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Population Control and Abortion

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INTRODUCTION

The purpose of this article is to suggest: a) the importance of population control, b) the need of focusing the discussion on the United States, 3) the importance of sociological studies when considering population control or other legal steps to modify societal patterns, d) the availability of data both statistical and comparative, e) the unique value of abortion in population control, f) the caution that we stay within our recognized constitutional and governmental protections in any planning undertaken.

Abortion has seldom been analyzed solely as an instrument of population control. Most of the plethora of abortion articles written since this subject became popular a few years ago1 concerned other aspects of abortion: abortion law reform, the constitutionality of specific statutes, the rights of the fetus and the mother, whether minors or husbands had rights that could be protected, how the liberalized abortion laws were working, and whether compulsory abortion (e.g., for juveniles) was permissible.2 At the same time,
the popular press was full of articles and books warning of an engulfing population "explosion" by the year 2000 or earlier and of a total breakdown of the environment in the face of this growth.\(^8\)

Not until 1971 did writers begin to face the legal problems involved in population control\(^4\) and few of the legally oriented articles published since then have extensively investigated any one method of population control. Moreover, almost all writers gullibly accepted the statistics of the population prophets of doom;\(^5\) only one urged the importance of better statistics and a reassessment of population trends in determining the legal problems of population control.\(^6\)

Even after *Wade* and *Bolton* in 1973 again tried to...
clarify the Supreme Court position, the law review notes turn to such neat questions as "who will pay the bill."

This article omits those neat issues of law so common to law reviews. These have been adequately debated and do not now constitute the important points for determination. We shall summarize the best current research and statistics and advance a few rather simple propositions to indicate that abortion is now, must be, and will be, a major factor in population control and that it is superior to other available methods of curbing population. The emphasis will be on the United States, though it is generally agreed that we are not yet ready to enact sweeping population control and that abortion is approached with temerity as a method. The dimensions of the population problem should first be put into proper perspective in light of current research.

**POPULATION MYTHS**

It now appears that the predictions of 300 million United States population by 2000 A.D. and 500 million by the year 2070.

See also Golding & Golding, supra note 5, wherein the authors point out the unreliability of the statistics and that such terms as "overpopulation" are not merely demographic or economic, but are value-laden.


9. 42 U.S.C. § 300a-6 (1970). Even constitutional amendments against abortion have been introduced in Congress and, as of April 17, 1973, were pending before the House Judiciary Committee. Civil Liberties, May 1973, at 8.

were inaccurate, far-fetched and a scare tactic. Also incorrect was the proposition that 2.0 children per couple was necessary to achieve zero population growth. These figures were based on a curve projection of 5 million population in 1800, 100 million in 1915, 200 million today and on an assumed child to parent ratio approaching 3. This ratio has declined, however, at least in part because of liberalized birth control and abortion laws. It now appears that the United States birth rate will level off at 2.06-2.11 children per couple and achieve a stabilized population of 240 to 270 million by 2000 A.D.\footnote{Spengler, supra note 4, at 530.}

In addition, contrary to popular belief, the underdeveloped (and even currently “overpopulated” countries like India and China) are not the main threat to global resources. Rather, the United States, even with a curb of population in the 200 millions, is the core of the problem. Although it is projected that 85 percent of the world population increase will be in the underdeveloped nations,\footnote{D. Nortman, POPULATION AND FAMILY PROBLEMS: A FACTBOOK 1-2 (1969).} the United States, with only 6 percent of the world

\footnote{11. Spengler, supra note 4, at 530. In 1967 the Census Bureau made four projections. The A and B projections, and similar private curves, formed the basis of the population “bomb” or “explosion” articles. The 1970 census figures, however, indicate projection C (second lowest) is a more accurate estimate in its showing of a fairly stable 206 million population by the year 2015. In Klemesrud, The 1980’s: New Food and Armchair Shopping?, N.Y. Times, Jan. 22, 1971, at 45, col. 1, it was reported that the University of Rochester Management Research Center found such factors as birth control and abortion to be reducing the child ratio to just over two per couple. On United States demographic transition from high to low birth and death rates—and their effects—see Stolnitz, The Demographic Transition: From High to Low Birth Rates and Death Rates, in POPULATION: THE VITAL REVOLUTION 30 (R. Freedman ed. 1964).


Much of the prediction of doom has been based on a projected flocking to a megalopolis. For example, one author foresees what he calls “almost unbelievable” urban masses of 5,000 square miles in the New York and Los Angeles regions, 2,000 square miles in the Chicago and San Francisco Bay areas, and 1,000 to 2,000 square miles in the Detroit, Southeast Florida, Washington, Dallas-Fort Worth, and several other areas. J. Pickard, DIMENSIONS OF METROPOLITANISM—URBAN LAND INSTITUTE RESEARCH MONOGRAPHS Nos. 14 & 14A (1967); Pickard, Is Megalopolis Inevitable?, 4 The Futurist 151 (1970). But the facts show that 14 of the 25 largest cities lost population between 1960 and 1970 and 75% of the city growth was in cities with populations between 30,000 and 250,000. Lave, Congestion and Urban Location, in REGIONAL SCIENCE ASSOCIATION, PAPERS 25, 133-50 (1970). For a discussion of congestion and related problems see Rothenberg, The Economics of Congestion and Pollution: An Integrated View, 60 Am. Econ. Rev., May 1970, at 114; Spengler, supra note 4.}
population, consumes 34 percent of the world’s energy, 29 percent of the world’s steel, and 17 percent of the world’s timber. Moreover, an American baby will, during his lifetime, cause 50 to 75 times the drain on resources caused by an Indian child. Secretary of Interior Morton and his advisory committee recently pointed out that if everyone in the world attained the same standard of living and used the same quantity of energy as a United States citizen, the world’s known energy resources would be exhausted in 18 months. Yet that committee has predicted a 50 percent increase in American energy requirements by 1980 and a staggering 300 percent increase by 2000 A.D. and the U.S. Geological Survey has just (May 1973) warned us of the exhausting of world resources.

In short, “the ecology of the earth . . . can accommodate itself better to a rising poor population than to a rising rich population.”

A third source of confusion is the supposed belief that other undesirable features accompany, or are caused by, population growth. Crime, disorder, drug use, international tension, the breakdown of social services, overcrowding, resource depletion and environmental deterioration are all said to be related to population growth. This belief, however, is without any proof and is based on the fallacy that if two things occur contemporaneously or exist co-spatially they are related, or even worse, that they are causally related. As the above-listed evils become synonymous with over-
population, the undesirability argument becomes self-proving. In fact, what little proof there is suggests that these maladies are due more to behavior patterns than to population size and that a greater impact on the evil could be made by modifying the behavior than by reducing population.\footnote{See R. Revelle's statements in 1969 Hearings, supra note 16; Golding & Golding, supra note 5; Mayer, supra note 15; N.Y. Times, Dec. 28, 1970, at 24, col. 3.}

As has been seen, the bases for many of the arguments urging population control are not sound. Nevertheless, there is a population problem; only the nature and extent of the problem are in dispute. As has been noted, because of the high rates of consumption and pollution in the United States, each American's impact upon the world environment represents a disproportionate threat to the future of humanity.\footnote{Ehrlich & Ehrlich, Introduction, 23 Hastings L.J. 1345, 1346 (1972). The authors note that each American's impact on the environment is twice that of a European and twenty to one hundred times that of an Asian.} Moreover, Americans have become increasingly aware that the quality of life for the average American has declined noticeably in the last ten years. This awareness has manifested itself in vigorous activity against environmental deterioration as well as against obsolete laws on birth control, sterilization and abortion.\footnote{Id. at 1346.}

**ALTERNATIVES TO ABORTION**

Family planning has been recognized as a basic human right in the Declaration of Human Rights.\footnote{The United Nations Declaration of Human Rights provided that "men and women . . . have the right to marry and found a family." G.A. Res. 217, U.N. Doc. A/810, at 74 (1948).} In considering the alternatives to abortion it should be evident that any program of population control must not result in injury to this right. If wealth is a qualification for giving birth, a form of genocide results. Nevertheless, proposals for population control have often been advocated for "them"—the backward nations, the poor, the ghetto residents, the blacks and the unwed.\footnote{Blake, Population Policy for Americans: Is the Government Being Misled?, 164 Science 522 (1969); see also Dembitz, Should Public Policy Give Incentives to Welfare Mothers to Limit the Number of Their Children?, 4 Fam. L.Q. 130 (1970) N.Y. Times, Nov. 24, 1968, at 77, col. 1. But see Pilpel, A Dissenting Viewpoint: Should Public Policy Give Incentives to Welfare Mothers to Limit the Number of Their Children?, id. at 146.} Moreover, it is not merely the frontal racial-economic attack that must be avoided, it is also the subtler and equally disparate pattern of who will in fact be disadvantaged by a program.\footnote{Gold et al., Therapeutic Abortions in New York City: A 20-Year Review, 55 Am. J. Pub. Health 964 (1965); Trout, Therapeutic Abortion Laws Need Therapy, 37 Temp. L.Q. 172 (1964); Hall, Therapeutic Abortion, Steriliza-}
ams,24 has apparently approved welfare programs with population overtones that do discriminate economically. In Dandridge, the Court allowed welfare (incentive) payments to be geared to the number of children (i.e., the amount of aid per child decreased as the number of children in the family increased). The state had justified this practice by stating that such a limitation on payments would encourage large families to practice family planning. The Court refused to consider this ground, relying on other justifications of the state practice. It has been suggested that the Court considered the population implications of its decision in Dandridge but left them unexpressed because of reluctance to enter such an “uncharted sea” at the time.24

Most of the alternatives to abortion as a means of population control are less effective and subject to greater ethical and legal objections.25 For example, it is now clear that net immigration is supplying 20 percent of the United States population growth. It would be simple and constitutional to cut off immigration (and herein lies some of the clearest constitutional authority for coerced population control—the recognized power to protect the nation from “the vast hordes of . . . people crowding in upon us”).26 Despite the constitutionality of an immigration cut-off, and that it might nearly achieve a zero growth ratio, such a measure would merely shift our problem to other countries and for this reason it is an unsatisfactory solution.

Many have advocated one form or another of an economic in-

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centive system as a method of population control.\textsuperscript{27} Aside from the fact that none of these programs have had much effect, either here or abroad,\textsuperscript{28} many such programs are often susceptible to the charge of economic and racial genocide noted above.

A third alternative is to rely upon voluntary or coerced use of contraceptives. While any increase in the voluntary use of contraceptives would produce some population decrease, the rather free use of contraceptives in the United States so far shows such a margin of unwanted pregnancies that this cannot be considered an adequate method alone to approach a zero population growth.\textsuperscript{29} The so-called "morning after pill," just coming into use, approximates abortion as a post hoc remedy but its requirement of immediate use makes its utility dubious. If contraception were coerced, it would be met by all the legal arguments against coercion hereafter noted and be almost impossible to enforce. Though many other alternatives have been suggested, only one more will be examined to make our point that abortion is probably the most important system of population control.

It has been proposed that we employ some method, involuntary in nature, such as adding an anti-fertility agent to the water supply.\textsuperscript{30} In the first place this is truly Orwellian; second, no such agent exists; third, it is likely to have serious side effects; fourth, most rural and suburban family wells would not be touched and the rich could avoid it by bottled water or other means; and finally, this kind of plan would run directly into the Griswold protection of "zones of privacy."\textsuperscript{31}

Having said all the above about alternatives, we must recognize that each (and others not mentioned) can, and already do, play a part in population control. Other presently significant factors are demonstrated by the following report of the Census Bureau: There was a 33 percent divorce increase in the 1960's resulting in nearly

\begin{itemize}
\item \textsuperscript{27} See, e.g., Beyond Family Planning; Pohlman, supra note 8, Population Symposium. Even the Dandridge decision provides some support for this position.
\item \textsuperscript{28} In Bumpass & Westoff, The "Perfect Contraceptive" Population, 169 SCIENCE 1177 (1970), it is estimated that 20\% of all American births or 35\% of Negro births were avoided by perfect contraception. Cf. Djerassi, supra note 22.
\item \textsuperscript{29} Some commentators have estimated that there would be at least 220,000 unwanted pregnancies a year even if everyone were to use the most effective contraceptives available. See, e.g., Roy, Abortion: A Physician's View, 9 WASHBURN L.J. 391 (1970); Ziff, Recent Abortion Law Reforms (Or Much Ado About Nothing), 60 J. CRIM. L.C. & P.S. 3 (1969). See also Population Council, Contraception and Sterilization, STUDIES IN FAMILY PLANNING No. 56, Aug. 1970, at 4.
\item \textsuperscript{30} Population Control Comment.
\item \textsuperscript{31} Griswold v. Connecticut, 381 U.S. 479 (1965). But see Population Control Comment.
\end{itemize}
twice as many divorced women as men remaining unmarried, and a large part of these women had or would have only one or no children. All these factors together seem already to be causing a downturn in the population curve.

COERCIVE BIRTH CONTROL

Although some very interesting arguments have been made to uphold coercive birth control, compulsion is a long way off. One argument for coercion is largely based on _Dandridge v. Williams_ as a population control case. In reality _Dandridge_ merely upheld restricting Aid For Dependent Children payments to $240-250 per family, thereby penalizing large families. Others seek their authorization in _Jacobson v. Massachusetts_ which declared compulsory vaccination constitutional against an argument that it violated a person's first amendment rights; or in _Skinner v. Oklahoma_ and _Buck v. Bell_ which upheld eugenic sterilization unless it operates discriminatorily. One of the constitutional authorizations which has been little explored is evidenced in _Missouri v. Holland_ in which Congress was recognized as having power to adopt laws to carry out treaty obligations. We have already pointed out the existing United Nations declaration of the right of the individual to control birth as a basic human right; if a similar treaty to which the United States is a party later extends state fertility control this case might come into play.

Eventually, all the articles and arguments for coercive birth control come down to whether there is a legitimate and compelling state interest and an analysis of the rights or interests of the individual that would be overridden. This is no new problem; as Justice Stone pointed out many years ago in _Miller v. Schoene_, in deciding that ornamental trees would have to be destroyed in order to pro-

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32. In 1960 there were 35 divorced persons per 1000; in 1970 there were 47 per 1000. The 1970 figures revealed that 35 divorced men per 1000 remained unmarried whereas 60 divorced women per 1000 remained unmarried. A.P. Dispatch, Washington D.C., Feb. 1, 1971.

33. For general trends in population growth see McCracken, _The Population Controllers_, 53 COMMENTARY, May 1972, at 45; Podhoretz, _Beyond ZPG_, 53 COMMENTARY, May 1972, at 6; 72 U.S. NEWs & WORLD REP., March 20, 1972, at 45. One of the best analyses for attorneys is Zemring, _supra_ note 22, since it shows the relative effectiveness of various factors during a controlled period under a liberalized abortion law.

34. See generally note 11 _supra_.

35. _E.g.,_ _Problem of Coercion Note_.


37. 197 U.S. 11 (1905).

38. 316 U.S. 535 (1942).


40. 252 U.S. 416 (1920).

41. 276 U.S. 272, 279-80 (1928).
tect fruit trees (one of the major industries of the state), "a pre-
ponderant public concern in the preservation of the one interest over
the other . . . is one of the distinguishing characteristics of every
exercise of the police power."

In opposition to coercion it is argued that the Court in Gris-
wold v. Connecticut\(^4\) recognized the privacy of the marital bedroom
and the right of a woman to control her body and to decide whether
or not to give birth to children. This position is bolstered by Justice
Goldberg's dictum therein that to require husbands and wives to be
sterilized after the birth of ten children would be invalid. The
Griswold decision, however, can be read as permitting voluntary
abortion or sterilization programs according to Justice Clark:

But suppose the husband and wife voluntarily submitted to
sterilization. Would it then violate the Constitution? I think
not . . . Procreation is certainly no longer a legitimate or
compelling State interest in these days of burgeoning popula-
tions. . . . If an individual may prevent conception, why
can he not nullify that conception when prevention has
failed?\(^4\)

The attempt to move beyond Griswold to uphold coercion
takes many forms (none satisfactory to this author):

(a) Skepticism of the Goldberg dictum and a suggestion that
"the individual motivation and social motivation sanc-
tioning abortion have at least become parallel. The
legitimate state interest is now in preventing overpopula-
lation."\(^4\)

(b) Argument that the state interest in reproduction has
always been recognized in the cases favoring procreation,
and that there is now merely a shift in goals toward
limiting reproduction.\(^4\)

(c) A denial that Griswold does give the woman a right to
control her reproductive functions over the state's interest
in quality of life.\(^4\)

\(^4\) 381 U.S. 479 (1965).
\(^4\) Clark, Religion, Morality and Abortion: A Constitutional Appraisal, 2
\(^4\) Means, The Constitutional Aspects of a National Population Policy, 15
VILL. L. REV. 854 (1970). See also ASSOCIATION FOR THE STUDY OF
ABORTION, INTERNATIONAL CONSULTANTS REPORT 4 (1970) (hereinafter cited
as ASA REPORT).
\(^4\) E. CHASTEEN, THE CASE FOR COMPULSORY BIRTH CONTROL (1971);
Greenawalt, supra note 4; Means, supra note 43. Comment, Population
Control—The Legal Approach to a Biological Imperative, 1 ECOLOGY L.Q. 143
(1971); Population Control Comment; Problem of Coercion Note.
\(^4\) Djerassi, supra note 3; Ketchel, Fertility Control Agents as a Possible
Solution to the World Population Problem, 11 PERSPECTIVES IN BIOLOGY AND
MED. 687 (1968); Means, supra note 44; Population Control Comment. But cf.
Babbittz v. McCann, 310 F. Supp. 293, 301 (E.D. Wisc.), appeal dismissed, 400
(d) An argument that finds a current overriding state interest based on welfare, juvenile delinquency and like factors.46

(e) Some reference to the degree to which the legislature and courts have already deferred to the almost unrestricted discretion of the medical profession.47

The ability to create a successful argument for a state overriding interest favorable to coercive abortion is very doubtful. Although the Supreme Court has recognized a legitimate and compelling interest of the state in curtailing personal liberty in time of war,48 decisions protecting individual freedoms are far more numerous.49 Two features that weigh rather heavily are: 1) members of Zero Population Growth, Inc., the most ardent coercive control organization, still favor voluntary means by a rather large margin.50 If they do not feel the controlling public interest, are the courts likely to? 2) The proof, as shown above, that voluntary abortion and other factors are presently achieving zero population growth. Where then is the need for coercion?

ABORTION AS A POPULATION CONTROL METHOD

Background

It may surprise some that consideration of the overpopulation-environmental factor was recognized in ancient Jerusalem. Judaism generally prohibited abortion but allowed it in time of famine.51 Not until the nineteenth century was abortion during the early months of pregnancy proscribed by the statutory law of any country in the world.52 With the enactment of legislation prohibiting abortion,53 abortions to save the life of the mother continued to be

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50. Sixty-four percent of the members favored abolishing all income tax deductions for children; 60% favored providing subsidies to parents who have "no more than the number of children necessary to halt . . . population growth;" 78% would additionally tax parents having more; while only 35% urge the government to limit the number of children by law, noncompliance with which would result in the imposition of appropriate penalties. Barnett, A Profile of ZPG Membership, 3 ZERO POPULATION GROWTH NAT'L REP., Jan. 1971, 19, 20, 41.

51. L. EPSTEIN, SEX LAWS AND CUSTOMS IN JUDAISM (1948).


allowed. There is evidence that the reason for such restriction of the practice of abortion was primarily as a protection for pregnant women from the risks of surgery. In recent years the risks of the operation have changed as have the medical reasons for abortion. Although fifty years ago most therapeutic abortions were performed for such conditions as diabetes, tuberculosis and heart disease, today most hospital abortions are done for mental health reasons or for fear of the results of German measles.

Abortion Law Reform

To bring abortion laws in accord with modern medical procedures, the 1962 recommendations of the American Law Institute were that abortions be permitted where pregnancy would gravely impair the physical or mental health of the mother, the child would be born with defects, or pregnancy resulted from felonious intercourse. In 1967 the American Medical Association approved this proposed statute. In 1967 and 1968 five states adopted substantially the American Law Institute proposal.

These reform measures, commonly called Therapeutic Abortion Acts, failed, however, as a solution to the illegal abortion problem. A large percentage of the abortions in the United States were performed on married women pregnant by their own husbands, who had several children and simply did not want other children. Moreover many statutory requirements were unrealistic.

From 1968 to 1970 five states (including one of the five adopting the American Law Institute proposal) went further by providing essentially for abortion on demand. The main thrust

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54. Hall, supra note 52, at 585.
55. Id. at 585-86.
58. Right to Abortion Comment at 490.
60. Id. at 14. For example, many statutes required that a woman report a rape within one week after it occurred in order for an abortion on grounds of rape. Many such victims will not risk the humiliation of making the report before knowing if a pregnancy has in fact occurred. Hall, supra note 52, at 588.
61. ALASKA STAT. § 11.15.060 (1970); HAWAII REV. STAT. § 453-16 (Supp. 1972); MD. ANN. CODE art. 43, § 137 (1971); N.Y. PENAL LAW § 125.05 (McKinney Supp. 1972); WASH. REVISED CODE ANN. §§ 9.02.060-070 (Supp. 1972). See also Abortion Act of 1967 c. 86 (Great Britain); A.M.A. Policy on Therapeutic Abortion, 201 AM. MED. ASS'N J. 544 (Aug. 1967); MODEL PENAL CODE.
of the reform movement has been based upon the belief that a pregnant woman, in consultation with her physician, should be allowed to decide for herself when pregnancy should be terminated.  

Rights of Husbands and Minors

The power of a husband or parent to prevent abortion has considerable impact on its effectiveness as a population control device. Whether the husband of a woman desiring an abortion must give his consent varies from state to state. The recent abortion decisions, Roe v. Wade and Doe v. Bolton, make no mention of the possible right of a husband to prevent an abortion. Additionally, the right of a minor to an abortion without parental consent depends on whether the statute itself distinguishes between adult and minor females and on the minor's emancipation. A few statutes define minors as those under 18 or 19 instead of 21. One statute provides that if the unmarried minor lives away from home the consent of only one parent is necessary. Parental and marital consent requirements become open to constitutional attack upon recognition of a right to abortion.

Constitutional Attacks on Abortion Laws

As receptiveness to abortion reform increased, proponents of liberalized abortion laws attacked the constitutionality of remaining restrictions on the right to abort. Grounds for attack include vagueness, and claim of a constitutional


62. Right to Abortion Comment at 491.


64. 73 S. Ct. 705 (1973).

65. 73 S. Ct. 739 (1973).

66. See, e.g., Ballard v. Anderson, 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971), holding that CAL. CIV. CODE § 34.5 emancipates minors for the purpose of obtaining therapeutic abortions without parental consent.


right to decide whether or not to bear children\textsuperscript{72} derived from the marital right to privacy.\textsuperscript{73} The contention that there is a fundamental right to bear or not to bear children seemed to be accepted by an increasing number of courts, with the critical issue being whether the state has a compelling interest in regulation of a subject falling within its police power.\textsuperscript{74} Opponents to reform of abortion laws argued that the fetus has a constitutional right to be born or that the legislature could properly grant such a right.\textsuperscript{75} Conflicting court opinions on these arguments emphasized the need for resolution by the Supreme Court.

\textit{The Abortion Decisions}

The joy with which many articles greeted the lower court cases in 1969 holding restrictive state abortion laws void for vagueness was short-lived. In 1971, the Supreme Court upheld the District of Columbia law in \textit{United States v. Vuitch}.\textsuperscript{76} In its decision, the Court avoided the question of whether the right of privacy found by the \textit{Griswold} court encompassed a woman's right to obtain an abortion.

This issue was met head-on in two recent decisions, \textit{Roe v. Wade}\textsuperscript{77} and \textit{Doe v. Bolton}.\textsuperscript{78} These decisions have rendered invalid nearly every abortion statute in the United States either in whole or in part.\textsuperscript{79} In \textit{Roe v. Wade}, the Court struck down the Texas criminal abortion statute making it a crime to procure an abortion except for the purpose of saving the life of the mother.\textsuperscript{80} Statutes similar to those in Texas are in existence in a majority of the states.\textsuperscript{81} The Court in \textit{Doe v. Bolton} found portions of the Georgia statute unconstitutional. Based upon the American Law Institute's Model Penal Code, the Georgia statute\textsuperscript{82} allowed therapeutic abortions when performed by a licensed physician and considered necessary for protection of the pregnant woman's life or health. Abortions were also permissible if the fetus was

\textsuperscript{72.} \textit{E.g.,} Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis.) (three-judge court), appeal dismissed, 400 U.S. 1 (1970).
\textsuperscript{73.} \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965).
\textsuperscript{74.} \textit{Right to Abortion Comment} at 498.
\textsuperscript{75.} \textit{See, e.g.,} Drinan, \textit{The Inviolability of the Right to be Born}, 17 W. Res. L. Rev. 465 (1965).
\textsuperscript{76.} 402 U.S. 62 (1971).
\textsuperscript{77.} 93 S. Ct. 705 (1973).
\textsuperscript{78.} 93 S. Ct. 739 (1973).
\textsuperscript{79.} 12 J. OF FAM. L. 459, 460 (1973).
\textsuperscript{80.} \textit{TEX. PENAL CODE} arts. 1191-94, 1196 (Vernon 1961).
\textsuperscript{81.} \textit{See, e.g.,} \textit{ARIZ. REV. STAT. ANN.} § 13-211 (1956); \textit{IDAHO CODE} § 18-601-03 (Cum. Supp. 1972); \textit{ME. REV. STAT. ANN. tit. 17, § 51} (1964); \textit{MICH. COMP. LAWS} § 750.14 (1968); \textit{OHIO REV. CODE} § 2901.16 (1967); \textit{WIS. STAT. ANN.} § 940.04 (West 1958).
\textsuperscript{82.} \textit{GA. CODE ANN.} §§ 26-1201-03 (Supp. 1972).
likely to be born with mental or physical defects, or if the pregnancy resulted from rape. Approximately one-third of the states have similar statutes. The Court held invalid those portions of the statute requiring that abortions be performed only in certain accredited hospitals or for that matter solely in hospitals (at least insofar as the statute failed to exclude the first trimester of pregnancy from these restrictions). Also found invalid were statute requirements of hospital staff approval prior to an abortion and concurrence by two fellow physicians in a physician’s decision to perform an abortion. Furthermore, the Court found the requirement that abortions be available only to Georgia residents to be a violation of the privileges and immunities clause of the Constitution.

The Roe decision held that the right of personal privacy, recognized in earlier decisions and extended to the areas of marital, familial and sexual relations, is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” However, the Court concluded that this right is not unqualified and must be considered against important state interest in regulation. The Court divided the period of gestation, holding that 1) prior to approximately the end of the first trimester the decision to abort must be left to the pregnant woman in consultation with her physician; 2) during the second trimester the state may regulate abortion procedures in ways reasonably related to maternal health; and 3) during the period subsequent to “viability” the state may regulate and proscribe abortion except where necessary for preservation of the life or health of the mother.

The Court selected “viability” as the moment when the state’s interest in the fetus becomes “compelling” because it is only when the fetus presumably has the capacity of life outside the mother’s womb that state regulation of fetal life has both logical and

84. 93 S. Ct. at 749.
85. Id. at 749-50.
86. Id. at 751.
87. Id.
90. 93 S. Ct. at 727. The majority determined the right of privacy to be found in the fourteenth amendment’s concept of personal liberties and its correlative restrictions upon state action. Id.
91. Id. The Court in Doe v. Bolton reiterated the Roe holding that a pregnant woman does not have an absolute constitutional right to an abortion on demand. 93 S. Ct. at 746.
92. Id. at 732.
biological justification.  

While it is clear from Roe and Doe that a pregnant woman does not have an absolute right to abortion on demand, still these decisions lift most of the barriers to abortion that had remained in the laws of most states.

**Abortion as a Population Control Factor in Foreign Nations**

It is interesting to contrast the recent advent of abortion as a factor in population control in this country with the statistics of other countries. In contrast to the United States, many foreign nations demonstrate more open encouragement of abortion as well as much longer use. Ruth Roemer, who has done some of the most complete research in this field, rated the availability of abortions in foreign countries on a six stage continuum: (1) on demand (Russia, Hungary, Rumania, Bulgaria); (2) on socio-ecological grounds (Japan, Poland, Czechoslovakia, Yugoslavia); (3) socio-medical grounds (Great Britain, Sweden); (4) medical grounds; (5) only to save the mother's life; and (6) allowing no abortion (Philippines). Most of the east European laws came into existence in the 1960's (though the laws of Russia, Hungary and Czechoslovakia were enacted in the previous decade); Japan's eugenic law (almost on demand) appeared in 1948; and the Scandinavian liberalizations began as early as the 1930's.

The statistics of Japan, the east European and Scandinavian countries tend to show that after about ten years under laws allowing abortions for eugenic or socio-economic reasons (interpreted substantially as "upon request" authorizations) the population growth will approximate, or be less than, zero. This is mainly due to these authorized (sometimes encouraged) but voluntary abortions. Japan, which is most similar to the United States in its industrialization while at the same time more densely populated, presents the most interesting statistics. The Japanese Eugenic Abortion Law was enacted in 1948; by 1957 the "total fertility

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rate dropped below the minimum for stationary population. 

. . . The net reproduction rate fell below one (zero population growth). . . . such a situation has been continuing for more than ten years." For the population to remain stationary, Japan would require a fertility rate of 2.13 per female and the total fertility rate recently has been about 2.95

Japan has recently taken steps to reverse the trend, and has set a goal of recovering fertility that will restore the population rate to 1 (zero population growth). Although there was a substantial baby boom in 1947-49 which appeared in the labor force in 1962-64, there was a sharp decrease in births after 1950 resulting in a sharp drop in the number entering the labor force after 1965. This further resulted in a labor force composed of persons of middle and advanced age and an even greater drop in the fertility and reproduction ratios. The Japanese have found that abortion is especially suited to the modification of the above trends.96 It has been noted that abortion is a method of birth control which can be turned on and off at will by the state, whereas contraception, once learned and practiced, would be difficult to deny or abolish.97

In the Scandinavian countries abortions have increased a little over twelve times in a twenty-five year period of liberalization. This, together with other factors, has produced just over a zero population growth, and has greatly increased the safety of terminating pregnancies.98

In the countries of east Europe which have essentially had "on demand" abortions for ten years or more, the ratio of abortions to live births has steadily increased; in Hungary it has since 1960 exceeded one abortion for each birth. In the six countries birth rates dropped 40 percent during the decade. And, to avoid a negative population growth rate, Rumania in 1966, Bulgaria in 1968 and Russia in 1970 instituted new policies to restrict abortions, e.g., requiring commission approval for abortions to women

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95. INTERIM REPORT OF THE POPULATION PROBLEMS INQUIRY COUNCIL, STUDIES IN FAMILY PLANNING No. 56, Aug. 1970, at 1. See also M. MURAMATSU, JAPAN'S EXPERIENCE IN FAMILY PLANNING: PAST AND PRESENT (1967); Lee, Law and Family Planning, 2 STUDIES IN FAMILY PLANNING No. 4, Apr. 1971, at 81 n.34. It is readily admitted that the Japanese and/or the United States experiences are not appropriate models for underdeveloped countries. Tauber, Population Growth in Less-Developed Countries, in The Population Dilemma (P. Hanson ed. 1969). However, here we are only concerned with the lessons Japan's experience can provide for the United States.

96. See materials cited in note 95 supra.


with fewer than three children. The need for industrial manpower now seems to predominate in these countries over population control; it is interesting how quickly this shift has come about and how rapidly the law can be changed to effectuate new goals.

The extent to which abortion is presently controlling population growth in the United States is sometimes forgotten. One article has called abortion "this age-old, most widely used and most clandestine method of fertility control." Prior to the liberalization of abortion laws in 1967, there were in the United States at least 200 abortions per 1000 live births or 20 percent. This figure is in line with the global average of about 25 percent, but is far less than the 50 percent rate found in east European countries with liberalized abortion laws. The statistics for the first year of operation under the New York and other state liberalized laws reveal an increase of about 8 times the estimated illegal or limited rate, and, even eliminating the out-of-state mothers, this placed the abortion rate at 50-100 percent of the live births. It can be seen that this is almost exactly the experience of other countries with liberalized laws. Furthermore, both in the United States and abroad the incidence of death from legalized abortions had dropped to a rate lower than that for normal births (3.2-3.8 per 100,000 in the United States), demonstrating that abortion is a safe and effective method of population control.

In light of the extent of population control through abortion during the period when it was illegal or restricted and the rapid expansion of its use since liberalization, it appears to be a reasonable thesis that elimination of the negative restrictions on abortion, or even, if necessary, subsidizing abortion, would adequately

99. See materials cited in notes 94 and 98 supra; see also Tietze, Abortion in Europe, 57 AM. J. PUB. HEALTH 1923 (1967).

As additional statistics and studies come from around the world the effectiveness of voluntary abortion in controlling population becomes clearer. Djerassi, supra note 22; Frejka, supra note 12; Wikstrom, Sweden Reviews Abortion, 89 CHR. CENT. 401 (1972); 225 SCIENTIFIC AM., July 1971, at 43; 227 SCIENTIFIC AM., Nov. 1972, at 50; 228 SCIENTIFIC AM., Jan. 1973, at 46.

100. Tietze & Lewit, supra note 94.


102. The Court in Roe v. Wade, 93 S. Ct. 705, 708 (1973), recognized the impact of population growth, along with pollution, poverty, and racial overtones, upon the problem of dealing with the sensitive and emotional abortion controversy.
control population growth in the United States without resort to compulsion. An argument can be made, however, that a compulsory plan is actually more desirable for it can be designed to affect every citizen equally while a program of fertility reduction, by use of propaganda, can be made to effect one group more strongly than another. This is the principal criticism minority leaders often have of government sponsored family planning programs. Criticisms of even greater force could be lodged against a program of subsidizing abortions, for such subsidies would be most attractive to the poor, a large percentage of whom are non-white, thereby encouraging racial and economic genocide. One commentator has suggested that a national policy of population control should not be directed primarily at the poor or black, but at affluent whites who are the principal producers of the bulk of future consumers in American society . . . [and] best placed to alter its demographic destiny. As a group, they are far better equipped with both the motivation to control their reproduction and the necessary knowledge of the means to limit procreation.

It is generally agreed that any society will, under existing conditions, tend toward a zero population growth; the only argument is as to the time schedule. It is also agreed that 2.0 to 2.2 children per female will produce zero population growth in an acceptable time sequence (though some have argued for as low as 1.3 to achieve this immediately) and that we are approaching or have reached that ratio at present. Since, in the liberalized states, the number of abortions has increased 6-8 times over the previous record and now stands at 50-100 percent of live births, if the same facilities were available throughout the United States the ratio of children would drop to 1.9±. A two-child family is frequently spoken of as the ideal when population control is being considered.


104. For example, in terms of annual income of less than $3,553 for a nonfarm family of four, 29% of all black families were below the poverty level as compared to 8% of all white families. Tien, National Population Programs & Standardization of Family Size, 15 VILL. L. REV. 801, 802 (1970).

105. Id. at 806.

106. Frejka, Reflections on the Demographic Conditions Needed to Establish a U.S. Stationary Population Growth, 22 POP. STUDIES 379 (1968); Coale, Should the United States Start a Campaign for Fewer Births?, 34 POPULATION INDEX 467 (1968). The predictions above have been confirmed, see 228 SCIENTIFIC AM., Feb. 1973, at 46, and note 11 supra.

107. Zimring, supra note 22, at 700-03. This article provides an incisive socio-legal study of Hawaii's attempts to resolve the abortion problem.

WHY VOLUNTARY ABORTION?

It may be properly asked why this writer has so favored voluntary rather than coerced abortion as an adequate means of restricting population growth. There are basically three reasons. First, as a civil libertarian I do not believe that we have yet, nor can we until voluntary abortion is adequately tried and found wanting, show a "legitimate and compelling state interest" that will override such constitutional rights as privacy and free choice in the most personal of relations—marriage and sex. Second, what is first needed is to repeal the laws which presently push for procreation and thus negatively affect population control. These include restrictions on divorce, contraceptives and sex education; laws against sterilization; inducements in the tax, welfare and other laws favoring large families; continuation of low minimum marriage ages; and even laws forbidding homosexuality, polygamy, prostitution and other "deviant" sexual behavior whose effect on population we do not really know. Third, the law is not adequately developed to presently uphold in the Supreme Court a coercive population control law (abortion, sterilization, or otherwise); if a real population emergency existed, however, after a fair trial of voluntary methods the Court might find a basis for upholding compulsion. To find constitutional authority for direct control legislation, the Court would likely look to the commerce clause (population is related to regulation of our modern economy).^{109} Such legislation could be expected to meet a barrage of attacks, among them that the legislation violates the marital right of privacy and the free exercise clause, since a large segment of the United States population belongs to a religious faith proscribing use of birth control devices or drugs.^{110}

As was pointed out above, the first step in a real experiment to see whether voluntary methods will adequately control population is to get rid of the laws favoring procreation and acting negatively against population reduction. Yet there are Court cases approving the negative laws as to formal aspects of marriage and divorce, bigamy and polygamy, sterilization and many other restrictions.^{111}

But in recent years, legislatures have moved away from enactment of laws regulating the "morality" of consensual sexual or sex-related behavior.^{112} This trend has been exhibited in the overturning of laws penalizing illegitimate children and their mothers.

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109. Id. at 1428-31.
110. Id. at 1431-40.
112. Problem of Coercion Note 1887.
in order to deter nonmarital sex,\textsuperscript{113} repeal of prohibitions on the sale of contraceptives,\textsuperscript{114} and the amending of divorce laws based on a "fault" concept.\textsuperscript{115} The state's inability to offer a substantial interest in support of such laws may be viewed as resulting from such decisions as \textit{Griswold v. Connecticut},\textsuperscript{116} \textit{Eisenstadt v. Baird}\textsuperscript{117} and abortion cases.\textsuperscript{118}

**CONCLUSION**

Merely arguing for free voluntary abortion, for the elimination of government policies operating negatively against population control and expressing the belief that we are not yet ready for compulsory abortion does not require a stalling or hold-and-see attitude. We have already begun to provide in our laws that cognizance should be taken of the environment and overpopulation in permitting and encouraging abortion. The Japanese and European experience in this regard may be helpful. In addition, the British 1967 Abortion Act requires taking account of the "actual or foreseeable environment." And the Oregon law as amended in 1969 provides that "account may be taken of the mother's total environment, actual or reasonably foreseeable."\textsuperscript{119} The on-request laws are generally viewed as providing for this same consideration.\textsuperscript{120}

Finally, the Supreme Court in \textit{Roe v. Wade}\textsuperscript{121} recognized the impact of population growth as a complicating factor in solving the abortion controversy. By rendering a decision invalidating most restrictions on abortions, the Court has paved the way for increased voluntary abortions and a resulting decline in the population growth ratio.


\textsuperscript{114} \textit{Id.} at 1887 n.154, \textit{citing} K. Weinberg, \textit{Laws Governing Family Planning} 12-20 (1968).


\textsuperscript{116} 381 U.S. 479 (1965).

\textsuperscript{117} 405 U.S. 438 (1972).

\textsuperscript{118} \textit{Problem of Coercion Note} 1887 and \textit{e.g.} cases cited at notes 70 and 72 \textit{supra}.

\textsuperscript{119} \textit{OREG. REV. STAT.} § 435.415(2) (1971).


\textsuperscript{121} 93 S. Ct. 705, 708 (1973).
This article has examined realistically the need for population control. It followed empirical data to the conclusion that the major focus of population control should not be some "they" in distant lands but the high resource consuming citizens of the United States. Central attention was paid to a method that would achieve zero population growth, provide necessary flexibility and be constitutionally and ethically acceptable. Voluntary but liberalized abortion (freely available), possibly with monetary inducements which could be varied for flexibility, seems the answer. The author would encourage other plans to minimize the American drain on and pollution of the environment, which may be more important for the future than further emphasis on population control. Voluntary liberalized abortion may already have proved its case and have become an adequate population regulator.