time of the child's birth and remains out of the labor market until the child reaches seventeen; the opportunity cost in forgone wages rises to nearly \$60,000 by the end of the period.<sup>27</sup> These figures may be somewhat bloated—after all, two-career families are common—but they capture the outlines of a massive expense.

Declining fertility also appears to reflect changes in values and priorities. Movement from traditional reproductive and family roles and toward new emphasis on career, self-expression, and the quality of friendship and romantic relationships all encourage postponing or skipping marriage and childbearing.<sup>28</sup> A study of European values and family structures reveals that those who have adopted the individualist and counter-traditional values just enumerated are most likely to be single or involved in childless cohabitation, while traditionalists are most likely to have entered into childbearing marriages.<sup>29</sup> The same study finds that the timing of European countries' fertility declines below replacement level corresponds roughly to the timing of this transformation in values.<sup>30</sup> A simpler statistical artifact of this change is a recent poll finding that, even absent economic constraint, German women on average express a wish for fewer than two children.<sup>31</sup>

The effect of declining fertility rates is that as cohorts age, the proportion of older to younger people grows. Rising life expectancy amplifies the effect, as relatively large older populations stick around to keep younger and relatively smaller cohorts company. In Europe, the number of people of pensionable age for every 100 people of working age is projected to rise from 35 today to 75 in 2050, with one-to-one ratios in Italy and Spain.<sup>32</sup> By another estimate, those

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26. See PHILLIP LONGMAN, *THE EMPTY CRADLE: HOW FALLING BIRTHRATES THREATEN WORLD PROSPERITY AND WHAT TO DO ABOUT IT* 73 (2004).

27. *Id.*

28. See Surkyn & Lesthaeghe, *supra* note 6, at 62–75.

29. *Id.* at 70–72.

30. *Id.* at 47–48.

31. See *Old Europe, Demographic Change*, *ECONOMIST*, Oct. 2, 2004, at 49–50.

32. *Europe's Population Implosion*, *supra* note 3.

over 65 in Europe will be equivalent to 60 percent of the working-age population in 2050.<sup>33</sup>

The proximate result promises to be a very serious economic drag on countries already heavily burdened by public debt and slow economic growth. An aging population means an increase in spending on pensions and health care; a smaller working population must make a larger per capita contribution to support the retired and the sick. The European Commission has estimated that such payments may drive up public spending by five to eight percentage points of GDP by 2040 in the fifteen member countries of the European Union, crowding out spending on productive investments.<sup>34</sup> Declining numbers of workers and reduced capital for investment mean, other things equal, a fall in economic growth. The International Monetary Fund has estimated that Europe's annual growth rate will be a half percentage point lower in 2050 than now—a number too speculative to be meaningful, but which expresses the certainty that a shrinking working population putting an increased share of income into transfer payments cannot be good for growth.<sup>35</sup> Taken together, diminished growth and the redirection of wealth to dependent populations will also crowd out spending on international influence, either via military power or through development assistance to new members of an expanded Europe and the world's poorest countries. Summing up these prospects, the French Institute for International Relations has recently predicted that Europe faces “a slow but inexorable ‘exit from history.’”<sup>36</sup>

### B. “Bare Branches” and Sex Asymmetry

In this sub-part, I treat the disproportion between men and women in populations where parents increasingly select the sex of their children.<sup>37</sup> This problem is linked to declining fertility by a

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33. *Half a Billion Americans?—Demography and the West*, ECONOMIST, Aug. 24, 2002, at 20, 22.

34. *Old Europe*, *supra* note 31, at 49.

35. *See id.*

36. *See Europe's Population Implosion*, *supra* note 3.

37. There is considerable debate on the relative proportions of gender disproportion caused by each of a variety of factors. One class of factors expresses a preference for sons over daughters, exercised at different points in the cycle of conception and childhood: sex-selective abortion, infanticide, and preferential caregiving and medical expenditures resulting in higher levels of childhood mortality in girls than in boys. For an outline of the debate over proportions among these causes, see Chu Junhong, *Prenatal Sex Determination and Sex-*

common structure: systematic social consequences arise from individual reproductive choices.

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*Selective Abortion in Rural China*, 27 POPULATION AND DEV. REV. 259 (2001) (observing that many Western observers were skeptical that sex-determination technology was widely available in China, while Chinese scholars resisted the suggestion that post-natal sex discrimination or infanticide caused the sex disparity). Today it is clear that China's domestic production capacity makes possible widespread sex-determination technology, and reported levels of sex ratio *at birth* show such a dramatic disproportion that any post-natal addition to the ratio must be regarded as additional, not supplanting. Another candidate is inaccurate reporting: some suggest that births of girls are underreported, either because of low cultural valuation of females or because, under China's one-child policy, parents who wish to have a son may conceal the birth of a daughter in an effort to avoid enforcement of the policy. For a discussion of this question, see Dudley L. Poston & Karen S. Glover, Too Many Males: Marriage Market Implications of Gender Imbalances in China 8–10 (unpublished paper, on file with author). As Poston and Glover note, however, Taiwan's sex disproportion at birth approaches China's despite near 100 percent reporting and no legal constraint on fertility, making underreporting seem unlikely to explain the bulk of China's sex ratio. *See id.* at 9. Moreover, although reliable studies of the nominally illegal practices of prenatal sex-determination and sex-selective abortion are difficult to come by, Junhong Chu's study of one village in which she had earned the trust of participants showed high levels of both practices. *See Chu, supra*, at 270, 273 (reporting 39 percent use of ultrasound sex testing during first pregnancies, 55 percent use in second pregnancies, and 67 percent use in additional pregnancies; 29 percent of respondents reported at least one abortion, and 38 percent of that group reported at least one sex-selective abortion). A third candidate is, paradoxically, improving health overall. Many more male than female fetuses are conceived, but because female fetuses are hardier than males, the natural proportion at birth only slightly favors males. Hence, other things equal, an improvement in the health of pregnant women, which decreases the rate of fetal wastage (miscarriages and stillbirths), should increase the proportion of male fetuses. Dhairiyarayar Jayaraj & Sreenivasan Subramanian, *Women's Wellbeing and the Sex Ratio at Birth: Some Suggestive Evidence from India*, 40 J. DEV. STUD. NO. 5, 91 (June 1, 2004). Although attractive for its note of optimism (perhaps not all news of sex disproportion is bad news!) and for its application of medical insight to social inquiry, this explanation cannot go far. The world's richest countries, where fetal wastage rates are presumably much lower than in India or China, do not even approach the sex disproportions registered in those countries. Political economist Emily Oster has recently drawn attention for her argument that high rates of hepatitis B contribute to sex disproportion by inducing higher rates of male births and female births; but Oster admits that hepatitis B cannot account for increases in sex disproportion over the last fifteen years, when infection rates have stabilized or fallen. Emily Oster, *Hepatitis B and the Case of the Missing Women* 2–3 (March 2005), [http://www.cid.harvard.edu/cidwp/pdf/grad\\_student/007.pdf](http://www.cid.harvard.edu/cidwp/pdf/grad_student/007.pdf). Oster makes no claim that hepatitis B could account for more than a fraction of the phenomenon. Other researchers, notably Amartya Sen, have sounded extremely cautious notes about her findings, which, although interesting, are far from conclusive. *See* Eve Conant, *What Carried the Girls Away*, N.Y. TIMES MAG., Feb. 12, 2006, at 27 (quoting Sen's skeptical assessment). On the existing evidence, it is very difficult to get away from the conclusion that sex-selective abortions and gender bias in childrearing play a large role in shaping existing sex ratios.

*1. The growth of the bare branches*

A disproportion of men to women in Asian populations—the result of sex-selective caregiving, infanticide, and, increasingly, abortion—came to widespread attention in 1990 when the economist Amartya Sen (future Nobel laureate) reported his calculation that, relative to the natural proportion of male to female births, more than one hundred million women were “missing” worldwide.<sup>38</sup> The natural sex ratio produces a slightly higher number of women than men in a population.<sup>39</sup> By contrast, today’s actual sex ratio in China shows 106.7 men for each 100 women, and India’s 107.2 men per 100 women.<sup>40</sup> The gap between expected and actual sex ratios translates to more than forty million “missing women” in China’s population of roughly 1.2 billion and more than thirty-nine million among India’s roughly 1 billion people.

Many interwoven factors account for parental sex selection in India: the higher status attached to male children, the superior earning potential of men over women (with its corollary, greater capacity to support parents and other family members), and the cost of providing a bride’s dowry.<sup>41</sup> A nationwide study conducted in 1997 found that Indian parents on average describe a 2:1 ratio of sons to daughters as the optimal mix—a preference plainly incompatible with natural sex ratios.<sup>42</sup> India’s southern states, which enjoy higher literacy rates than the rest of the country, exhibit the least distortion in their sex ratios.<sup>43</sup> Kerala, with near-universal literacy, many female-headed households, and a net out-migration of males for work, is unique in having significantly more women than men in its population; however, neighboring Tamil Nadu has a ratio of just over 101 men per 100 women, and Karnataka, home to

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38. See Amartya Sen, *More Than 100 Million Women Are Missing*, N.Y. REV. BOOKS, Dec. 20, 1990, at 61–66. Subsequent studies have modestly reduced his estimates, chiefly because he used sub-Saharan African births as a baseline, and the share of women among births in that population is slightly higher than for other groups. See HUDSON & DEN BOER, *supra* note 4, at 58–59.

39. See HUDSON & DEN BOER, *supra* note 4, at 59–61.

40. *Id.* at 62. Similar numbers prevail in Pakistan (108.6) and Afghanistan (106.5), with slightly less dramatic figures in Bangladesh (103.8) and Taiwan (104.3). *Id.*

41. See *id.* at 65–80.

42. See *id.* at 73.

43. See *id.* at 92.

Bangalore, has a ratio somewhat under 104:100.<sup>44</sup> The national sex ratio at birth ranged from 109.8 to 113.8:100 between 1987 and 1998.

Two factors that promote reproductive autonomy appear also to have contributed to India's present sex asymmetry. One is the increased availability and decreased cost of prenatal sex-determination testing and abortion. Between 1982 and 1987 alone, the number of sex-determination clinics in Bombay rose from 10 to 248.<sup>45</sup> Amniocentesis, which cost the equivalent of \$88 to \$117 in the 1980s, now costs \$12 to \$30—a lot of money in a poor country, but also a huge decrease in cost for the poor.<sup>46</sup> Ads for sex-determination testing suggest the cost is worthwhile: “Better [500 rupees] now than . . . [500,000 rupees] later,” they warn, advertizing to the potential cost of a daughter's dowry.<sup>47</sup>

Although there is dispute in India over how much of the country's sex disproportion arises from abortion and how much from neglect of female infants, the sex bias in abortion is manifest.<sup>48</sup> A Bombay study of one thousand abortions found 97 percent were of females, a number that seems implausibly high.<sup>49</sup> A study of a hospital in Punjab in the 1980s and 1990s found that 13.6 percent of mothers of newborn boys admitted—with reticence that may suggest underreporting—had undergone pre-natal sex-selection; the comparable figure was 2.1 percent for mothers of girls.<sup>50</sup> The other female fetuses presumably were not carried to term.

The second interaction between reproductive autonomy and sex disproportion is that falling fertility rates, with their connection to increasingly mobile, expressive, and individualist modes of life, exacerbate sex disproportion.<sup>51</sup> Fertility rates have fallen dramatically in most of India, albeit from a high baseline.<sup>52</sup> Monica das Gupta

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44. *Id.*

45. *Id.* at 110.

46. *Id.*

47. *Id.*

48. For a start on the dispute, see *id.* at 112–13.

49. *Id.* at 111.

50. *Id.* at 112.

51. For a discussion of this cultural dimension of declining fertility, see Surkyn & Lesthaeghe, *supra* note 6.

52. India's current fertility rate stands at 3.07 children per woman, down from 5.43 in 1970–75. United Nations demographers predict a decline below replacement level in 2030–

and P.N. Mari Bhat have found that falling fertility intensifies the pressure for sex selection because the total number of children that parents want falls faster than the number of sons they desire.<sup>53</sup> In consequence, carrying a female infant to term diminishes the chances of reaching the desired number of sons more dramatically for a family desiring a small number of children than for a family that wants a larger number of children. Consequently, where both economic interest and social esteem produce a strong preference for male over female children (or, more precisely, a preference for a mix of male and female children that falls well off the biological distribution), the broadly liberalizing trends that produce falling fertility rates also increase the likelihood of sex-selective abortion and, other things equal, will increase sexual disproportion.

China is the source of the term “bare branches,” which refers to “surplus men” who will never be able to marry in countries of “missing women.” As noted, China’s male-female ratio is 106.7:100, and its “missing women” total about forty million.<sup>54</sup> The sex ratio for the population overall understates the sex disproportion among the young, because China’s disproportion has grown a great deal in recent years.<sup>55</sup> Official Chinese publications put the ratio for children under age five at 118:100.<sup>56</sup> The introduction of ultrasound technology for prenatal sex identification in the 1980s seems to have increased the sex disproportion; an official ban on prenatal sex identification has had uncertain effects as yet.<sup>57</sup> As in India, the preference for sons is powered by esteem (sons are higher-status than daughters and are guarantors of family continuity) and by economic interest (men are chief wage-earners and, above all, providers for their parents’ retirement).<sup>58</sup> The government’s notorious one-child policy restricts the number of births in which families may attempt to

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35, but that is nearly pure speculation. WORLD POPULATION PROSPECTS, *supra* note 13, at 68.

53. See Monica Das Gupta & P.N. Mari Bhat, *Fertility Decline and Increased Manifestation of Sex Bias in India*, 51 POPULATION STUD. 307, 307–15 (1997).

54. HUDSON & DEN BOER, *supra* note 4, at 58–59.

55. See *id.* at 131–32.

56. *Id.* at 132.

57. See *id.* at 171–73.

58. See *id.* at 155. Hudson and den Boer quote anthropologist Sulamith Heins Potter as describing living conditions for retirees without children who rely on government support as “pitiable,” noting that “these old men and women live in decrepit buildings with little food and must depend on the goodwill of neighbors to provide water and fuel.” *Id.*

reach the desired number of sons.<sup>59</sup> The Chinese setting is thus a striking combination of traditional state coercion and technologically enabled reproductive autonomy, and of authoritarian biopolitics and the problems of new biopolitics.

## *2. The consequences of sex disproportion*

The inevitable consequence of sex disproportion is that, assuming the wish to marry is at least as frequent in men as in women, there will be many reluctant bachelors. Hudson and den Boer estimate conservatively that by 2020 China will be home to between twenty-nine million and thirty-three million “surplus males” between the ages of fifteen and thirty-four.<sup>60</sup> Their estimates for India range between twenty-eight million and thirty-two million bare branches.<sup>61</sup> Even in the conservative range, these numbers raise the prospect of more than fifty million young men in the world’s most populous countries who will be reluctantly unable to marry or become fathers.

What is a large population of unmarried young men likely to mean? There are several parts to the answer. First, unmarried men are statistically likely to belong to the lowest socioeconomic classes, to be underemployed or unemployed, and to be relatively transient because of both their need to move for work and their lack of family-based community ties.<sup>62</sup> Second, according to historical sociologists, they tend to associate with other bachelors in loose societies of laborers, transients, adventurers, or ne’er do wells.<sup>63</sup> The subcultures

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59. In practice, the policy has been unevenly enforced, and where it is enforced the policy amounts in effect to a ban on second children in urban areas and on third children in rural areas, with significant dispensations for China’s ethnic minorities. *See id.* at 152–54.

60. *Id.* at 186.

61. *See id.* at 124.

62. *See id.* at 188–90. Except for the absence of family-based community ties, these characteristics present a serious ambiguity in the direction of causation: men are not born bachelors but become such, and men with limited aptitude, family wealth, and social capital are likely to fare poorly in the marriage market. Thus, while bachelorhood may exacerbate the characteristics just sketched, it is plausible that the chief dynamic at work is that a surplus of men means the least marriageable will be channeled into bachelorhood.

63. *See id.* at 190–92 (summarizing a large amount of historical material on the characteristics of bachelor populations). For particularly significant sources, see DAVID T. COURTWRIGHT, *VIOLENT LAND: SINGLE MEN AND SOCIAL DISORDER FROM THE FRONTIER TO THE INNER CITY* (1996); James F. Rooney, *Societal Forces and the Unattached Male: An Historical Review*, in *DISAFFILIATED MAN: ESSAYS AND BIBLIOGRAPHY ON SKID ROW, VAGRANCY, AND OUTSIDERS* (Howard M. Bahr ed., 1970).

that develop in these groups are prone to drug and alcohol abuse, violence, norms of extreme sensitivity to insult, and risk-taking behavior of all sorts.<sup>64</sup> Third, unless they move into monastic or other orders that provide social integration without marriage, bare branches maintain a relatively alienated attitude toward settled society and sometimes fall into an oppositional and opportunistically predatory stance. Hudson and den Boer follow a number of historical scholars in suggesting that “surplus males,” seeking outlets for ambition and energy, populated Chinese and Indian bandit troops, freelance Chinese armies that spurred disastrous rebellions, and Portuguese rogue aristocrats who preyed on peasants and led expansionary overseas adventures.<sup>65</sup>

These general claims appear to line up with present reality in India and China. Amartya Sen has observed that inter-regional contrasts in India reveal “a strong—and statistically very significant—relation between the female-male ratio in the population and the scarcity of violent crimes.”<sup>66</sup> Although the precise figures are debated, millions of Chinese are transient, semi-employed, semi-legal laborers known collectively as the “floating population,” thought to be seventy to eighty percent male and largely unmarried.<sup>67</sup>

In this Part, I have summarized two unsettling demographic trends: declining fertility and increasingly unequal sex ratios. Both have systemic and troubling consequences: respectively, rising dependency rates and stresses on public pension systems, and unmarriageable male populations lacking clear paths to settled and productive adulthood. I now turn to the specifically political consequences of these trends.

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64. See HUDSON & DEN BOER, *supra* note 4, at 192–200 (summarizing material on these populations). For significant sociobiological accounts of this pattern, see Allan Mazur & Alan Booth, *Testosterone and Dominance in Men*, 21 BEHAV. & BRAIN SCI. 353 (1998); Allan Mazur & Joel Michalek, *Marriage, Divorce, and Male Testosterone*, 77 SOC. FORCES 315 (1998); Christian G. Mesquida & Neil I. Wiener, *Human Collective Aggression: A Behavioral Ecology Perspective*, 17 ETHOLOGY & SOCIOBIOLOGY 247 (1996).

65. See HUDSON & DEN BOER, *supra* note 4, at 200–02, 207–27, and sources cited therein.

66. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 200 (1999).

67. See HUDSON & DEN BOER, *supra* note 4, at 230–38 (noting the widespread association of this population with crime and alcoholism).

### III. DEMOGRAPHIC CRISIS AND POLITICAL THREAT

#### *A. The Pattern of Pro-natalist Politics*

Declining fertility, or the perception of declining fertility, is not new, even if it has never been so widespread or dramatic as it is now. In past episodes, an unsettling pattern has recurred. Pro-natalist agitators have identified culture, values, or preferences—pick your vocabulary—as the source of declining fertility and issued polemics against them. Pro-natalist polemicists tend to favor a homogenous, hierarchical, and “virtuous” version of national community. This form of pro-natalist politics has consistently identified the moral health of the political community with its fertility rate. It has consequently picked out three principles as diseases on the body politic: individualism, with its stress on personal satisfaction and development over reproduction; pluralism, the acknowledgement of valid forms of life that do not honor family and reproduction foremost; and, above all, women’s equality.

I give two historical instances, one from Imperial Rome, the other from eighteenth-century France. While historical analogies cannot be said to “prove” anything about the probable results of present trends, they do serve two purposes. First, they illustrate vividly the texture of cultural events, such as reactionary pro-natalist politics, that would otherwise be mere dry forecasts. Second, because they arise from circumstances in some ways similar to ours, they evoke recurrent tendencies that may reveal something about human reactions to circumstances that recur too seldom and with too much irreducible variety to serve as the basis for social-science generalizations.<sup>68</sup>

I have selected two examples remote from each other and from the present because they represent a recurrent ideological pattern in pro-natalist politics. An actual or perceived decline in fertility draws

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68. This observation squares with one that Jared Diamond has recently made about the value of historical case studies in seeking to make tentative social-science generalizations. While there are “too many potentially independent variables and far too few separate outcomes to establish those variables’ importance statistically,” there are also “huge quantities of information about the sequence of steps connecting initial conditions to outcomes.” In other words, dense information about specific events can help inform scholars about recurrent patterns of cultural response to ecological or, in this case, biological events. See JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* 194 (2005).

attention to values and practices that take people away from reproduction: pluralism, individualism, luxury, effeminacy, and women's empowerment, all polemically portrayed as decadence. The new visibility of non-reproductive ways of living raises the possibility that repopulation from generation to generation is not automatic; that fertility depends on a culture that honors reproduction and laws that reward it. Two responses are typical. First, political actors assert a state interest in reproductive choices. Reproduction is now styled a political as well as a natural duty, and the citizen or subject is sometimes portrayed as the property of the state, a part of its stock of natural resources. Second comes an assault—polemical at the most modest and sometimes legally coercive—on non-reproductive cultural forms: luxury, individualism, and any sexual practice that does not produce offspring. This way of asserting the priority of state or social interests over individual choice in intimate matters gives pro-natalist politics an affinity with modern forms of authoritarian and totalitarian politics, particularly the fascist apotheosis of the nation.

In Rome during the age of the emperor Augustus, a widespread perception arose that the Roman elite were failing to reproduce. In this polemical view, elites preferred sensual indulgence to childbearing and pursued that preference through refusal to marry, contraception, abortion, exposure (abandonment) of newborns, and infanticide.<sup>69</sup> Augustus responded with a decree directing each citizen to produce at least three children and granting certain benefits to those who met this standard while punishing the unmarried and the childless with penalties such as restrictions on their right to inherit.<sup>70</sup> This state claim on the reproductive capacity of the citizenry was accompanied by a genre of declensionist polemics, complaining that the once virile and fecund Roman people had become effeminate, self-indulgent, and infertile.<sup>71</sup> The attack was

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69. See TIM G. PARKIN, DEMOGRAPHY AND ROMAN SOCIETY 111–21, 126–27 (1992) (outlining this perception, the evidence bearing on it, and the legal response).

70. *Id.* at 115–16 (noting that many ambiguities surround this decree, prominently whether “three children” refers to the number born or the number surviving, and that we know little for certain about the frequency and severity of its enforcement).

71. See *id.* at 120 (“Literary, moralistic references abound where [having no children at all] is seen as disgraceful but, by implication, widespread. . . . Pliny the Elder explicitly condemns *contemporary* morals, according to which [the status of being childless and unmarried] occupies the place of highest [authority] and [power] . . . in sharp contrast (so he would have us believe) to the ‘good old days.’”).

not only on self-indulgent men but also on increasingly autonomous upper-class women, whose wealth and legal rights gave them a measure of control over reproductive decisions, which they pressed to the hilt, collaborating with or perhaps overcoming their husbands in declining to bear children.<sup>72</sup> The polemical target was thus male individualism as well as the relative emancipation of female citizens.

Eighteenth-century France recapitulated the Roman pattern. For much of the eighteenth century it was widely believed that France was losing population.<sup>73</sup> Picking up ancient tropes linking the virtue of kings to the fertility of their people, critics of the monarchy seized on the perceived fertility collapse for polemical advantage.<sup>74</sup> Philosophes and republicans developed sociological attacks on the king, arguing against values and behavior that supposedly undercut fertility, which they associated with the wealthy and aristocratic allies of the monarchy.<sup>75</sup> The most frequent objects of attack were “libertines,” aristocratic men who, like their Roman predecessors, preferred the wealth, freedom, and episodic sexual gratification of a bachelor (and sometimes a “sodomite”) existence to the duties of fatherhood.<sup>76</sup> In the years before the French Revolution, “the language employed to denounce celibacy became increasingly harsh, the proposals more Draconian.”<sup>77</sup>

This critique was crystallized in an assault on “luxury,” a line of attack shared by the Marquis de Mirabeau, the abbe Charles-Alexandre de Moy, and the conservative Melchior Grimm, among many others.<sup>78</sup> In this account, “luxury” stood for a preference for social standing and the pleasures of consumption and self-cultivation over the expenses and burdens of childrearing.<sup>79</sup> Mirabeau proposed a graduated luxury consumption tax to redirect resources from

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72. See LONGMAN, *supra* note 26, at 151–69 (outlining the patterns of cultural reaction to declining fertility).

73. In fact, the opposite was true; mostly because mortality rates were falling, but shrinking family sizes and the beginning of rural emigration to towns and cities produced the impression of a desolated land. See BLUM, *supra* note 10, at 1–4 (2002).

74. See *id.* at 5–6.

75. See *id.* at 21–60.

76. See *id.* at 26–27.

77. *Id.* at 43.

78. See *id.* at 45–51.

79. See *id.* at 46 (“[T]he preference for ensuring a comfortable style of life rather than producing the largest possible number of children was increasingly and virulently denounced as morally reprehensible.”).

pleasure and display to production and reproduction.<sup>80</sup> Georges-M. Butel-Dumont contended in 1771 that the state must go farther and punish those who remained unmarried.<sup>81</sup> Another polemicist argued, “[i]f it is illegal to commit suicide because that means robbing the Fatherland of oneself, it should be all the more so to stay single because each citizen is obliged to contribute . . . his share in [the nation’s] perpetuation.”<sup>82</sup> As in imperial Rome, these proposals envisaged a direct and powerful claim of the state on the reproductive capacity of the individual citizen and embraced authoritarian, even proto-totalitarian, regulation to enforce the claim.<sup>83</sup>

Reactionary gender politics accompanied the French pro-natalist agenda. One polemical target was the alleged effeminacy of wealthy and especially aristocratic men, portrayed as wigged, made-up, mincing, and clad in silk.<sup>84</sup> Another was the autonomy of upper-class women who, presumably under the influence of luxurious appetites, avoided childbearing to preserve themselves for other pleasures. The pro-natalist Mirabeau described a flighty and self-indulgent new mother of a first child, a daughter, who declares of her disinclination to take on another pregnancy: “The job is dreadful . . . and I don’t feel like sacrificing myself for my posterity.”<sup>85</sup> Such gender-specific polemics have particularly ominous political implications. The literal occupation of a woman’s body by the child in utero and the substantial hazard of childbearing (particularly before the advent of modern medicine) both give pro-natalist legislation an aspect of intimate coercion.<sup>86</sup>

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80. *See id.* at 48–49.

81. *See id.* at 49.

82. *Id.* (quoting ANGE GOUDAR, *LES INTERETS DE LA FRANCE MAL ENTENDUS DANS LES BRANCHES DE L’AGRICULTURE, DE LA POPULATION, DES FINANCES ET DE L’INDUSTRIE, PAR UN CITOYEN* 272 (Amsterdam, 1756)).

83. Blum provides a number of other striking instances. An anonymous pamphleteer in 1763 wrote that “[l]ibertinage . . . kills millions by preventing the propagation of the species.” The abbe Jacques-Joseph Duguet declared, “[a]nything opposed to fecundity, even if it’s only the wish, is criminal and degrades marriage . . . .” According to F.B. Felice, “Onanism is opposed to the natural destination of sperm . . . the one who engages in it becomes his own murderer. Still more criminal is the [onanism] committed in marriage.” *Id.* at 50–51.

84. *See id.* at 49.

85. *See id.* at 47.

86. This intuition forms the basis of Jed Rubenfeld’s anti-totalitarian argument for abortion rights. *See* Jed Rubenfeld, *Concurring in the Judgment Except As to Doe, in* WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S

The French Revolution carried many of these polemical themes into political struggle and legislation. When the laws of February 13–19, 1790 abolished clerical vows of chastity, the speaker of the Assembly declared that the country could no longer tolerate infertile celibacy: “for reasons both moral and demographic . . . there are 100,000 young women who must be married.”<sup>87</sup> Legislative assaults on the infertile laity were less decisive, but the deputies issued both pro-natalist policies and rhetoric. A decree of 1791 took the tack of today’s pro-natalist incentives, reducing personal taxes on the fathers of more than three children.<sup>88</sup> The post-Terror constitution of 1795 excluded the abstemious from the highest levels of government, providing that “no one may be elected to the *Conseil de Anciens* . . . unless he is married or widowed,” that is, unless he had made a good-faith effort to join the chain of social reproduction.<sup>89</sup> The deputy Louis Depuy announced, “The citizen is the property of the Fatherland and a part of its wealth”—a radical extension of the premises of first-generation biopolitics—and urged that childless unions be declared invalid.<sup>90</sup> Another deputy, Charles F. Bouche, denounced all unmarried persons as “parasites, in general corrupt or corrupting . . . a useless weight on the face of the earth.”<sup>91</sup>

This is the pattern of pro-natalist politics. There is not significant evidence that this pattern is recurring in any important way in Europe or Japan today. I suggest later that this may be partly a consequence of women’s well-established equality and partly a result of continuing revulsion at the eugenic policies of the last century.<sup>92</sup> These are early days, however, and it would be naïve to imagine that the same political pattern could not recur as the effects of declining

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MOST CONTROVERSIAL DECISION 109, 111 (Jack Balkin ed., 2005) [hereinafter WHAT ROE V. WADE SHOULD HAVE SAID] (“A woman’s right not to be impressed into unwanted labor is no less than a man’s. . . . [N]o law could more plainly violate this right than a law forcing a woman to bear a child.”).

87. BLUM, *supra* note 10, at 158–59.

88. *See id.* at 159.

89. *Id.* at 163.

90. *Id.* at 158.

91. *Id.* at 159. Examples abound outside the opinions of lawmakers. In 1794, representatives of a popular society called (in a twist of retrospective irony) Condom addressed the Convention, complaining that “regenerated France is still crawling with bachelors” and urging a declaration “that celibacy is a political crime” and institution of “a heavy punishment upon those guilty of it.” *Id.* at 162.

92. *See infra* Part IV.B.

fertility become increasingly palpable. Other connections between demographic crisis and illiberal politics, while less richly instanced in history, are less speculative today.

*B. The Politics of Pensions and Immigration*

An obvious response to the increase in dependency ratios is to increase immigration of working-age adults and permit them to stand in for the “absent” native-born adults of a population with sub-replacement fertility levels. This option, however, would likely set in motion a political crisis. Immigration on a scale that would prevent dependency ratios from rising would be much greater than developed countries have so far embraced. According to a United Nations estimate, Germany would need to admit 3.6 million immigrants per year between now and 2050<sup>93</sup> (against a baseline of roughly 80 million inhabitants<sup>94</sup>) to keep dependency rates constant.<sup>95</sup> The corresponding figure would be even more dramatic in countries such as Italy, Spain, and Japan, where a substantial decline in absolute population is now projected.<sup>96</sup>

The numerical challenge is the least of the difficulties attending immigration. Germany and the rest of Europe have been politically fractured over current immigration levels, which are too small to make much of a dent in their dependency ratios. In light of these political constraints, the Rand Corporation’s European division has concluded that public policy needed to focus on influencing domestic fertility because “[t]he sheer numbers of immigrants that are needed to prevent population ageing [sic] in the EU and its Member States are not acceptable in the current socio-political climate prevailing in Europe,”<sup>97</sup> a judgment that preceded the politically explosive riots among France’s North African immigrants in fall of 2005.

Policymakers confront two other options, neither politically attractive. The first is a substantial increase in the age of eligibility for public pensions,<sup>98</sup> the second a harsh cut in the level of pension

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93. WORLD POPULATION PROSPECTS, *supra* note 13, at 35.

94. *Id.*

95. *See Old Europe, supra* note 31.

96. *See id.* at 36–38.

97. *See GRANT ET AL., supra* note 9, at 135.

98. *See Old Europe, supra* note 31.

benefits. While such reform has succeeded on the margins, particularly in the United States, any changes that approached offsetting the increased cost from demographic change would likely be political dynamite. The recent stillbirth of Social Security reform (even in the relatively market-oriented United States) in a time of conservative ascendancy suggests the difficulty of revising this class of entitlements.<sup>99</sup> So does the long-running German stalemate between the Christian Democrats and the Social Democrats, which has so far blocked any serious reform of that country's disaster-bound welfare-spending commitments.<sup>100</sup>

Increased immigration has thus emerged as a visible option in discussions of fertility decline, not so much to point the way to a solution as to highlight the newly paradoxical relationship between two aspects of national identity in Europe and Japan: social solidarity in the form of a generous welfare policy and the expectation of ethnic homogeneity.<sup>101</sup> It was an implicit premise of those countries' welfare policies that benefits would go to people with whom taxpayers identified—a pattern of ethno-national spending that neared perfection in West Germany's nearly overwhelming decision to absorb the former East Germany into its welfare state. It now begins to seem that nothing like the current level of social support can continue unless Europe gives up even today's relative homogeneity in favor of becoming a continent of immigrant societies.<sup>102</sup> To take that path, though, would force the question of

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99. See Ramesh Ponnuru, *Why Conservatives Are Divided*, N.Y. TIMES, Oct. 17, 2005, at A19 ("Social Security reform appears to be dead for now.").

100. See Edmund L. Andrews, *German Parliament Votes To Revamp Pension System*, N.Y. TIMES, May 12, 2001, at A4 (discussing Germany's halting efforts at reform); Mark Landler, *An Unlikely German Coalition Now Seems To Be More Likely*, N.Y. TIMES, Sept. 30, 2005, at A8 (noting the continuing deadlock in German electoral politics).

101. For a discussion of the relationship between nationalist sentiment and social solidarity with particular reference to the contrasting political cultures of the United States and Germany, see MICHAEL LIND, *THE NEXT AMERICAN NATION: THE NEW NATIONALISM AND THE FOURTH AMERICAN REVOLUTION* 220–32 (1995). For the perspective of a leading German political theorist and public intellectual on this question, see Jurgen Habermas, *Open Letter on Europe*, FRANKFURTER ALLGEMEINE ZEITUNG, May 31, 2003 (arguing that an ethos of social solidarity forms the basis of Europe's rejection of severe inequality). Sociologist Anthony Giddens makes a similar argument about the essentially cultural-conservative basis of European social solidarity in *Anthony Giddens and Will Hutton in Conversation*, in *ON THE EDGE: LIVING WITH GLOBAL CAPITALISM* 1, 31–33 (Will Hutton & Anthony Giddens eds., 2001).

102. As the immediately preceding discussion and sources cited therein indicate, the claim here is not that Europe is in fact homogenous, but that the national political cultures of

whether welfare-state solidarity could survive absent ethno-national solidarity, or whether the continent's transformation by immigration would transform its political cultures into less solidaristic, more laissez-faire societies. The second option would push European countries in the direction of the United States, where relatively open immigration co-exists with minimal entitlements, so that the country takes on a low burden of solidarity—whether measured in fiscal obligations or in collective identification—by admitting foreigners.<sup>103</sup>

The politics that worked out this question would inevitably interact with existing rifts over the place of immigrants in France, Germany, the Netherlands, and other European countries. Although forecasting specific developments in political cultures is usually a fruitless game—particularly across an ocean and at the scale of continents—a crisis of solidarity and ethno-national identity suggests a perfect storm for reactionary conceptions of the national community as ethnically homogeneous, superior in virtue, and under threat in its defining traditions and character.

This is a speculative discussion, but not a wildly imaginative one. The most fractious themes of Europe's domestic politics are immigration and the future of the welfare state. Both raise charged questions about the nature of national community: who “we” are, what we owe one another, and what the two questions have to do with each other. Fertility decline brings the two issues face to face in a manner that may tend to make ideas of national community more rigid and reactionary at the very moment that practical exigencies make national populations more heterogeneous.

### *C. Sex Disproportion and Politics*

The most interesting and novel question to arise from sex disproportion is what it will mean for the very important political transitions that China and India are now undergoing. In a time when “the future of Western political theory will be decided outside the West,” the development of electoral democracy in India, democratic-

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Europe are far from finding a way to reconcile the fact of growing heterogeneity with the longstanding commitment to generous social supports.

103. Immigration has recently increased in political salience in the United States, driven not so much by disputes over public benefits as over access to the American job market—the main economic good that the United States provides its new arrivals. See, e.g., Shia Kapos & Paul Giblin, *Rallies Sound the Drumbeat on Immigration*, N.Y. TIMES, Sept. 4, 2006, at A18 (describing demonstrations and counter-demonstrations on immigration law reform).

tending reform in China, and market institutions in both countries are of great moment.<sup>104</sup> Stakes are high for the well-being of the more than two billion people who inhabit those countries, for the geo-political order they will either anchor or disrupt, and—as the quotation just given suggests—for the future of the very institutional forms China and India are now pursuing and revising.

The first possible consequence concerns the status of women in society. To the extent that gender equality is a normative aim of liberal and democratic institutions and an empirical contributor to the development of these institutions, resurgent gender hierarchy is bad for political development.<sup>105</sup> Unhappily, sex disproportion can be bad for women's status. As women become relatively scarce, men increase competition to control them, which tends to produce early marriage, high levels of direct discipline of women by men, and, for the most vulnerable women, increased levels of kidnapping, sale as brides, and prostitution.<sup>106</sup> Although a formalist trained in the rudiments of economics might imagine the contrary consequence—that increased demand for women relative to supply would increase the bargaining power of the women themselves—a bit of realist reflection reveals the problem.<sup>107</sup> Scarcity increases bargaining power only when women are recognized as formal equals in bargaining, or

104. SUNIL KHILNANI, *THE IDEA OF INDIA* 198 (1997).

105. I take up this question further at *infra* Part VI.A.

106. See Scott J. South & Katherine Trent, *Sex Ratios and Women's Roles: A Cross-National Analysis*, 93 AM. J. SOC. 1096, 1096–115 (1988).

107. What I have just called a realist attitude would follow the classic analysis of legal realist Robert Hale in describing private economic transactions as relations of mutual coercion in which bargaining position depends on the parties' respective capacity to bring threats to bear on one another. See ROBERT L. HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* 3–34, 385–99 (1952) (diagnosing property rights as establishing economic relationships of reciprocal threat and exploring modes of legal mitigation and equalization of threat). Joseph W. Singer has continued to do important and theoretically ambitious work in Hale's vein. See Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 650–51 (1988) (“As Hale tried to teach us, every transaction takes place against a background of property rights. And the definition, allocation, and enforcement of those entitlements represent social decisions about the distribution of power and welfare. No transaction is undertaken outside this sphere of publicly delegated power; the public sphere defines and allocates the entitlements that are exchanged in the private sphere. At the core of any private action is an allocation of power determined by the state.”). One might also look at the issue as a matter of cultural or interpretive context, as Charles Taylor does in describing negotiation as involving a number of implicit presuppositions, including the nature and value of the persons involved. See Charles Taylor, *Interpretation and the Sciences of Man*, in 2 PHILOSOPHICAL PAPERS: PHILOSOPHY AND THE HUMAN SCIENCES 15, 32–33 (1985).

at least are practically able to withhold the resources they control. When the holder of the resource—in this case, a woman’s own person—cannot withhold it because of legal disability or material vulnerability, an increase in the value of the resource means a greater chance that she will be coerced into giving it up. Thus, there may be an unhappy relationship between sex disproportion and resurgent hierarchy in gender relations where, as in both India and China, women’s positions are already subordinate and vulnerable.<sup>108</sup>

The second possible consequence is the rise of potentially anti-democratic and illiberal institutions, either to absorb populations of unmarried men or to address the anti-social behavior associated with such men. The military is the foremost public institution suited to absorb unmarried populations; a large and restive military is also an independent political actor with potentially anti-democratic goals. These goals may or may not extend to coups or other overt power struggles. They may well include pressure for destabilizing adventures intended to establish—for reasons of both funding and status—the importance of the military. The potential for overt power struggles is particularly great in government made vulnerable by the uncertainties of political reform, as China seems increasingly to be; the potential for dangerous adventurism is manifest in China’s relations with Taiwan and India’s with Pakistan.

Domestic police forces are also likely to grow in response to unmarried male populations. China announced in 1999 that it would substantially increase the size of the People’s Armed Force, which is charged with “maintain[ing] internal stability by quelling domestic unrest and rioting.”<sup>109</sup> The increase was a response to labor and political unrest, some of it associated with the transient population. Interestingly, unmarried men may be the members of the People’s Armed Force as well as its targets: the new recruits have been described as “the dregs” of current army personnel. Any armed locus of authority, particularly one that works at the intersection of ordinary law-and-order and political repression, can pose a danger to liberal and democratic political development.

Perhaps the most troubling question is whether unmarried young men are particularly likely recruits for extremist movements,

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108. See HUDSON & DEN BOER, *supra* note 4, at 74; see also *id.* at 73 (noting women’s low rates of literacy and employment in India, relative to those of men).

109. *Id.* at 256.

particularly their violent or para-military wings. India has been plagued by such organizations, mostly Hindu nationalists, since before its independence in 1947. The Shiv Sena, the Rashtriya Swayamsevak Sangh (RSS), and others have been responsible for religious massacres, harassment of both minorities and religiously tolerant governments, and one of the founding wounds of Indian politics: the assassination of Mohandas Gandhi.<sup>110</sup> While political movements are tightly controlled in China, nationalism stands alongside economic growth as a pillar of the present government's legitimacy, and ultra-nationalist sentiment is known to be strong among many young Chinese.<sup>111</sup> The role that ultra-nationalists would play in a Chinese political crisis cannot be more than speculation, but it could hardly be good for liberal democracy.

In material terms, nationalist groups offer their members an opportunity for economic advancement chiefly through patronage and participation in organized crime, particularly extortion.<sup>112</sup> This

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110. For the role of Hindu nationalist parties—particularly the Shiv Sena—in Indian politics, see SIKATA BANERJEE, *WARRIORS IN POLITICS: HINDU NATIONALISM, VIOLENCE, AND THE SHIV SENA IN INDIA* (2000); ASHOK DHAWALE, *THE SHIV SENA: SEMI-FASCISM IN ACTION* (2000); JULIA M. ECKERT, *THE CHARISMA OF DIRECT ACTION: POWER, POLITICS, AND THE SHIV SENA* (2003). For a propagandist's defense of the program of the RSS, see M.G. CHITKARA, *RASHTRIYA SWAYAMSEVAK SANGH: NATIONAL UPSURGE* (2004). The career of the Shiv Sena in Mumbai and the surrounding state of Maharashtra combines nationalist rhetoric, street-fighting ethnic self-assertion, social-service provision, and community-building. Young men, particularly those who face limited employment prospects in the migrant slums of Mumbai, make up the organizational core of the party and the bulk of its militants. Dhawale gives a characteristic left-wing inflection to this fact: "An extremely vital element in the [Shiv Sena] social strategy was its appeal to unemployed and lumpenized youth[.]" DHAWALE, *supra*, at 73. Banerjee offers a somewhat more subtle account, noting that Shiv Sena organizations provided three kinds of benefits to the young male members who were the primary targets of recruitment: economic opportunity (chiefly through patronage and extortion), concrete social networks, and an ideology of membership or belonging in an imagined, essentially Hindu Indian identity. See BANERJEE, *supra*, at 111–13. Membership in nationalist organizations addresses several of the needs described in the earlier sociological sketch of the characteristics of populations of unmarried men. See *generally supra* Part I.B.2.

111. See Geremie R. Barme, *To Screw Foreigners Is Patriotic: China's Avant-Garde Nationalists*, 34 *CHINA J.* 209 (1995) (detailing the rise of a fashionable form of ultra-nationalist sentiment among young Chinese). For a discussion of the dynamics of Chinese nationalism from a cultural and anthropological perspective, see *CHINA INSIDE OUT: CONTEMPORARY CHINESE NATIONALISM AND TRANSNATIONALISM* (Pal Nyiri & Joana Breidenbach eds., 2005).

112. See BANERJEE, *supra* note 110, at 112–23 (describing economic benefits as a major part of Sena recruitment efforts to those who otherwise lack prospects); DHAWALE, *supra* note 110, at 64–74 (detailing the appeal of the Shiv Sena to economically marginal youth and the party's general benefit from economic crisis).

appeals to young men who tend to fare poorly in the legitimate economy. In social terms, nationalist organizations provide community centers, shared activity, and an environment of solidarity in which those who are blocked from other modes of social integration, such as marriage and employment, can enjoy belonging and recognition in their otherwise unattached status.<sup>113</sup> Ideologically, nationalism provides an abstract community—the nation—with which those otherwise socially displaced can identify emotionally; moreover, violent nationalism assigns these young men an honored role: warriors, the defenders of a nation in which, without nationalist ideology, they might lack any substantial place.<sup>114</sup> In this respect, nationalism at once valorizes the violent terms of status in populations of unmarried men and proposes to integrate that group-specific status into a position of honor within the national community. In an irony that is at once poignant and unsettling, nationalist ideology sometimes places special emphasis on the warrior's role as a defender of the nation's womanhood, particularly against the depredations of an internal alien, such as India's Muslims. Men who lack erotic, emotional, and social ties with actual women

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113. See BANERJEE, *supra* note 110, at 117–18. She also favorably discusses the work of other observers who argued that “the Sena offered young Maharashtrians a sense of exhilaration not derivable solely from monetary gains,” but rather dependent on a sense of community built around discipline and order inflected by a spirit of “national solidarity.” *Id.* at 118 (quoting MARY FAINSOD KATZENSTEIN, *ETHNICITY AND EQUALITY: THE SHIV SENNA AND PREFERENTIAL POLICIES IN BOMBAY* 114 (1979)). On these accounts, “the Sena men . . . saw themselves [as] . . . unaccommodated men making a claim on their land for the first time, and out of chaos evolving their own philosophy of community and self-help.” *Id.* (quoting KATZENSTEIN, *supra*, at 97).

114. Banerjee writes, “Many young men were . . . attracted by the Sena’s advocacy of violence as political tool . . . . Speeches . . . emphasized aggression, framed by a Hindu identity, as a legitimate and necessary element of political action.” *Id.* at 112. On the role of warrior identity and masculinity in Hindu nationalist politics, she describes the debt of both the RSS and the Shiv Sena to celebrations of a “warrior” tradition in Indian history and nineteenth-century Hindu revivalism, and observes, “Notions of ‘masculinity’ and ‘Hinduism’ intertwined closely in the political identity implicit in the Shiv Sena’s message. ‘Masculinity’—incorporating such attributes as decisiveness, aggression, muscular strength, and a fighting spirit to do battle—juxtaposed feminine values, labeled as weakness . . . nonviolence, compassion, and consensus building.” *Id.* at 132–33. In her excellent discussion of Sena ideology, Eckert reports, “Violent action is considered not only as honest but further as courageous and manly . . . . This insistence on the true man being defined by physical strength and physical, nearly unmediated, violence, exemplifies the theme of the ‘recuperation of masculinity’” as a major appeal of the Sena. ECKERT, *supra* note 110, at 136.

are thus invited to imagine themselves the protectors of the nation's femininity.<sup>115</sup>

In this Part I have outlined the potentially disruptive relationship between biopolitics and the broader politics of nation, public morality, and warfare. I have argued that both historical precedent and current trends suggest that population decline and skewed sex ratios can produce or strengthen nationalist and reactionary politics. In the next Part, I put these developments in a broader context: the development and transformation of Euro-American biopolitics over the last three centuries.

#### IV. A BRIEF HISTORY OF BIOPOLITICS

In addressing conjoined demographic crises and political threats, the world is not writing on a blank slate. The effort to formulate a political response must contend with the morally troubling legacy of centuries of history. In this Part, I survey that history and its implications for contemporary biopolitics.<sup>116</sup>

An opening word is in order on the relationship between biopolitics and the basic commitments of modern liberal and democratic politics. On the one hand, the basic normative commitment of modern politics is to secure the freedoms of persons: we assess states by how closely they adhere to these principles, recently to the point of authorizing intervention and overthrow where states are grossly illiberal and undemocratic. Yet on the other hand, there is no perfect autonomy in politics because we are also, inevitably, resources for the state. In order to enforce a relatively free

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115. For a discussion of this dynamic in Sena ideology, see ECKERT, *supra* note 110, at 140–47.

116. In contrast with the intercontinental focus of this article's discussion of demographic trends, this treatment of the historical stages of biopolitics is rather centered on the political and legal cultures of the North Atlantic. It would not really be accurate to describe China or India as having gone through the same first- and second-generation experiences that I ascribe to Europe and, in a lesser degree, the United States. In this respect, the historical material describes the origins and trajectory of the normative lenses through which readers trained in the North Atlantic legal cultures, or that of the post-World War II international human rights period, are likely to understand the relationship between individual reproductive choices and state interests. My rationale for treating this relatively restricted history is that the problems that define third-generation biopolitics really are ones that we—all the world—are in together, and in which the relationship between social or state interests and substantive reproductive autonomy comes into the same kind of difficulty and paradox whatever the historical normative developments behind it. I am thus writing for my audience a regional history of "our" response to what is now, in its broad outlines, a global problem.

social order, even a state entirely free of totalitarian ambitions makes demands on the wealth, the conduct, and the bodies of its citizens. Concentrating here only on the last—the concern of biopolitics—citizens show up for jury duty; they report for prison, or are taken there; and, when there is war, they show up to fight and die. Our role as resources for the state is inevitable because our autonomy depends on the survival and integrity of the state.

Preserving autonomy, therefore, requires distinguishing between cases where personal autonomy and the health of the state are reconcilable and others where they come into conflict. It is necessary to avoid two kinds of mistakes: first, overestimating the necessary extent of state regulation and thus excusing gratuitous invasions of autonomy; and, second, underestimating the need for state regulation and remaining sanguine about uses of autonomy that can produce serious problems for the state. The challenge of third-generation biopolitics—to reconcile the commitment to reproductive autonomy with recognition of its systemic political implications—is a new and important instance of this general problem.

A caveat is in order here. This discussion of the history of biopolitics is egregiously incomplete. It concentrates on political and cultural developments in Europe and North America to the exclusion of developments in other regions under discussion in this article, notably India and China. My reason is neither that I believe those countries' experience can be assimilated to that of the North Atlantic (quite the contrary) nor that I believe they lack comparably deep and vital engagement with these issues.<sup>117</sup> Rather, I am motivated by two kinds of limitations. One is a limitation in my audience, which for this article is almost exclusively made up of American legal academics whose training is predominantly in North Atlantic traditions. The other, which disposes of the issue, is my own regrettable lack of training to summarize the history of biopolitics in non-Western traditions.

The above-discussed French obsession with fertility as an expression of national vitality or decline—the fruit of the king's just rule and a barometer of virtue and vice in the population—began as

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117. For a recent, book-length demonstration of this point, see AMARTYA K. SEN, *THE ARGUMENTATIVE INDIAN: WRITINGS ON INDIAN HISTORY, CULTURE, AND IDENTITY* (2005) (arguing throughout that Indian thought richly engages a variety of political, theological, and cultural issues, often ethnocentrically imagined to be the exclusive product of Western intellectual history).

part of an old tradition of magical association between fertility and the health of the realm. By the decades following the French Revolution, however, that obsession had become a policy aim steering the regulatory apparatus of the early-modern state. This aim was premised on the main idea of the first 150 years of biopolitics, what I call the “First Generation” biopolitics: that citizens and subjects were in good part resources for the nation, and that, like any important resource, they merited appropriate regulation in the national interest. With the end of World War II and the rise of new attention to reproductive autonomy, this premise came into disrepute, replaced by the main idea of “Second Generation” biopolitics: reproductive decisions belong to individuals, and any legitimate interest of the state lies in public morality and the well-being of persons, not the maintenance of a pool of material resources composed of living human bodies. Moreover, such state interests are set against the premise of individual reproductive autonomy. The problems of “Third Generation” biopolitics emerge against the backdrop of the repudiation of the First Generation and the rise of the Second Generation.

*A. Thomas Malthus and Demographic Pessimism*

First Generation biopolitics can surely claim Thomas Malthus among its founders. Malthus enjoys the rare distinction of having bequeathed his name to a view of the world, one premised on the application to human beings of a putative biological principle: “the constant tendency in all animated life to increase beyond the nourishment prepared for it.”<sup>118</sup> He applied this principle to human beings in the form of a simple and grim cycle in demographics and economics. Whenever wages (or other income) rose high enough to support fertility above the replacement rate, human beings responded with offspring.<sup>119</sup> A rising population meant a larger workforce, which drove down wages to the point of privation, even starvation.<sup>120</sup> “The poor,” Malthus wrote, “consequently must live

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118. THOMAS MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION 14 (Donald Winch ed., Cambridge Univ. Press 1992) (1803).

119. *See id.* at 25–26. Malthus wrote of this principle: “The passion between the sexes has appeared in every age to be so nearly the same that it may always be considered, in algebraic language, as a given quantity.” *Id.* at 40.

120. *See id.* at 25–26.

much worse, and many of them be reduced to severe distress.”<sup>121</sup> The distressed poor would be unable to afford to marry or bring their children alive through infancy, which would induce a fall in population.<sup>122</sup> This in turn would drive wages high enough to support reproduction at or above the replacement rate, beginning the grim cycle again.<sup>123</sup>

I devote several pages to Malthus’s views for two reasons. First, he is seminal in the development of North Atlantic biopolitics, having inaugurated an alliance between would-be scientific social inquiry and the already familiar and recurrent anxiety about the demographic health of the nation. Second, the connection between Malthus’s intense conservatism and his biopolitical commitments is a stark reminder that biopolitics is political in quite a familiar sense: interpretations of demographic trends interact with and are often inflected by the fears, aspirations, and convictions of those who make them. It is partly with the reactionary legacy of Malthus in mind that I have undertaken this article, in the face of a new set of demographic crises, with an explicit commitment to securing and expanding substantive versions of liberal and democratic freedoms.

Although he is now remembered in intellectual shorthand as a pessimist who failed to appreciate that rising productivity would enable a finite world to feed many more people than it once could, Malthus was very much a practitioner of demographic politics.<sup>124</sup> The son of a radical minister who had embraced the French Revolution as an emblem of the promise of human improvement, Malthus turned sharply against his father’s political optimism.<sup>125</sup> His theory is very

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121. *Id.* at 25.

122. *See id.*

123. *See id.* at 25–26.

124. It is worth noting that although Malthus seems to have envisioned a steady-state economy and is, thus, routinely criticized for failing to anticipate that productivity increases would enable a finite world to feed a growing number of people, his thesis does not depend on the steady-state premise. On the contrary, the thesis that population will always increase in excess of the resources available to support it can apply at any level of productivity increase that does not outstrip the maximum potential rate of reproduction. Such a view, for instance, seems partly to have underlain Marx’s contention that the development of capitalism would lead to the steady impoverishment of the proletariat. For a discussion of the connection between Malthus and Marx in this respect, see David Singh Grewal, *The Demographic Contradiction of Capitalism* (unpublished manuscript, on file with author).

125. *See* Donald Winch, *Introduction* to MALTHUS, *supra* note 118, at vii (describing Malthus’s father as “an ardent follower of Rousseau” and likely “attracted by [William]

much about the limits of politics; he argued relentlessly that unyielding tendencies in human nature constrained the power of political reform to improve human circumstances.<sup>126</sup>

Malthus did concede that human reproduction differs from that of other species because people make self-conscious decisions in accord with plans of life.<sup>127</sup> He referred to “preventive checks” on population as unique to humans, while “positive checks,” forming the cycle of overreach and privation sketched above, held for all forms of life.<sup>128</sup> He classified the uniquely human preventive checks into “moral restraint,” meaning celibacy or at least continence, and “vice,” which included all “irregular gratifications” of the sexual desire, all of which he regarded as degrading to human dignity and especially to female character.<sup>129</sup> He does not seem to have regarded regulation of “vice” as an appropriate goal of public policy. He treated moral restraint as a product of gradual increases in individual virtue, expressing doubt that even education in his demographic principles would persuade the poor to limit their reproduction.<sup>130</sup>

Malthus’s polemical targets were visionary reformers. The thrust of his argument was that neither wealth redistribution nor other reforms in the economic or political order could improve the human lot because, by inducing the poor to reproduce faster, they would only intensify the cycle of expansion and privation. Malthus thus devoted a great deal of his *Essay* to deriding the programs of socialist reformers—including Marquis de Condorcet and Robert Godwin—and to attacking England’s laws for support of the poor.<sup>131</sup> The more ambitious the reform, the greater the burst in fertility and the

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Godwin’s anarchistic vision of a perfect egalitarian society without government or social hierarchy”).

126. *See id.* at ix (“Malthus embarked on a life-long attempt to show that those who attributed human suffering to defective social and political institutions overlooked one of its perennial sources and were guilty of fundamental error.”).

127. *See* MALTHUS, *supra* note 118, at 21–22.

128. *Id.* at 21.

129. *Id.* at 22–23.

130. Malthus suggested that “mere knowledge of these truths” might “not operate sufficiently to induce any marked change in the prudential habits of the poor.” *Id.* at 330. He did, however, insist that his thesis did not deny the possibility of progress but only restricted its possible sources: “To the laws of property and marriage, and to the apparently narrow principle of self-love, which prompts each individual to exert himself in bettering his condition, we are indebted for . . . everything that distinguishes the civilized from the savage state.” *Id.* at 331.

131. *See id.* at 45–123.

immiseration that would follow.<sup>132</sup> Moreover, under conditions of want, an egalitarian allocation of property would give way to resurgent proletarianism as hungry laborers succumbed to hard bargains. Soon enough, the division between workers and owners would be restored, however visionary the plan of reform that had sought to replace it.<sup>133</sup> Thus Malthus drew from his demographic principles a lesson of political quietism:

That the principal and most permanent cause of poverty has little or no relation to forms of government, or the unequal division of property; and that, as the rich do not in reality possess the power of finding employment and maintenance for the poor, the poor cannot, in the nature of things, possess the right to demand them, are important truths flowing from the principle of population[.]<sup>134</sup>

The purpose of his argument was thus “less . . . to propose new plans of improving society, than to inculcate the necessity of resting contented with that mode of improvement which is dictated by the course of nature,” that of incremental individual growth in the virtue of self-restraint.<sup>135</sup>

### *B. The Vicissitudes of Human “Improvement”*

The marriage of demographic science and policy science that Malthus proposed became the core of first-generation biopolitics, although usually with more robust aims than Malthus’s, which were

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132. Malthus’s treatment of Godwin’s egalitarian program takes this argument in its strongest form, imagining a society of perfect equality in which demographic crisis and reversion to inequality promptly follow as a result of demographic laws. *See id.* at 56–67.

133. *See id.* at 65–67.

134. *Id.* at 329.

135. *Id.* at 327. Again, Malthus was hardly a pure reactionary. He expressed hope that “the representative system,” by improving the standing of poor members of the community, would give them both something to hope for and something to lose, thus inducing a greater measure of prudence. Nonetheless, his constant theme was skepticism of reform. He wrote:

But though the tendency of a free constitution and a good government to diminish poverty be certain; yet their effect in this way must necessarily be indirect and slow, and very different from the direct and immediate relief which the lower classes of people are too frequently in the habit of looking forward to as the consequence of a revolution. This habit of expecting too much, and the irritation occasioned by disappointment, continually give a wrong direction to their efforts in favour of liberty, and constantly tend to defeat the accomplishment of those gradual reforms in government, and that slow melioration of the condition of the lower classes of society, which are really obtainable.

*Id.* at 253.

mainly proscriptive. Throughout the nineteenth century and into the twentieth, the premises of biopolitics remained that (1) individual reproductive decisions had a substantial effect on the national interest and (2) policy decisions could legitimately take account of this interest in seeking to influence or dictate reproductive patterns.

This stage of biopolitics carried an obsession with “improving” human stock that laid the groundwork for the poisonous eugenics movement of the twentieth century. As early as the opening decades of the nineteenth century, English reformers concerned with ameliorating the condition of the industrial working class joined Malthus’s belief that overpopulation caused poverty to a non-Malthusian confidence that scientific progress could induce rapid improvements in well-being.<sup>136</sup> These reformers broke with Malthus’s identification of birth control as “vice,” taking it instead as a critical instrument of progress.<sup>137</sup> In the following decades, American utopians, such as those in New York’s Oneida community, attempted new modes of sexual regulation, including “male continence” (which depended on refraining from ejaculation, and would certainly have struck Malthus as “vice”) and “stirpiculture,” an Oneida eugenic practice aimed at improving the race by selective breeding and innovative childrearing.<sup>138</sup> Like many utopian gestures in that period of American history, those practices only made explicit aspirations that were widespread in less articulate forms as Americans experimented with new modes of autonomy in a world of increasing choice. For instance, without any change in reproductive technologies, the fertility rate dropped by one child per white woman between 1830 and 1850, twice the decline of the previous thirty years.<sup>139</sup>

Later in the century, biopolitics became linked to a statist utopian program that anticipated full-blown racist eugenics. Operating without a well-founded genetic account of inheritance, reformers connected the qualities of children with the state of mind

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136. See LINDA GORDON, *THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA* 39–44 (2002) (distinguishing between Malthus’s pessimism and the reformism of some who took their cue from him).

137. See *id.*

138. See *id.* at 44–52.

139. See ROBERT H. WIEBE, *THE OPENING OF AMERICAN SOCIETY* 163–64 (1984) (attributing these developments to a new interest in control over one’s own body as part a general flourishing of democratic attitudes and practices).

of the parents at conception, and, thus, argued for loosening or abolishing marriage laws to produce children born of love, not duty, who would accordingly display superior moral qualities.<sup>140</sup> Other radicals of the post-Civil War period argued that increasing equality for women would “improve the race” along all dimensions, as women with power over their reproductive choices would (1) have fewer children to avoid the risk to health and life of childbearing, (2) choose fathers with an eye to the genetic patrimony of their children, and (3) conceive and bear children in a state of mind that would produce good qualities in offspring.<sup>141</sup>

At the end of the nineteenth century and beginning of the twentieth, biopolitics turned toward the anti-immigrant and white-supremacist eugenics that persists in infamy.<sup>142</sup> Demographers warned that falling birth rates among native-born (and especially educated) white Americans, coupled with the high fertility of immigrant groups, could result in the complete replacement of the first population by the second.<sup>143</sup> Sounding anti-feminist (as well as pro-natalist) themes from pre-Revolutionary France and even Augustan Rome, the enemies of “race suicide” assailed educated and wealthy women, whom statistics showed to be slow breeders, and warned that women’s participation in the workforce detracted from their roles as wives and mothers.<sup>144</sup> President Theodore Roosevelt in 1905 attacked women who avoided having children as “criminal against the race . . . the object of contemptuous abhorrence by healthy people.”<sup>145</sup> Across the Atlantic, the same anti-feminist and anti-decadence themes sounded in the Germany of World War I, where the importance of healthy bodies as a national resource came to the fore in the long slaughter of trench warfare.<sup>146</sup> Much the same

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140. See GORDON, *supra* note 136, at 73–77.

141. See *id.* at 80–85. Although Gordon presents this species of optimism as quaint, I believe it has some value when stripped of pseudo-scientific pretensions. In fact, my argument in the latter portions of this article runs along the same lines.

142. See *id.* at 86–104.

143. See *id.* at 88 (discussing this warning, issued by demographer-sociologist Robert Hunter).

144. See *id.* at 86–89.

145. *Id.* at 86. (quoting THEODORE ROOSEVELT, PRESIDENTIAL ADDRESSES AND STATE PAPERS (1910)).

146. See Elisabeth Domansky, *The Transformation of State and Society in World War I Germany*, in LANDSCAPING THE HUMAN GARDEN: TWENTIETH-CENTURY POPULATION

response followed World War I in France, where in 1920 the Chamber of Deputies overwhelmingly passed an anti-contraceptive measure, an emblem of both the “almost universal support” for pronatalist values and “the new willingness of the French state to legislate on its behalf.”<sup>147</sup>

However pernicious were the eugenicist programs that preceded World War II, the slide of scientific and pseudo-scientific demographic policy into genocide marks a horrific rupture in history and conscience which needs no rehearsal here. The aggressively pronatalist nationalism of Nazi policy was part and parcel of the eliminationist hatred toward “non-Germans” and “non-Aryans,” particularly Jews. As the West struggled to absorb the crimes of the world’s most literate and scientifically advanced country, talk of “race suicide,” of improving the national stock, and of the duty to produce for the nation all took on an aspect of the criminal, torrid fascist fantasy of ethnic sameness, of a nation without strangers. In retrospect, there was horror hidden (or not so hidden) in the pragmatic defenses of German sterilization policy in the American eugenicist, *Eugenical News*; the matter-of-fact transmission of German eugenicist claims about Jewish rates of inherited disorders in the *Journal of American Medicine*;<sup>148</sup> and Justice Oliver Wendell Holmes’s pronouncement in *Buck v. Bell* that “[t]hree generations of imbeciles are enough.”<sup>149</sup> After such knowledge, what forgiveness? There was little for the idea that the physical health of the national community, conceived in racial terms or in the imagery of fertility and virility, could be anything other than a marker along the way to totalitarianism.

### *C. Second-Generation Biopolitics: The Turn to Autonomy*

The end of World War II ushered in a set of changes that moved biopolitics decisively away from the conception of persons as state

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MANAGEMENT IN A COMPARATIVE FRAMEWORK 46–66 (Amir Weiner ed., 2003) [hereinafter LANDSCAPING THE HUMAN GARDEN].

147. Mary Louise Roberts, *The Dead and the Unborn: French Pronatalism and the Abortion Law of 1920*, in LANDSCAPING THE HUMAN GARDEN, *supra* note 146, at 91–92.

148. See EDWIN BLACK, WAR AGAINST THE WEAK: EUGENICS AND AMERICA’S CAMPAIGN TO CREATE A MASTER RACE 297–301 (2003). I have avoided drawing on the arguments of this polemical book, but it contains considerable archival research on the eugenicist and other medical literature of the period shortly before the Holocaust.

149. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

resources and instead made reproductive choice a basic dimension of a new conception of autonomy—one based in keeping the state out of decisions about intimate relations. One overwhelming negative motive drove this change: horror at what eugenic politics had wrought in Nazi Germany. The change also had several affirmative sources, which developed partly in response to eugenic totalitarianism and genocide. One was the rise of international human-rights culture, with its universalist commitment to securing individuals against state abuses.<sup>150</sup> Another was the women's movement, which brought trans-Atlantic and eventually global demands for women's equal social, economic, and political participation, and whose leaders and members were almost uniformly committed to reproductive autonomy.<sup>151</sup> A third, specific to the United States, was the turn of the Constitutional jurisprudence of personal autonomy from the *Lochner*-era concern with rights of property and contract in a free-labor economy to the post-New Deal emphasis on securing individual conscience and life-path, including choices about childbearing and intimate relations.<sup>152</sup> A final and

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150. See Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, art. 10, U.N. Doc. A/Res/34/180 (Dec. 18, 1979) (effective Sept. 3, 1981) (committing signatories to provide “[a]ccess to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning”); *id.* at art. 12 (“States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”).

151. See GORDON, *supra* note 136, at 242–78 (discussing the interaction of the women's movement and abortion law and politics in the United States between the late 1930s and the late 1970s); Dorothy McBride Stetson, *Introduction: Abortion, Women's Movements, and Democratic Politics*, in ABORTION POLITICS, WOMEN'S MOVEMENTS, AND THE DEMOCRATIC STATE: A COMPARATIVE STUDY OF STATE FEMINISM 1, 1–16 (Dorothy McBride Stetson ed., 2001) (discussing the relationship between women's movements and abortion law in Austria, Belgium, the Netherlands, France, Germany, Great Britain, the United States, Spain, and Italy).

152. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 150–62 (1991) (describing *Grissold* and its progeny as interpretively transformed applications of the deep-seated constitutional principle of protecting essential interests against state interference). For a flavor of the theories of autonomy that have sprung up around the jurisprudence of abortion, see Reva Siegel, *Concurring*, in *WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 86, at 63 (arguing that “criminal abortion statutes . . . coerce pregnant women to perform the work of motherhood” and cannot survive the principles of equal citizenship embodied in the Fourteenth and Nineteenth Amendments to the Constitution), and Jed Rubenfeld, *Concurring in the Judgment Except As to Doe*, in *WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 86, at 109 (denying that “the law [can] force women to bear children against their will” and finding in constitutional autonomy jurisprudence a repudiation of the long history in

critically important factor, which produced a massive increase in reproductive choice even where autonomy-based principles of sexual equality were weak or nearly absent, was the advent and diffusion of inexpensive and effective contraceptive technology, which greatly increased the degree of choice in conception even independent of legal abortion rights; similar developments in abortion technology increased the real capacity of women to control childbearing even where abortion remained illegal, and considerably increased the efficacy of the right to abortion where it was protected.<sup>153</sup>

The implicit empirical supposition of the era of reproductive autonomy is that individual reproductive choices do not produce aggregate results in which the state has a legitimate interest sufficient to justify coercive reproductive policy. Justice Jackson's famous observation that the Constitution is not a suicide pact<sup>154</sup> implies an empirical judgment about the operation of fundamental rights: that in the vast majority of circumstances, individual autonomy will be compatible with the political governance, economic operation, military security, and intergenerational reproduction of the polity.<sup>155</sup> The prominence of reproductive autonomy in second-generation biopolitics, similarly, supposes that reproductive autonomy is not a demographic suicide pact.<sup>156</sup> The two trends that this article has explored—population decline and sex disproportion—present a basic

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which "societies have found ways to keep women from deciding freely whether or when they will bear children").

153. See Susheela Singh et al., *Abortion: A Worldwide Overview, in THE SOCIOCULTURAL AND POLITICAL ASPECTS OF ABORTION: GLOBAL PERSPECTIVES* 15–49 (Alaka Malwade Basu ed., 2003) (surveying incidence and safety levels of abortion worldwide).

154. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949).

155. For a discussion of how changing facts may alter the balance among competing principles and pare back the domain of autonomy, see MICHAEL IGNATIEFF, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* (2004) (arguing that many features of everyday freedom suppose the good faith of others, which a prevalent terrorist threat undermines).

156. Neo-Malthusian arguments that population growth was out of control persisted throughout the period of second-generation biopolitics. Although those who were alarmed by population growth argued for a state interest in the aggregate results of reproductive decisions, their conclusions tended to support the agenda of reproductive autonomy inasmuch as they sought to promote family planning measures. Some, of course, crossed the line into support for China-style controls on family size, which set them athwart the spirit of second-generation biopolitics. For a sample of both aspects of this position, see EHRLICH & EHRLICH, *supra* note 17, at 202–19 (arguing that education and economic opportunity are the best long-term tools for reducing population growth, but also evincing considerable sympathy for China's one-child policy).

challenge to the coherence and viability of second-generation biopolitics: the possibility that individual reproductive decisions can produce aggregate results with serious consequences for the well-being of the entire polity.

Having laid out the historical background to today's biopolitics, I now turn to the first of two discussions of partial but promising solutions. In the next Part, I argue that novel financial arrangements can make possible intergenerational burden-sharing on the international level to make up some of the demographic asymmetries produced by declining fertility within countries while avoiding the political hazards of achieving the same benefits through immigration. This approach may provide some help in threading the needle I described earlier in Part III.B: the unhappy conjunction of two crises in the European and Japanese ideas of solidarity; the first, a financial crisis in the welfare state, and the second, a change in the ethnic homogeneity that social solidarity has long presupposed.

Before starting this discussion, I should note that I do not admire ethnic homogeneity as a basis of national identity—quite the contrary. I propose a way to save parts of the European and Japanese models of social solidarity because the alternative may be worse, and because I believe solidarity is a value worth carrying forward into a more heterogeneous world. Changing everything at once brings risks better avoided. One of the major aims of public policy should be to affect the direction and sequence of sweeping changes to preserve the good that they endanger while taking advantage of the good potential that they bring. My proposal in the next Part is in that spirit.

#### V. INTERGENERATIONAL AND INTERNATIONAL BURDEN-SHARING: A MODEL FOR BIOPOLITICAL PUBLIC POLICY

An effective approach to the problems of today's biopolitics requires engagement on several fronts: in the "core" biopolitics areas of reproduction and childrearing, and in the closely related fiscal and political crises that new demographic developments portend. While it would be stretching the concept of biopolitics too far to sweep in all public policy that responds to demographic crises, it is appropriate to count as biopolitics any policy that has two features. First, it is intended as a response to the problems generated by reproduction, childbearing, and other core issues in the governance of the human body. Second, in its design, biopolitical public policy acknowledges

and seeks to take advantage of realities such as declining fertility and skewed sex ratios, directly engaging those problems in an attempt to extract opportunities from them. In this Part, I describe an approach to transnational fiscal policy that provides a model for biopolitical public policy in general. This model describes an imagined contract for international and intergenerational burden-sharing. It begins in biopolitical reality: plummeting fertility rates in rich countries produce a world where certain countries have very high dependency ratios, while others, including much of Asia and Latin America, now have proportionately large working-age populations. Moreover, slow-growing and falling populations in rich countries and still fast-growing populations in poorer countries intensify another major difference between regions of the world: some, such as Europe, are rich in capital and increasingly poor in labor, while others, such as India, are rich in labor power—that is, in human bodies—but still hungry for capital.

A public policy for a new set of biopolitical problems should ask whether there is a way to take advantage of these international asymmetries to mitigate the fiscal effects of demographic change. As noted earlier, the traditional way to do this is for regions with high dependency ratios and capital-labor ratios to permit immigration to swell their adult workforce.<sup>157</sup> Yet massively increased immigration is probably politically unviable in most European polities and xenophobic Japan. In both hemispheres, hostility toward foreigners and skepticism about the possibility of integrating newcomers politically and culturally have produced calls for new immigration restrictions, the opposite of what fiscal solvency would require.<sup>158</sup> While there have also been calls for opening international labor markets, they have come mostly from commentators on the far left and have had little traction among mainstream students of international relations, let alone politicians and voters.<sup>159</sup>

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157. See *supra* discussion and notes in Part III.B.

158. See *supra* discussion and notes in Part III.B. For a discussion of Japanese xenophobia, see Norimitsu Onishi, *Ugly Images of Asian Rivals Become Best Sellers in Japan*, N.Y. TIMES, Nov. 11, 2005, at A1 (describing popularity of racist, xenophobic graphic novels); Norimitsu Onishi, *Japanese Find a Forum To Vent Most Secret Feelings*, N.Y. TIMES, May 9, 2004, at A1 (describing popularity of a xenophobic Japanese internet bulletin board).

159. See, e.g., MICHAEL HARDT & ANTONI NEGRI, *EMPIRE* 396–400 (2000) (calling for open migration). For a discussion of paucity of attention to open labor markets even among those who strongly advocate open markets in capital and goods, see David Singh Grewal, *Is Globalization Working?*, 20.2 ETHICS & INT'L AFF. 247–59 (2006) (reviewing MARTIN

A novel form of fiscal policy offers a chance to achieve some of the benefits of labor migration without absorbing its political cost. This is just the sort of innovative approach that a biopolitical public policy requires.<sup>160</sup> The model, proposed by Yale economist Robert Shiller, rests on the new technological viability of complex contracts for the sharing of risk and benefit across large populations over time.<sup>161</sup> Shiller proposes that the capacity to gather and analyze unprecedented amounts of data lays the technological groundwork for what he calls “macro-markets”: index funds that would make possible investment in entire economic sectors or even national economies. He envisions, for instance, an agreement between nations to share portions of their GDP to compensate for performance above or below a specified baseline of expectation, making possible some hedging against national-level economic

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WOLF, WHY GLOBALIZATION WORKS (2005) and JAGDISH BHAGWATI, IN DEFENSE OF GLOBALIZATION (2004)).

160. As I note, this proposal is not original to me, although I believe its application to this problem is original. I lack the training to defend it in full detail, either theoretical or institutional—i.e., I have neither an economics Ph.D. nor experience as a financial analyst or risk broker. Moreover, this proposal is a different sort of animal from the material on substantive freedom that I treat in the next Part and which makes up the bulk of my proposals to address the problems of third-generation biopolitics. My reasons for including this proposal nonetheless are that (1) it seems inevitable that a suite of policy responses will be necessary to mitigate the demographic and political problems I am tracing; every bit helps; (2) institutional experimentation may take flight on the wings of necessity, so that an idea that seemed far-fetched under ordinary circumstances would seem worth a try under exigent ones; and (3) it is a familiar role of the law professor to engage in disciplinary arbitrage, advancing certain ideas not by refining their formulation but by proposing to apply them in previously unfamiliar domains where they have something to offer.

161. See ROBERT J. SHILLER, THE NEW FINANCIAL ORDER: RISK IN THE 21ST CENTURY (2003). The general form of Shiller’s proposal concerns the implications of new data-gathering and information-management technologies for risk-pooling. See *id.* at 110–20. Pooling risk through private and social insurance is, of course, one of the great advances of modern economic life, enabling individuals to diffuse losses that would otherwise be financially devastating by replacing the risk of massive costs that one must bear alone with a probability-discounted periodic or lump-sum payment in the form of an insurance premium. Notoriously, however, insurance is dogged by moral hazard: the tendency of individuals who can externalize the costs of their actions to behave in riskier ways than they otherwise would, whether by driving recklessly or—where the insurance is income support—by accepting unemployment and collecting checks. Shiller proposes that collection and aggregation of data for the entire sector or region of the economy in which the insured participates, rather than the individual’s employment status or income, can enable an insurer to differentiate between losses that reflect sectoral changes beyond the individual’s control and others that are merely local to the individual. In a scheme of income support based on such data, payments would be based not on individual income, but on whether the average income of sector participants had fallen below a specified baseline.

downturns.<sup>162</sup> These would not be charitable arrangements, but self-interested contracts aimed at blunting the edge of bad luck. One can imagine, for instance, the benefits to regional stability of a contract that would have given Argentina's and Indonesia's governments a share of China's booming national income during the disastrous financial contractions those countries experienced at the turn of the millennium. One can imagine the appeal to all parties of entering into such an agreement *ex ante*, when none knew which would experience a short-term fiscal crisis and which a continuing expansion.<sup>163</sup>

This concept could form the core of a biopolitical public policy. Labor migration—the solution Europe, Japan, and Korea are likely to resist for political and cultural reasons—is an individual response to differences in wage rates (adjusted for cost of living, availability of employment, and so forth) across nations. These rates, in turn, reflect the ratio of labor to capital in each economy, with high-capital countries paying more for relatively scarce labor and plentiful labor taking low wages in relatively low-capital countries.<sup>164</sup> In a borderless world where the costs of migration were zero, populations of workers would rearrange themselves—as capital has already begun to do—until a single, global average wage emerged for each occupation.<sup>165</sup> Liberalization of international labor markets would allow workers in low-wage countries to take advantage of high European wages with some dragging effect on European wage rates, but also with the more-than-offsetting benefit of increasing the population of workers paying into Germany's social pension system. The question is whether a complex international financial arrangement might take advantage of the same differential without moving bodies across borders. Could it, that is, take advantage of

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162. *See id.* at 175–85.

163. For information on the Indonesian financial crisis, see Steven Radelet & Jeffrey Sachs, *The Onset of the East Asian Financial Crisis*, in CURRENCY CRISIS 105 (Paul Krugman ed., 2000). For information on the growth of China, see Keith Bradsher, *China Reports Another Year of Strong (or Even Better) Growth*, N.Y. TIMES, Jan. 26, 2006, at C5 (reporting 9.9% growth in Chinese GDP in 2005, a figure in line with the last fifteen years of growth).

164. This is, of course, a simplified picture, particularly in its neglect of the human capital dimension of labor, which significantly affects the marginal economic value and, thus, the wage rate of workers.

165. This account leaves out the determinants of variation in wages within a single labor market, such as compensation for geographically undesirable locations. The exposition is deliberately simplified, but not to the point of distortion.

biopolitical facts to address biopolitical problems without creating the crisis in domestic politics that this article has warned might result from European and North Asian demographic contraction?

Here is the form such a contract might take. The governments of Germany, Japan, the European Union, or all of these commit for a period of two decades to subsidize public investments in education, public-health, and infrastructure in India and China. In return, the Indian and Chinese governments commit a share of their future GDPs, roughly from the decades of working life of the cohorts that benefit from the rich countries' payments, to the governments of the investor countries. These payments will subsidize the public pension plans of the investor countries when their "missing" workers (those not born under a sub-replacement birthrate) would otherwise have been contributing payroll taxes to the national fisc.

These contracts would take advantage of the same resource differentials that drive labor mobility. The developing countries are rich in population (particularly young population) relative to their supply of capital for health and education to raise the value of their rising cohorts. The rich countries, by contrast, are rich in capital but relatively poor in population, particularly the working population of the coming generation. Under the contract envisioned here, the rich countries' capital would help prepare the next working generation in labor-rich and capital-poor countries for productive careers. In return, workers in the latter countries would effectively become payers into the public pension systems of the capital-rich countries, replacing a portion of their diminishing working-age populations.

These expenditures would not be foreign aid, but rather in the nature of investments. The contracts would enable capital-rich, high-wage countries and labor-rich, low-wage countries to take advantage of asymmetric levels of development without incurring the political costs of massive migration. Such a contract could be written as a risk-sharing instrument at both ends so that the investor country's contributions would be contingent on its GDP during the years of its payment, or could be based, like many investments, on fixed payments by the investor in return for a share of a designated pool of wealth or income later.<sup>166</sup> The investment structure of the contract

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166. Of course, the poor countries' repayments might also be fixed, which would provide some assurance for rich-country pension plans but considerable disincentive to poor-country governments reluctant to shoulder the burden of carrying European or Japanese retirees, regardless of their financial capacity to do so.

would produce incentives, usually missing from foreign aid, for the investing countries to monitor and police performance in the expenditure of their investments.

Would returns from the investment be meaningful? Consider the returns from an index fund in the Chinese or Indian economy nowadays, when those two are doubling every seven and ten years, respectively.<sup>167</sup> The contract proposed here would be a way for a country, or its pension system in particular, to make an investment of this form. The terms of the contract, of course, would depend on the parties' forecasts for the performance of the developing economies, but that is nothing unusual in an investment contract.

The attractiveness of an investment in this form would also depend on how the investing companies construed their alternatives. Specifically, it would be reasonable to compare the costs and benefits of alternative approaches to the fiscal problems that come with fertility decline. Earlier sections of this article have laid out the high costs of doing nothing at all: a massive increase in the dependency ratio and a potentially crushing burden on public pension systems. This section opened with a discussion of the political costs of reducing the dependency ratio by increasing immigration levels: a rise in nativist sentiment and backlash against liberalized immigration. As I note below, what may be the most attractive solution—pro-natalist policies aimed at reconciling family and work—comes at a high fiscal cost and seems, from the experience of France and the Nordic countries, to cushion but not avert the effects of fertility decline. Therefore, absent some new strategy, reciprocal international investment would seem a fiscally attractive and politically viable way to approach the problem. Naturally, there is no reason that adopting one solution would exclude simultaneously pursuing another. The aim would be an optimal mix of strategies, measured both in present cost and in risk-discounted levels of expected benefit. At a minimum, the contract envisioned here would be a strong candidate for a place in that mix.

Would countries receiving payments in the early stages of the contract pay their obligations later? There is no easy way to repossess years of investment in health and education, and geriatric countries

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167. As noted at *supra* note 163, China's annual rate of growth has been around ten percent. India's annual growth rate has been in the neighborhood of seven percent. See Saritha Rai, *India: Growth, Still Strong, Slows*, N.Y. TIMES, July 1, 2005, at C4.

are not, other things equal, the most likely to go to war to collect their pension payments.<sup>168</sup> These concerns are not empty, but countries have a remarkable record of faithfully repaying debt, even when the obligations date back to now-repudiated regimes or the payments make up unconscionable shares of public expenditure.<sup>169</sup> History provides as much reassurance as could reasonably be asked that governments would honor the debts envisaged in these hypothetical contracts.

In this Part, I have argued that one partial solution to the problem of declining fertility lies in novel financial arrangements that can make possible intergenerational burden-sharing among nations. The solution does not concentrate directly on increasing fertility levels. Rather, it mitigates the effects of declining fertility levels in developed countries by taking advantage of international variation in dependency ratios across time. I have suggested that this partial solution is a model of biopolitical public policy, an approach to biopolitical problems that acknowledges and seeks novel ways to take advantage of the same biopolitical facts that produce those problems—in this case, internationally varying dependency ratios. In the next Part, I turn to a “core biopolitics” approach to both declining fertility and sex disproportion: promoting women’s substantive freedom in reproductive and childrearing decisions.

#### VI. WOMEN’S EMPOWERMENT, SEX RATIOS, AND FERTILITY: THE CORE OF BIOPOLITICS

Both declining fertility and sex disproportion are intimately linked to the level of “substantive freedom” that women enjoy. By substantive freedom, I mean not just what women are formally permitted to do, but what they are in fact able to do.<sup>170</sup> For instance,

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168. Although superficially flip, the point that aging countries are relatively unlikely to project force in international relations is a serious contention of analysts concerned with fertility decline. See LONGMAN, *supra* note 26, at 20–21.

169. See SHILLER, *supra* note 161, at 180 (pointing out that such obligations are generally honored even in exigent circumstances).

170. This distinction tracks the “substantive” definition of reproductive autonomy that I gave for purposes of this article. See *supra* note 5. As there, I do not mean to make any point about the desirability or importance of a focus on formal freedom or nominal legal permission to act in a certain way. Rather, I am simply interested in a more inclusive metric of freedom, which I find captures many phenomena that motivate this paper. There is, of course, a serious problem in measuring substantive freedom as a “greater” or “lesser” quantum; a problem that generally plagues any effort to measure human well-being in an objective or “cardinal” rather

while the absence of a censorship law might constitute formal freedom to read about feminism or family planning, only literacy, combined with access to books, pamphlets, or online pages, would count as substantive freedom to read. Similarly, while women might be formally allowed to enter the labor market, unequal education, a husband's threat to punish a wife for working, or the sexist attitudes of potential employers would all weigh against counting women as substantively free to work.<sup>171</sup> Because these distinctions may seem fairly abstract and their content will vary from context to context, I will now break down the argument by way of particular cases.

### *A. Women's Empowerment and Demographics*

#### *1. The contours of the problem*

The basic strategies for addressing sex disproportion are to ban sex selection, to appeal to culture by raising the status of women, and to appeal to economic interest by decoupling family income and retirement security from the sex of children. The obvious ways of pursuing each strategy turn out to be unsatisfactory because they are relatively ineffectual.<sup>172</sup>

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than a subjective or "ordinal" sense; a problem, that is, for any attempt to judge aggregate human welfare or flourishing other than by revealed preferences. For information on the intellectual origins and continuing relevance of this problem, see Robert Coote & Peter Rappoport, *Were the Ordinalists Wrong About Welfare Economics?*, 22 J. ECON. LIT. 507 (1984) (describing the rise of ordinalism as a Kuhnian paradigm shift that made some questions tractable by setting aside others, rather than a simple advance in methodological insight). I do not purport to solve that problem here, but rather to concentrate on the implications of substantive increases in freedom in particular domains: literacy, workforce participation, and, in consequence of these, participation in the decision making of the household. In these specific domains, if not in social aggregates at large, it is possible to say (1) what the object of inquiry is, i.e., what we are talking about, and (2) whether we are looking at more or less of it in a particular context. It may be that an attention to substantive, objective, or cardinal measures of well-being or capability requires this kind of move to the particular, but I leave that question to another time.

171. Sen has developed this position in many essays. See AMARTYA SEN, RATIONALITY AND FREEDOM 501, 583, 659 (2002) (including the sections *Markets and Freedoms, Opportunities and Freedoms*, and *Freedom and the Evaluation of Opportunity*); SEN, *supra* note 66; AMARTYA SEN, RESOURCES, VALUES, AND DEVELOPMENT 509 (1997) (including the section *Goods and People*).

172. At this point, I suspect that morally motivated opponents of abortion will respond that I have tipped my ideological hand by ignoring the straightforward alternative of banning all or most abortions. It is my strong impression that, as a purely practical matter, the arguments advanced here about the ineffectiveness of bans of particular medical technologies

Begin with prohibition: banning (in order of increasing generality) sex-selective abortion, pre-natal sex-identification, or technology that enables that identification (regardless of its other uses). Of course, outright bans on technology such as ultrasound and amniocentesis bring their own costs in forgone medical capacity. Moreover, the effectiveness of prohibition is uncertain at best. Where the technology is available and parents want to use it, the procedures they seek seem to take place. Maharashtra, the state where Bombay lies, banned abortions that follow sex-determination tests in 1988.<sup>173</sup> The juvenile sex ratio there in 2001, however, stood at 109:100, more lopsided than in the majority of Indian states and more pronounced than in Maharashtra in 1991.<sup>174</sup> The use of ultrasound technology for prenatal sex determination is illegal throughout China, which has not yet driven down the sex disproportion.<sup>175</sup> There is, then, reason to doubt that bans on use of medical procedures for sex-selection purposes are effective, at least under present cultural and administrative conditions.

Changing economic incentives seems to make a difference, but at a high price. Experiments in China's Zhejiang province suggest that instituting old-age pensions can indeed reduce the sex disproportion at birth.<sup>176</sup> The main difficulty is that, thanks to the one-child policy, China's fertility rate now stands at 1.70 children per woman, compared to 4.86 in 1970–75.<sup>177</sup> The speed of that demographic contraction significantly outpaces even those of Europe and Japan, which thirty to forty years ago had much lower fertility rates than China's. China's dependency ratio will thus skyrocket in the coming decades, regardless of future trends in birthrates. Moreover, for all its extraordinary economic growth, China remains on the whole a poor country; one plagued by both administrative difficulty in tax collection and serious, long-term uncertainty as to its political

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apply a fortiori to bans on *procedures* that may be performed by a variety of technologies. Although a commitment to both formal and substantive reproductive autonomy is among the normative priors of this article, in this instance I think purely practical considerations are enough to settle the question.

173. See HUDSON & DEN BOER, *supra* note 4, at 111.

174. See *id.* at 105.

175. See *id.* at 246–47.

176. See *id.* at 245–46 (citing *6.3 Brides for Seven Brothers*, *ECONOMIST*, Dec. 19, 1998, at 58).

177. See WORLD POPULATION PROSPECTS, *supra* note 13, at 67.

stability.<sup>178</sup> If rich countries face serious questions about sustaining public pensions through demographic contraction, the problem holds for China a fortiori. Besides the raw fiscal difficulty of making a Chinese pension program work, political uncertainty would reduce the effect of announced pension benefits on expectant parents. Discounting for the possibility of state failure or crisis leading to a change in the policy, many would still seek to have sons to insure against the disappearance of promised benefits.

Raising the status of women is both attractive in concept and highly uncertain in practice. The power of state policies to induce cultural change of this sort is uncertain. China's state education system is sex-neutral and has produced near-universal basic education for women but has not averted the present sex disproportion.<sup>179</sup> Nor does economic development seem to address women's status automatically by, for instance, promoting egalitarian ideas. In India, the sex ratios for affluent, educated families are often worse than for poorer families.<sup>180</sup> Moreover, the low valuation of women feeds back into the shaping of economic reality: given lower priority than their brothers, pressed to marry, treated as subordinates by their husbands, and regarded as second-rate by employers, women will not in fact enjoy the same earning power as men, even when they attain the same level of education and are not formally barred from the workplace.

Nonetheless, the feedback between economics and culture runs in both directions, and women who manage to make good on new economic alternatives may be able to demand better treatment in their personal lives and incrementally change their cultural status.<sup>181</sup> The problem is to find the right sequence of changes to set in

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178. For a survey of these problems from a modestly polemical but informed perspective, see GORDON G. CHANG, *THE COMING COLLAPSE OF CHINA* (2001).

179. See HUDSON & DEN BOER, *supra* note 4, at 252.

180. See *id.*

181. In the notes accompanying the next section, I cite a variety of authors—many particularly interested in South Asia—who develop this argument. Within the legal academy, my proposal to understand how distinct but intersecting spheres of activity interact in producing or inhibiting substantive freedom owes most to Madhavi Sunder. See Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 561–62 (2001) (describing women's empowerment as achieved partly through complementary capacities to dissent or resist coercion in both the public and the private spheres); Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399 (2003) (describing the same).

motion a cycle of increasing equality for women. I address that problem in the next section.<sup>182</sup>

## 2. *Women's substantive freedom: The key to a cycle of reform*

As noted, sex ratios do not necessarily improve with general indicators of progress in well-being. Amartya Sen reports that “variables that relate to the *general* level of development and modernization *either* turn out to have no statistically significant effect, *or* suggest that modernization . . . can even *strengthen*, rather than weaken, the gender bias in child survival.”<sup>183</sup> Such general indicators of development as urbanization, male literacy, the availability of medical facilities, and the level of poverty either fail to mitigate the sex disproportion or intensify it.<sup>184</sup> Falling poverty rates, in particular, are sometimes associated with an increase in the sex disproportion.<sup>185</sup>

None of this is particularly counter-intuitive, given a family preference for sons over daughters. Wealth and medical resources increase power over reproduction. Male literacy means access to information about medical procedures, urbanization means proximity to sophisticated medical technology, the prevalence of

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182. For China, at least, lifting the one-child policy would seem a straightforward way to reduce the effect of preference for sons on the sex ratio of newborns. The limits of this measure, however, are evident in the results of an inadvertent natural experiment: Taiwan, which does not restrict the childbearing decisions of its citizens, has a male-female sex ratio of 104.3:100. *See* HUDSON & DEN BOER, *supra* note 4, at 62. While significantly better than the figure for mainland China, this number suggests that cultural valuation of sons and their superior earning power exercise independent influence on sex selection. Taiwan has a mixed public-private pension system, with mandatory contributions to private schemes, but considerable problems with compliance and little allowance for movement from firm to firm or sector to sector by workers in the private economy. Although new reforms promise a more effective system with fewer gaps, one cannot say that Taiwan avoids the Chinese economic incentive to have male children as a form of retirement insurance. Taiwan is thus at best a partial control, relative to China, for isolating the influence of the cultural preference for sons on sex-selective abortion. *See* Shean-Bii Chiu, Taiwan: Compulsory Occupational Pensions Still Dominate, Int'l Conference on Pensions in Asia 6-7 (Feb. 2004) (unpublished paper, on file with author) (discussing gaps and inequities in Taiwan's pension system); President Chen Shui-bian, President Chen's National Day Address (Oct. 10, 2005), *available at* <http://www.gio.gov.tw/taiwan-website/4-0a/20051010/2005101001.html> (discussing pension reform).

183. SEN, *supra* note 66, at 197.

184. *See id.*

185. *See id.* These figures refer to the sex ratio in the overall population and in the population surviving early childhood. I say more later about the implications for the sex ratio at birth.

medical facilities speaks for itself, and growing wealth brings the capacity to pay for procedures such as pre-natal sex-determination and abortion. Generally speaking, greater resources will mean greater capacity to bring about family desires, and millions of family-level decisions will register as systemic demographic effects.<sup>186</sup>

What is interesting is to disaggregate the family, asking whether the preference for sons is common to all members or enforced by husbands, and, if the latter, under what conditions women might enforce a contrary preference. On this point, there is provocative evidence regarding sex disparities in early-childhood survival. While general indicators of development do not mitigate this disparity, two other variables do reduce sex inequality in children's survival: women's literacy and women's labor force participation.<sup>187</sup> These are indicators of development, but they are also, specifically, indicators of the level at which *women* have participated in the benefits of development. These data suggest that as women gain practical capacity, they enforce a relatively sex-equitable use of family resources, with great benefits for the survival of female children.

In making sense of this phenomenon, it is helpful to follow Sen in treating families as sites of "cooperative conflict."<sup>188</sup> In this model, partly congruent and partly conflicting individual interests (including values and beliefs, which may of course include commitment to the family itself as a unit distinct from the sum of its parts) yield a "solution" for the family's use of resources. The solution includes both a set of priorities and a set of decision-making procedures for setting or balancing priorities.<sup>189</sup> A solution may be either relatively egalitarian or relatively inegalitarian, both in its acknowledgement of the preferences of different family members and in the role it gives

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186. See ALAKA MALDWADE BASU, *CULTURE, THE STATUS OF WOMEN, AND DEMOGRAPHIC BEHAVIOUR, ILLUSTRATED WITH THE CASE OF INDIA* 227 (1992) (arguing that the reason sex ratios in childhood survival sometimes worsen with increases in income is the corresponding increase in access to relatively high-quality medicine, which families with strong son preference will generally reserve for boys).

187. See *id.* at 160–81 (surveying and interpreting findings to this effect from India and elsewhere, including Latin America and sub-Saharan Africa).

188. See *id.* at 221. For a particularly helpful discussion and elaboration of Sen's model, see BINA AGARWAL, *A FIELD OF ONE'S OWN: GENDER AND LAND RIGHTS IN SOUTH ASIA* 53–81 (1994).

189. See AGARWAL, *supra* note 188.

each family member in setting priorities.<sup>190</sup> Applying this model to the issue of childhood survival suggests that, while a generic increase in the resources available to the family does little to make the solution more sex-egalitarian, an increase in women's capacities enables them to enforce egalitarian solutions. How far literacy and access to work increase the standing, self-confidence, or other factors of "voice" within the family, and, alternatively, how far they change negotiating positions by creating an "exit" option into an alternative life is unclear, but some combination of effects is intuitive.<sup>191</sup> What seems clear, however, is that when they can, women tend to enforce a use of family resources that supports the survival of girls as well as boys.

It does not follow from this that women's empowerment also diminishes sex-selective abortion. That would depend foremost on why women insist on sex-equitable solutions within the family: for

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190. *See id.* As Agarwal points out, the variables that figure here are not just control of resources, but also cultural ideas of which issues are at stake in negotiation and which are so clearly settled as to be off-limits to bargaining. *See id.* at 73–75. Another important variable is which conditions women perceive as "problems" (whether or not open to negotiation) bearing on their well-being, or that of their children, and which are accepted (preceding even the question of negotiability) as untroubling. Sen and Nussbaum have emphasized the importance of an idea of false consciousness in this connection, suggesting that experience of empowerment reveals interests previously obscured from the interest-holder. *See* SEN, RATIONALITY AND FREEDOM, *supra* note 171, at 65, 90–92; Martha Nussbaum, *Charles Taylor: Explanation and Practical Reason*, in *THE QUALITY OF LIFE* 232–41 (Martha Nussbaum & Amartya Sen eds., 1993). Others have argued that the poor are always in some measure aware of their disadvantage and simply require practical opportunities, not enhanced insight, to challenge it. *See, e.g.*, JAMES C. SCOTT, *WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE* (1985). Although I tend to follow Sen and Nussbaum in believing that exposure to new experiences and ideas can revise one's estimation of one's interests—and that to believe the contrary would be more condescending than even a crude "false consciousness" view—the present argument does not require a judgment on this point. Increased capacity, or substantive freedom, is open to interpretation as either a source of insight into one's interests or an instrument for pursuing and enforcing interests already recognized. For reasons to believe that self-understanding frames any negotiating process, see CHARLES TAYLOR, *PHILOSOPHY AND THE HUMAN SCIENCE: PHILOSOPHICAL PAPERS* 34–37 (1985) (arguing for the place of self-understanding in constituting activity such as politics or negotiation).

191. The reference, of course, is to ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSE TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970). For his part, Sen notes "considerable evidence that when women can and do earn income outside the household, this tends to enhance the relative position of women in the distributions within the household." SEN, *supra* note 66, at 194. He also suggests that literacy and education make women aware of alternatives and give them some confidence in insisting on the legitimacy of their desires. *Id.* at 198–99. The phenomenology of these suggestions is of mixed voice and exit, which seems right.

reasons of sex egalitarianism or out of love for existing children. Mitigation of sex disparities in childhood survival rates might reflect indiscriminate love for children already born, meaning mothers would stick up for their living daughters but not refuse sex-selective abortions. Alternatively, sex-neutral maternal concern might extend to potential children. As a third possibility, empowered mothers might be resisting the valuation of male over female lives in general. If either the second or third alternative explained a significant share of the improvement of girls' survival rates where women are empowered, then women's increased capacities should also translate into successful resistance to sex-selective abortion, and thus to improved sex ratios at birth.

Moreover, it would be artificial to imagine that the motives women bring to bear on reproductive decisions are constant, changing only as women's capacity to effect their aims waxes and wanes. In fact, economic power and cultural status are intuitively connected here. An increase in women's capacity will bring new experiences that, in turn, all but ensure new priorities for both women and men.<sup>192</sup> Where women work outside the home and can read, the result is a different set of everyday interactions, expectations, and experiences of capacity, all redounding to women's sense of agency in general and to the goals and priorities they set.<sup>193</sup>

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192. See *supra* note 190 and accompanying text (discussing Sen, Nussbaum, and Taylor on this issue). This is a kind of moral-psychological corollary of the growing recognition that women's agency is a critical factor in economic and social development; not merely in the passive sense that it makes women bearers of greater quanta of well-being, but in the active sense that women's empowerment contributes to development processes that affect both women and men. This thesis is the thrust of the discussion in SEN, *supra* note 66, at 189–203. For a recent summation of arguments and data supporting this view, see Isobel Coleman, *The Payoff from Women's Rights*, FOREIGN AFF., May–June 2004, at 80, 83 (“Educated women have fewer children; provide better nutrition, health, and education to their families; experience significantly lower child mortality; and generate more income than women with little or no schooling. Investing to educate them thus creates a virtuous cycle for their community.”).

193. See AGARWAL, *supra* note 188, at 421–66 (describing in several case-studies, as well as theoretically, how struggles over resources are also “struggles over meanings,” that is, over what women's and men's interests are and how they should count). “Struggles” should be underscored: women's increasing control of resources has often resulted in both violence and a recrudescence of male-supremacist politics. See *id.* at 271–76 (describing such reactions). The view that changes in economic structure and opportunity and changes in individual values go hand in hand appears to find confirmation also in the decline in native-born white American fertility rates around the beginning of the nineteenth century, which prompted pro-natalist warnings of “race suicide.” Summarizing historians' views of that period, Linda Gordon concludes, “The economic reorganization that made smaller families more economical also

*3. Fertility and women's substantive freedom*

In this sub-part, I return from sex ratios to the other half of my biopolitical discussion: the analytically distinct and geographically separate problem of sub-replacement fertility. Thus, we are once again primarily discussing the reproductive decisions of women and families in the richest developed regions. The common thread of the argument is that increases in women's substantive freedom in each context should be a powerful element in any strategy to address the biopolitical crisis of that setting, whether it is missing women or missing heirs. Of course, the particular elements of substantive freedom at issue will differ from place to place.

In wealthy, broadly liberal settings such as Europe (and to a lesser degree Japan and South Korea), the basic substantive freedoms that count so much for women's well-being in poor countries are secure. The relevant question is not whether women are substantively free (i.e., are in fact able) to enter the workforce and to influence family decisions about resources and reproduction. The relevant question instead involves the structure of the tradeoffs women and families confront in making the decisions that shape a personal life and a career: whether to enter a reproductive partnership, whether to have a first child, whether to have a second or third child, whether to enter and remain in a career, whether to leave the workforce. While there may be neither formal nor significant practical barriers to a woman's making any one of the decisions just listed, the opportunity cost of each may be such that certain combinations of choices are effectively impossible. If rich and poor alike are free to sleep under the bridges of Paris, so, too, are women free to leap those bridges in a single bound, with a child on one hip and a briefcase on the other. How many women will be able to do so is another question.

It is, moreover, a question that public policy can influence. As noted, Philip Longman has argued that the cost to a middle-class American family of raising a child through age seventeen is about one million dollars, the lion's share in forgone wages by one parent.<sup>194</sup> Longman's contention is that American families would

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made upper- and middle-class women eager for broader horizons, which in turn made them desire smaller families." GORDON, *supra* note 136, at 100-01.

194. See LONGMAN, *supra* note 26, at 72-75 (summarizing his argument and cost estimates).

prefer to have more children than they in fact do, but they are deterred by the cost of childrearing.<sup>195</sup> Thirty-eight percent of French parents report that three children is the ideal number for a family, but fewer than 15 percent have that number.<sup>196</sup> As noted, German poll results suggest a preference for family size below the replacement rate,<sup>197</sup> but this preference may in part reflect recognition of the costs of childrearing.<sup>198</sup> These figures suggest that public policy increases the substantive freedom of women and families when it reduces the opportunity costs of bearing and rearing children in terms of workplace participation, and vice-versa.<sup>199</sup> An increase in substantive freedom along these dimensions, all things equal, will mean increasing the number of children families have by reducing the marginal cost of each. Put differently, the goal would be reconciliation of two kinds of choices: the choice to bear children and the choice to work. Reconciliation has been the goal of French family-support policy since 1994, and it has come along with an increase in the country's fertility rate in recent years, after three decades of decline.<sup>200</sup> Moreover, France's fertility rate has passed 1.9, making it the highest in the European Union (tied with Ireland) and significantly higher than those just below it, Luxembourg (1.78) and Finland (1.73).<sup>201</sup> The country's fertility rate is high despite the fact that France has one of the EU's highest rates of two-earner families, with 70 percent of those including two full-time workers.<sup>202</sup> Eighty-one percent of women with one child and 69 percent of women with two children are in the workforce.<sup>203</sup> These figures suggest that France's goal of reconciliation has found some success.

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195. *See id.* at 81–85 (reporting that United States women and families express a wish for more children than they in fact have).

196. *See* Hugh Schofield, *Joy for France As Population Goes Boom*, SUNDAY HERALD, Sept. 25, 2005, available at <http://www.sundayherald.com/print51878>.

197. *See supra* note 31 and accompanying text.

198. *See supra* note 28 and accompanying text.

199. *See supra* notes 26–27 and accompanying text.

200. *See* Marie-Thérèse Letablier, *Fertility and Family Policies in France*, 1 J. POPULATION & SOC. SECURITY 245 (2003), available at [http://www.ipss.go.jp/webj-ad/WebJournal.files/population/2003\\_6/9.Letablier.pdf](http://www.ipss.go.jp/webj-ad/WebJournal.files/population/2003_6/9.Letablier.pdf).

201. *See id.* The most recent report is of a rate approaching 1.92. *See* Schofield, *supra* note 196.

202. *See* Letablier, *supra* note 200, at 256.

203. *See id.* at 255.

Several kinds of transfers, targeted subsidies, and state-provided services work to reduce the cost of French children to their parents. Direct per-child payments (beginning once a family has two children) set a baseline, with both payments and tax breaks rising further for families with three or more children.<sup>204</sup> Paid maternity and paternity leave policies rise to a three-year income entitlement for mothers (and occasionally fathers) of a third child who opt to leave work for that period.<sup>205</sup> Most significant for the goal of reconciliation is an extensive scheme of child care, including state-financed nurseries for children under three, schools beginning at age three, and tax-breaks and subsidies for in-home child-care.<sup>206</sup> The effect is to reduce a panoply of childrearing costs: the danger of losing one's job, the direct cost of care, and the income loss from forgone employment. The ultimate goal is to soften the often stark choice between bearing and raising children and remaining employed.

It is instructive to contrast the French experience with those of other European countries. Indeed, Europe presents a laboratory of experimentation with fertility policy. Spain, which since the end of Franco's fascist regime has pursued a passive policy that relies on families to make reproductive decisions and to care for their own children, has gone from having Europe's second-highest fertility rate in 1971 to one of its lowest today.<sup>207</sup> Germany provides relatively generous welfare-state support, but, until recently, it has offered little in the way of subsidized care for the pre-school children of working mothers, and it gives significantly shorter maternity leaves (at fourteen weeks) than France.<sup>208</sup> The country's overall family-support policy, while it consumes 2.7 percent of GDP, consists of pocketbook transfers that create no meaningful infrastructure to

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204. See *id.* at 246–50; Schofield, *supra* note 196.

205. See Letablier, *supra* note 200, at 250; Schofield, *supra* note 196.

206. See Letablier, *supra* note 200, at 250–57; Schofield, *supra* note 196.

207. See GRANT, *supra* note 9, at 137. As with all such comparisons in Europe, there are confounding variables. Spain has experienced persistent unemployment among young people, which has probably interacted with a relatively new sexual libertarianism to delay childbearing or to inhibit it for reasons partly independent of state policy. See also Surkyn & Lesthaeghe, *supra* note 6, at 47 (noting the timing of Spain's adoption of post-traditional values); David C. Unger, *An Immigration Experiment Worth Watching in Spain*, N.Y. TIMES, Mar. 20, 2005, at A12 (noting a persistent Spanish unemployment rate around ten percent).

208. See GRANT, *supra* note 9, at 95 (noting additionally that only five percent of pre-school children of working mothers received subsidized child care).

reduce the burdens of child care and directly reconcile work and family.<sup>209</sup> German fertility rates remain much lower than France's, as the high opportunity cost of childbearing presses the average age of mothers at first birth to nearly 30.<sup>210</sup>

The Scandinavian countries, particularly Sweden and Norway, follow a family-support policy much nearer France's, emphasizing reconciliation of work and family. They enjoy commensurately higher fertility rates. Norway guarantees forty-two weeks of paid maternity leave, about three-fifths as much paid paternity leave, and an option of either tacking on a year's unpaid leave or accepting substantial, income-scaled subsidies for child care.<sup>211</sup> Sweden provides 390 days of paid leave, which parents can divide as they wish (except for sixty days set aside for the secondary care-giver, a gesture toward gender equity).<sup>212</sup> Public childcare, which in Scandinavia has always aimed at reconciling work and family on ground of gender equity, enables about two-thirds of Swedish mothers with young children to work outside the home.<sup>213</sup> A remarkable feature of Swedish demography is that fertility is "pro-cyclical," that is, positively related to women's earnings and employment levels, suggesting that Sweden's policies of reconciliation have substantially reduced the tradeoff between women's equal economic participation and childbearing.<sup>214</sup>

That such policies are costly hardly needs remarking. Crudely put, they are subsidies for the production of a valuable resource: replacements for the present generation of workers and taxpayers.

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209. See *Europe: Kinder, Gentler; Germany's Declining Population*, *ECONOMIST*, Dec. 6, 2003, at 39 (describing child-care facilities as "poor or non-existent" in the West German welfare state and noting that childrearing "has traditionally been considered a private not a public matter" in Germany).

210. See *id.*

211. Marit Ronsen, *Fertility and Public Policy – Evidence from Norway and Finland*, 10 *DEMOGRAPHIC RESEARCH* art. 6, 146–47 (2004). Ronsen's longitudinal study of Norway and Finland did not find expansion of public child care correlated with an increase in fertility, but, as Ronsen noted, this unexpected and counter-intuitive finding likely reflects the fact that child care emerged at a time of increasing female participation in the workforce, and thus interacted with a growing commitment to work and increased opportunity costs in child-bearing. *Id.* at 160. The relevant question is the difficult counter-factual of what would have happened had women entered the workforce in large numbers without the benefit of public child care—specifically, whether fertility might have fallen to something nearer German levels.

212. See GRANT, *supra* note 9, at 124.

213. See *id.* at 125.

214. See *id.* at 130.

Regarded as a subsidy they are open to plausible justification: parents absorb much of the cost—and all the employment-based opportunity cost—of their children, while reaping only a tiny and diffuse share of their children's later contribution to the economy.<sup>215</sup> The massive positive externalities of children are sufficient economic reason to encourage their production.

A complementary rationale is the increase in women's substantive freedom which reconciliation policies produce. This freedom is valuable, not just because it induces higher fertility rates, but also as a social goal in itself. In developing countries, increases in substantive freedom press fertility rates downward as women exercise newfound agency to resist pro-natal norms that have long been enforced by direct coercion or lack of meaningful alternatives.<sup>216</sup> In wealthy countries, however, the effect may be the opposite: with expanded sets of viable choices, women and families are particularly interested in reconciling several kinds of goods, such as career and childrearing. There, an increase in substantive freedom will mean an increase in fertility rates over present levels, which partly reflects the costly tradeoffs of choosing to have children. A society of greater substantive freedom to reconcile such complementary goals is a freer society.

As noted earlier, such policies may not increase fertility to the replacement rate in many rich societies. Estimates of the elasticity of parents' decision to bear children even in France suggest as much—although one must bear in mind that such indifference curves are artifacts of personality and culture, not natural kinds.<sup>217</sup> Replacement-level fertility, however, need not be the standard of success. Policies that can mitigate the effects of fertility decline while increasing substantive freedom are desirable in both respects, even if they cannot carry the whole weight of the task.

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215. See LONGMAN, *supra* note 26 (discussing Philip Longman's analysis of the cost, including opportunity cost, of raising a child).

216. For a discussion of the remarkable effect on fertility rates of the indicia of women's substantive freedom, particularly labor market participation and literacy, see SEN, *supra* note 66, at 198–99.

217. Researchers estimate the elasticity level of demand for children in France to be 0.2, suggesting that fiscally viable subsidies can press fertility upward, but not to replacement level. See Guy Laroque & Bernard Calanie, *Does Fertility Respond to Financial Incentives?*, <http://www.econ.yale.edu/seminars/apmicro/am05/salanie-051215.pdf>.

*B. Women's Empowerment and Democracy: A First Pass*

The falling fertility rates of rich countries and the rising sex disproportion of poor countries both conjure up alarming political associations. In Europe, particularly, perceptions of demographic decline are historically associated with reactionary and authoritarian politics. In India and China, as elsewhere, large populations of unmarried young men are ideal recruitment targets for ultra-nationalists and other extremist movements. In the last Part, I argued that increases in women's substantive freedoms can mitigate the two demographic crises, and thus also diminish their consequences. Here, I present tantalizing evidence that women's substantive freedoms may also have a direct effect on politics, tending to make extremism and authoritarianism less potent. If this is true, then women's empowerment is an apt response to the demographic crises on both the level of demography and the level of politics.

One of the most provocative forays into this issue is by political scientist M. Steven Fish.<sup>218</sup> Fish was drawn to the question of why predominantly Islamic countries are less democratic than others, even correcting for levels of economic development (widely acknowledged to correspond to democratic governance).<sup>219</sup> Dissatisfied with the claim that Islam is culturally hostile to democracy in some ill-specified way, Fish introduced a new independent variable: the subordination of women, as measured by women's literacy, sex ratios in the living population, and the percentage of high government posts occupied by women.<sup>220</sup>

The preceding discussion suggests that the first two are particularly apt indicators, as literacy affects women's substantive freedom in family and social life and sex ratios express women's agency or lack of it. Taking as a dependent variable the numerical assessment of democratic governance assigned each country in the world by the nongovernmental organization Freedom House, Fish found that each of his indicators of women's subordination significantly reduced the explanatory power of a country's

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218. See M. Steven Fish, *Islam and Authoritarianism*, 55 *WORLD POL.* 4 (2002).

219. See *id.* at 13–14 (stating that the link between Islam and authoritarianism “is too stark and robust to ignore, neglect, or dismiss”).

220. *Id.* at 24–28.

predominantly Islamic or non-Islamic population makeup.<sup>221</sup> Fish offered several provisional theoretical speculations about the causal story behind these findings. Perhaps male domination in family and social life sows authoritarian habits of arbitrary power in some, craven subordination in others, and diminishes the expectation that power in general should be answerable to either egalitarian principles or demands for reason-giving.<sup>222</sup> Perhaps the integration of women into a variety of social, economic, and political contexts induces different, less authoritarian behavior in the men of those contexts.<sup>223</sup> Perhaps, for whatever reasons, women tend to hold attitudes less conducive to authoritarianism than men, such as weaker tastes for domination and hierarchy or a preference for cooperative or consensual problem-solving.<sup>224</sup>

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221. *See id.* at 25–29. (“Women’s status . . . on the whole . . . appears to account for part of the link between Islam and authoritarianism.”).

222. *See id.* at 30–31. This view finds support from some commentators within the Muslim world. *See* ABDELLAH HAMMOUDI, *MASTER AND DISCIPLE: THE CULTURAL FOUNDATIONS OF MOROCCAN AUTHORITARIANISM* 44–143 (1997) (arguing for a causal connection between patterns of interpersonal domination and submission and political authoritarianism); HISHAM SHARABI, *NEOPATRIARCHY: A THEORY OF DISTORTED CHANGE IN ARAB SOCIETY* 26–60 (1988) (arguing in a similar vein).

223. *See* Fish, *supra* note 218, at 30–31. This model would depend on the social-psychological effects of negotiation and bargaining. For a discussion of recent research in the social psychology of reciprocity, with particular attention to its relevance to legal questions, see Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71 (2003). Brain researchers have also found that areas of the brain associated with emotions and social engagement are activated in individuals who show high levels of trust and reciprocity, potentially suggesting that training in reciprocal negotiation induces motivation to further reciprocity. *See* James K. Rilling et al., *A Neural Basis for Social Cooperation*, 35 NEURON 395, 395–405 (2002); Kevin McCabe et al., *A Functional Imaging Study of Cooperation in Two-Person Reciprocal Exchange*, 98 PROC. NAT’L ACAD. SCI. 11832, 11832–35 (2001). I discuss the historical development of the moral psychology of reciprocity as an idea in political economy and law in Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1253–58 (2005).

224. *See* Fish, *supra* note 218, at 30–31. This view is associated with “difference feminism,” the position that women tend to a distinct and characteristic set of values and attitudes that are salutary in social and political life. For a classic statement of this view, see Carol Gilligan, *In a Different Voice: Women’s Conceptions of Self and Morality*, 47 HARV. EDUC. REV. 481 (1977) (criticizing Lawrence Kohlberg’s account of moral learning, with its emphasis on application of abstract principle, as insufficiently relational and contextual, and identifying women’s perspectives with the latter qualities). For a psychoanalytically informed version of a similar perspective, see NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* 173–219 (1978) (arguing for a relationship between deeply embedded gender characteristics reproduced through parent-child relations and the social and institutional structure of liberal capitalism).

This is not the place to attempt an assessment of these competing but potentially complementary explanations. For my part, I am intensely skeptical of arguments that suppose any “essential” social or political attitudes inherent in men or women, and reflexively friendly toward arguments that emphasize the variation in potential attitudes within both sexes, depending on institutional and cultural context.<sup>225</sup> My own discussions in this Part reflect that emphasis, treating women as agents and bearers of interests inflected by revisable self-conceptions, rather than as vectors of essentially “feminine” values or social modes.

I will offer one view of how women’s empowerment may weaken the power of extremist politics. Today, the ideological appeal of such nationalism almost always involves a reaction to women’s increased social participation and power within the family, and a proposal to restore “traditional” relations. This attitude holds for the Shiv Sena and other Hindu nationalists,<sup>226</sup> Islamists,<sup>227</sup> and smaller-scale reactionary movements that revive such customs as belief in, and persecution of, witches as a way of constraining empowered

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225. This emphasis partly reflects an interest throughout my work in how attitudes toward politics, sex, race, human equality or inequality, and so forth vary from time to time and place to place, and how institutional change can induce changes in attitudes, or at least clear space in which such changes can occur. I think any awareness of the variety of human experience of sex and gender makes confident generalization in an essentialist vein almost impossible to sustain. My emphasis on contingent aspects of sex and gender also reflects a political choice: so long as we cannot know what is fixed and what is mutable, an interest in how non-coercive institutions can open space for free exploration of mutability—particularly in newly egalitarian sex relations—seems to me an appropriately experimental and open-ended attitude.

226. For a discussion of this dynamic in Sena ideology, see ECKERT, *supra* note 110, at 142–43 (reporting that Sena members frequently identify themselves as defenders of the honor of their nation’s women and defenders against the alleged threats to purity of ethnic mixing). For information on the topic of Hindu nationalism as the assertion of a masculine principle, see Brian K. Smith, *Re-envisioning Hinduism and Evaluating the Hindutva Movement*, 26 RELIGION 119, 120–23 (1996).

227. For discussion on the persistent appearance of women’s status and free activity as a spur to Islamist affiliation, see generally *Blind Faith*, SYDNEY MORNING HERALD, Aug. 27, 2005, <http://www.smh.com.au/news/world/blind-faith/2005/08/26/1124563028951.html> (substantiating through reportage on the political and theological affiliations of the July 7, 2005 London bombers and their “jihadist obsession with purity amidst the perceived corruption of the West”). Many commentators have remarked on the same quality in the Islamist abhorrence of the West. See, e.g., Jonathan Raban, *My Holy War*, NEW YORKER, Feb. 4, 2002, at 28 (noting the gynophobia and “sense of extreme moral precariousness” in connection with women of the founding Islamist Sayyid Qutb).

women.<sup>228</sup> To the extent that women have become invested in both their new capabilities and an expanded view of their interests and potential agency, they might well experience contemporary nationalist movements as a direct threat. This interpretation avoids essentialist speculation about women's intrinsic attitudes toward hierarchy or the effect of feminine presence on institutional culture. Instead, this interpretation focuses on the concrete fact that most contemporary nationalism and related extremism present a threat to the status and participation that increase women's power to control resources, exercise power within the family, and influence reproductive decisions.

This interpretation is quite plausible in Europe and may help to explain why declining fertility has not produced a meaningful upsurge in support for nationalist agendas there. It is not that there has been no effort to yoke such agendas to concern about falling population. On the contrary, France's far-right National Front has linked demographic alarms to attacks on abortion rights and calls for restoring women's traditional roles as mothers and housewives.<sup>229</sup> This classic expression of reactionary pro-natalism, however, has found little traction in contemporary France, where women's integration into political and economic life has shifted even mainstream pro-natalist positions from a first-generation emphasis on children as social resources to solicitude for women's autonomy that falls much nearer the spirit of the second-generation commitment to autonomy. As Marie-Thérèse Letablier notes, twentieth-century French family policy rested originally on "the idea that children were a collective investment," and thus "[m]others of numerous children were rewarded for being 'good citizens' by giving children to the Nation."<sup>230</sup>

In recent decades, however, this sex-specific idea of citizenship, in which women's civic role is substantially identical with their biological function, has given way to a relatively gender-equitable concern for women's capacity to reconcile family and work

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228. See AGARWAL, *supra* note 188, at 271–76 (describing such episodes in Indian villages as responses to women's increased control of resources).

229. For discussion on the intersection of the National Front's anti-immigration stance and its concern with the decline in "authentically French" births, see Carolyn Sargent, *Counseling Contraception for Malian Immigrants in Paris: Global, State, and Personal Politics*, HUM. ORG., July 1, 2005, at 147.

230. Letablier, *supra* note 200, at 246.

commitments.<sup>231</sup> This reconciliation-oriented approach is compatible with recognizing that there is a collective interest in the aggregate results of individual reproductive decisions; in this respect, it comes to grips with contemporary demographic problems. The reconciliation-oriented approach, however, is not compatible with the historical impulse of pro-natalist politics: coercion in reproductive decisions and insistence on a return to traditional sex and gender roles. It makes room to acknowledge the social interest in reproductive decisions but bounds that interest by principles of autonomy and gender equity.

This analysis gives cause for guarded optimism. It suggests that some kinds of progress are hard to reverse—specifically, that once women are integrated into political and economic life on relatively equitable terms, their commitment to their own substantive freedoms will constrain the potential scope of reactionary politics.<sup>232</sup> In this respect, at least, history may not be prologue: past episodes of reactionary pro-natalism occurred in times and places where women were much more economically and politically vulnerable than in Europe today. Conversely, if political commitments to women's substantive freedoms are fairly stable, this means that acknowledging demographic concerns in politics and policy may not be as worrisome as it has sometimes seemed in a period haunted by the ugly memory of first-generation biopolitics.

This hopeful point, however, leaves open two major reasons for concern. One is that women's gains in substantive freedom may remain quite vulnerable outside Europe—both in Japan and Korea—where fertility is well below replacement rate, and in those countries where the demographic problem is sex disproportion. Because women's substantive freedoms are both the best means to address the demographic problems themselves and, maybe, a check on the extremist politics that otherwise tend to accompany both

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231. *See id.* at 256–60 (outlining this shift).

232. Of course, a commitment to a mutable and contingent idea of the political behavior of the sexes leaves open the possibility that empowered women will behave in ways that undermine what I am calling their substantive freedom—for instance, by supporting political programs that urge a return to hearth and kitchen or by opposing formal reproductive rights. I can only respond that, as a rule of thumb, those who stand to lose resources or alternatives from a political program are somewhat less likely to sign on than those who do not. I am essentialist enough about human rationality to accept this description as capturing a widespread tendency, albeit one that ideological, psychological, religious, or other appeals can sometimes overcome.

demographic crises, their fragility is worrisome. Second, even assuming that women's substantive freedoms are good checks against reactionary pro-natalist politics, there is less reason to believe they would similarly check the nativist and racist politics that might accompany a large increase in the number of immigrants to Europe or East Asia.

## VII. CONCLUSION

Whether freedom is sometimes self-undermining is an old question, but not a tired one. Asking it is an important way of ensuring that we do what is necessary to preserve essential freedoms. In this spirit, I have argued that reproductive autonomy can produce social and political consequences that might endanger liberal freedoms. The argument is not an attack on reproductive autonomy, but a reflection on what might be necessary to preserve it.<sup>233</sup> In different cultural, economic, and political settings, increasing control over the number and the sex of children has produced sub-replacement fertility rates and a growing sexual disproportion among children and young adults. Both trends contribute to potential political crises: a demographically inflected crisis of the welfare state on the one hand, and a potential for growth in authoritarian parties and institutions on the other.

The most promising response is not to cut back on reproductive autonomy but to deepen and broaden it by seeking to increase the

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233. Some readers, particularly Neil Siegel, have suggested that the appeal of this article's argument might be entirely independent of the reader's beliefs about the moral status of abortion: those who favor reproductive choice, as I do, should find in the paper an analysis of a potential threat to it and a response that is compatible with preserving it; while those who oppose reproductive choice should still be persuaded that sex-egalitarian social relations and reconciliation of childbearing and career are attractive ways to mitigate serious demographic crises. While this "overlapping consensus" view of the article is plausible and has some appeal to me, I prefer to leave it as a speculative matter rather than insist on who should agree with me and why. My motivations are to address potential threats to three values I hold dear: liberalism, democracy, and a vision of sexual equality that includes formal and substantive reproductive autonomy. Anyone who shares all or some of these values and is persuaded by my analysis might well join in my conclusions. I suspect, however, that readers who regard abortion as deeply wrong will find the entire discussion morally blind, and object to my combination of (1) supposing the normative attractiveness of all aspects of reproductive autonomy and (2) treating the results of abortion decisions in a consequentialist way rather than concentrating on the inherent moral status of the act. The argument will thus strike them as perverse or incomplete. To those readers I can only say that this is the character of deep and abiding moral disagreement, and that I hope my description and argument nonetheless have some force for them.

bases of women's substantive freedom: in developing countries, education and workforce participation; in rich countries, the capacity of women and families to reconcile work and childrearing.<sup>234</sup> Although best paired with other policies, a focus on increasing substantive freedom belongs at the heart of a political response to both demographic crises. Promoting substantive freedom is not just normatively attractive from a liberal perspective: it is also the best practical solution to the paradoxes of autonomy. In this case, at least, the answer to freedom's self-undermining potential is to become freer still.

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234. This is a slightly rhetorical way of putting the matter. As I note particularly in the text accompanying note 170, *supra*, it may not be possible to produce a unified metric of "substantive autonomy." In any event, that is not a task I have attempted here. A more analytically precise way of putting the matter is that substantive reproductive autonomy's aggregate results are less likely to undermine liberal or democratic values to the extent that reproductive autonomy is complemented by substantive freedom in literacy, workforce participation, and the capacity to reconcile childbearing with career. Thus, enhancing these dimensions of substantive autonomy is likely to be an effective, as well as a normatively attractive response, to the problems of third-generation biopolitics. This autonomy-enhancing response should be taken as a progressive alternative to the attacks on reproductive autonomy, formal and substantive, that might accompany the illiberal dangers of third-generation biopolitics.

