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Criminal Law and Population Control

Kent Greenawalt
Columbia Law School, kgreen@law.columbia.edu

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I. INTRODUCTION

Several important questions can be asked about criminal law and the population problem. One is how greatly overpopulation, with its contribution to poverty and urban crowding, is a cause of crime, and, obversely, the extent to which population control would be a form of crime control. Another question is how much population growth increases the range of behavior that is and should be covered by criminal sanctions.[1] Although these and other questions deserve attention, the purpose of this article is more modest—to consider possible changes in criminal law that could help ease the population problem.

A. How Great Is the Population Problem?

It is useful, at the outset, to clarify some assumptions about population growth. This is necessary not only because of the need for methodological care but also because assumptions of doubtful validity are frequently expounded as obvious truths. The most basic question is whether the United States now has an overpopulation problem. This question is presently the subject of vigorous disagreement. A recent New York Times editorial began in the following manner:

> Is the population bomb defused? Census Director George H. Brown thinks it has been. He cites data showing that American women are having fewer children, and he views as probably too high the oft-quoted estimate that the United States will have 300 million persons in the year 2000. Tomorrow's population problems in this

* Professor of Law, Columbia University. A.B. 1958, Swarthmore College; B. Phil. 1960, Oxford University; LL.B. 1963, Columbia University.

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1. Ecological problems, for example, which are partly the product of an expanding population, require that some activities be made criminal that were previously unregulated.

country, he suggests, will arise more from the changed composition of the American people than from explosive population.[2]

Dr. Paul Ehrlich, who takes an avowedly apocalyptic view of population growth, found it incredible when the announcement that the United States might reach "only" 280 million people by the year 2000 was greeted as a sign of the end of the population explosion.[3] According to Dr. Ehrlich "it is difficult to imagine any American life style which would prevent three hundred million of us" from "eventually destroying the planet."[4]

The layman who looks for guidance about the dimensions of the population problem founders.[5] There is the difficulty of ascertaining the significance of the drop in the birth rate during the last few years.[6] It is highly probable that the number of births per 1,000 people will increase during the next decade, because a higher pereentage of the population will be of childbearing age as a consequence of the "baby boom" following World War II. Less certain and more important is whether the fertility rate, based on the number of children born to childbearing women, is undergoing a long-term decline or is down temporarily, as during the Depression.[7] Future attitudes of those of childbearing age toward having children are crucial, but these attitudes depend on a variety of incalculable social factors. A highly visible minority of young people, for example, have embraced values and life styles that place much less emphasis on family and children than did their parents, but one cannot be sure if this presages a long-term shift away from the traditional centrality of children in our notions of human fulfillment. In addition, since working women typically have fewer children than those who stay at home, an expansion of opportunities for women, accompanied by the kind of change in women's roles urged by the Women's Liberation Movement, might reduce the birth rate. On the other hand, if these changes were paralleled by extensive child care services allowing women to work comfortably and to have large

2. N.Y. Times, Oct. 17, 1970, at 28, col. 2.

3. Ehrlich, *The Population Bomb,* N.Y. Times, Nov. 4, 1970, at 47, col. 6. Dr. Ehrlich's views are developed at greater length in P. EHRLICH, THE POPULATION BOMB (1968). *See also Playboy Interview: Dr. Paul Ehrlich,* PLAYBOY, Aug. 1970, at 55.

4. Ehrlich, *The Population Bomb,* N.Y. Times, Nov. 4, 1970, at 47, col. 5.

5. For readable yet careful and balanced essays on population growth see THE POPULATION DILEMMA (2d ed. P. Hauser 1969). For an excellent summary of the views of experts with relevant citations see Population Education Staff Comm., Planned Parenthood—World Population, Population Growth and Family Planning: A Review of the Literature, May 1, 1970.

6. *See* Hauser, *The Population of the United States, Retrospect and Prospect,* in THE POPULATION DILEMMA, *supra* note 5, at 85.

7. The fertility rate dropped from 122.7 in 1957 to 84.8 in 1968. *Id.* at 87.

families, the result might be different. In summary, the uncertainties of social change make it impossible to predict birth rates with any confidence.[8]

Even if agreement could be reached about the likely rate of growth, a sharp difference of view would remain. Dr. Ehrlich believes that our present population is rapidly destroying the environment and that an ecological catastrophe can be avoided only if the population increases no further. Others take a more sanguine view of the country's ability to deal with deterioration of the environment as population grows at a moderate rate, especially if the increased population is less heavily concentrated in major cities.[9] Lurking in the background of assertions about a desirable level of population often are unexamined premises about the proper "trade off" of quality of life and number of people living. So long as a growing population is thought to improve the quality of life, there is no dilemma; but the word "over-population" implies that the two are in conflict. According to Dr. Ehrlich, "[e]ach American has roughly 50 times the negative impact on the Earth's life-support systems as the average citizen of India."[10] In other words, if Americans were willing to make great sacrifices in their material standard of living, the environment could support many more Americans.[11] In population discussions, at least those from a secular perspective, it is generally assumed that we have an obligation to the unborn to preserve the quality of life and to promote the long-run survival of the human race, but there seems to be no duty to maximize the number of people enjoying life's goods. This attitude is understandable in countries in which most of the population lives in miserable conditions, but the average American

8. Technological advances may also have profound significance. For example, some convenient and widely employed method of controlling the sex of offspring would probably have substantial impact upon the birth rate. Since couples frequently continue to have children in order to have one of a preferred sex or a desired number of each sex, control of sex would undoubtedly reduce the size of some families. If parents more often preferred having boys to girls, the imbalance would limit future birth rates.

9. *See generally* Golding, *Ethical and Value Issues in Population Limitation and Distribution in the United States*, 24 VAND. L. REV. 495 (1971); Spengler, *Population Control: A Multidimensional Task*, 24 VAND. L. REV. 525 (1971).

10. Ehrlich, *The Population Bomb*, N.Y. Times, Nov. 4, 1970, at 47, col. 5. *See also* Davis, *Overpopulated America*, THE NEW REPUBLIC, Jan. 10, 1970, at 13-15.

11. Conversely, a steadily improving standard of living may make it increasingly difficult for the environment to sustain a given level of population. While some environmentalists think that scarce natural resources, pollution problems, and other ecological factors set finite limits on society's consumption of goods, others believe that improving technology and greater attention to the environment will permit expansion of resources and reduction of pollution with increasing consumption and without a breakdown of the ecological balance. If the former view is accurate, a society with a stable population cannot indefinitely improve its standard of living.

income is certainly not essential to a life that, on balance, is satisfying. Yet somehow the idea of Americans fifty years from now having a standard of living equal to that of present-day Italians is almost unthinkable. Perhaps it is sufficient to observe that a steady reduction in living standard is not a viable political program, and it may well be that compulsory population control would be a preferable alternative to most people. In any event, those more optimistic than Dr. Ehrlich doubt that moderate population increase will interfere with improvement in the quality of life or lead to an ecological catastrophe.

A further point of disagreement about the population problem concerns the relationship between population growth in this country and in the rest of the world. Some argue that we need to set an example for less affluent countries that must control population. Others contend that we will lose power if we control population and other countries do not and that we also will reduce the proportion of the world's population that is genetically and culturally healthy.[12] Another troubling question about "external" relations is this country's long-term attitude toward the populations of what are euphemistically called "developing" countries. Although social reality has not fully caught up with social norm, extreme differences in wealth and opportunity are no longer considered tolerable in this country. Thus far, social attitudes have proved rather impervious to the notion that similar differences are not acceptable between persons in different countries. Should the country be stirred by conscience or fear to ameliorate the gross disparities that now exist, one course might be to greatly increase the immigration of poor persons.[13] This would intensify any need to reduce the birth rate. On the other hand, if a substantial part of our gross national product were given in aid to other countries, the sacrifice in internal living standards might reduce population pressure.

Another point of importance in gauging the desirable level of population in this country is the prospective distribution of the population. It is clear that concentration of population is at the root of many problems and that for these problems dispersal is an alternative to reduction in total population.[14] Consequently, one's view of the need for a reduced birth rate is affected by the importance that he attaches to problems that might be solved by dispersal and by his estimate of the

12. *See, e.g.*, Wallich, *Population Growth*, NEWSWEEK, June 29, 1970, at 70.

13. Since net immigration now contributes about 20% of the annual growth rate in population, a significant reduction in growth could be achieved by more restrictive immigration policies. *See* Taeuber, *Affluency of Two Hundred and One Million Americans*, COMMERCIAL & FINANCIAL CHRONICLE, Nov. 21, 1968, at 31.

14. *See* Golding, *supra* note 9, at 515; Spengler, *supra* note 9, at 532.

comparative acceptability and workability of policies of dispersal and population control.

The following discussion assumes the existence of a population problem substantial enough to justify government efforts to reduce the birth rate. It is not assumed, however, that the population problem is, or will be in the foreseeable future, of such apocalyptic dimension that failure to reduce the birth rate will mean the termination of humanity at large or the disintegration of this society. Although this premise may prove to be incorrect, it at least seems to represent the presently prevailing view. Since legislators typically respond to the generally held perceptions of society, the premise is a useful point for analysis of the role of the criminal law at this time. The reader should understand, however, that his own judgment may greatly affect his evaluation of existing and possible legal norms.

B. Some Premises About Compulsory Legal Rules

When the relevance of legal rules for controlling population is considered, the significant distinction is between compulsory and noncompulsory measures[15] rather than between criminal and noncriminal measures.[16] Rather than advancing a new theory about the role of compulsory rules, this article attempts to apply some of the generally aceepted insights about these rules to the population problem. Before beginning this task, however, it is necessary to state the premises on which this discussion is predicated.

Compulsory legal rules generally should be employed only if nonlegal techniques, such as education, or noncompulsory legal measures, such as tax incentives, are insufficient to produce the desired social end.[17] The end must be important enough to outweigh both the misery that compulsory measures may inflict and the substantial social

15. Even this distinction does not neatly classify all possible rules. It is neither a criminal nor a compulsory rule, for example, to label as a "bastard" a child born of artificial insemination with a donor's sperm. Treating artificial insemination as adultery seems to me close enough to a criminal sanction—even if adultery is not a crime—to merit treatment here. *See* text accompanying notes 103-07 *infra*.

16. My views on what should be the special characteristics of behavior controlled by criminal punishment rather than "civil" compulsion are elaborated in Greenawalt, *"Uncontrollable" Actions and the Eighth Amendment: Implications of Powell v. Texas*, 69 COLUM. L. REV. 927 (1969).

17. A nonlegal technique is not always preferable to a legal one. Lynching by private citizens, for example, is less desirable than a fair system of criminal sanctions, even though it may be equally effective in deterring certain kinds of antisocial acts and incapacitating antisocial actors. For a recent treatment of the desirable bounds of the criminal law see H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION pt. III (1968).

cost of enforcing them. Ordinarily, compulsory measures should not be undertaken unless they can be effectively enforced[18] and unless they operate, in theory and practice, with a degree of equity among different social groups.[19] Only for the most pressing reasons should people be forbidden from doing what they believe they are morally obligated to do, because frustration of the moral sense of citizens is likely to yield disobedience of particular laws and more generalized discontent with the legal system.[20] Similarly, there should be very strong reasons before the law controls behavior that is considered to be an important area of personal rather than social choice.[21] If these premises are accepted, the population problem adds a significant dimension to the arguments for repeal of certain criminal prohibitions.

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18. It is arguable that the criminal law in some areas serves an important symbolic purpose even though enforcement is relatively ineffective. Knowledge of widespread disobedience of certain criminal laws, however, may undermine respect for law generally.

19. If forbidden behavior is harmful enough, however, even substantial inequity of application is preferable to abandoning the use of compulsion.

20. My thoughts on how prosecutors and judges should respond to claims of moral justification for violations of law are developed in Greenawalt, *A Contextual Approach to Disobedience*, 70 COLUM. L. REV. 48, 78-80 (1970).

21. For the classical debate on the use of the criminal law to forbid behavior that does not directly harm others see J.S. MILL, ON LIBERTY (1952) and J. STEPHEN, LIBERTY, EQUALITY, FRATERNITY (1872). For a modern exchange see P. DEVLIN, THE ENFORCEMENT OF MORALS (1965) and H. HART, LAW, LIBERTY, AND MORALITY (1963). *See also* Skolnick, *Coercion to Virtue: The Enforcement of Morals*, 41 S. CAL. L. REV. 588 (1968).

My own view is that if a criminal sanction were uniquely effective in controlling the behavior involved, society would in a very limited class of circumstances be justified in using it independent of the possible harm to others that the forbidden behavior might cause. If the members of a society are nearly unanimous that certain behavior is harmful to those who engage in it—"harm" being judged by standards accepted by the potential actors as well as others—and there is reason to believe that most people engage in the behavior only because temporary psychological aberration, extreme temptation, or a failure to consider probable consequences prevents a rational assessment of their long-term self-interest, then the state may properly try to prevent the behavior. Suicide attempts, for example, should generally be prevented, even apart from the indirect effect suicide has on the surviving families. If a drug gave tremendous temporary pleasure but caused grave physical or mental deterioration, people should be stopped from taking it. Even if these conditions are met, the criminal sanction is not appropriate unless it is effective and does not cause more harm than benefit. In any event, the conclusion that the law should not ordinarily control choices that are considered personal need not rely on an "objective" standard, such as self-regarding versus other-regarding acts, for delineating the respective areas of societal and personal concern. Rather, it can rest on the assumption that if many people believe that a certain area is personal, attempted regulation of the area will create a sense of lost liberty that is undesirable. There are, of course, important differences of degree. Many motorcycle riders consider a helmet requirement an invasion of personal liberty, but one doubts if most of them experience it as a very significant invasion. Another reason not to interfere with matters considered to be important areas of personal choice is that—unlike helmets on cyclists—they involve private consensual behavior against which enforcement is difficult. The prohibition of such behavior is likely to create widespread disobedience.

II. The Effect of Existing Criminal Prohibitions on Population Control

A number of legal prohibitions may in some degree contribute to procreation. Among these are laws forbidding abortion, sterilization, prostitution, homosexuality, and other "deviant" sexual behavior, and laws limiting the sale and purchase of contraceptives. Criminal law also contributes to the population problem in quite a different way by protecting existing human life. Although no one would suggest dispensing with crimes of homicide, the need to limit population might serve as a justification for excluding from this class of offenses certain acts now treated as criminal, such as mercy killing or some infanticides.[22]

A. Suicide, Mercy Killing, and Infanticide

Although in most states neither suicide nor attempted suicide is a crime, it is typically criminal to assist someone else to commit suicide. The actual killing of another person is criminal regardless of whether the victim wanted to be killed or whether the actor killed the victim in order to relieve him of suffering. Infanticide by mothers may be treated more leniently than other murders, but in most jurisdictions it is murder nonetheless.[23]

Suicide and mercy killing can be quickly dismissed in this discussion since they have no real bearing on the population problem. If everyone who wanted to die could take his own life or have another do so without legal impediment, the effect on population size would be minimal. If mercy killing, apart from euthanasia of those who want to die, connotes an act of mercy to the victim, it encompasses primarily those already dying painfully and grossly deformed infants that have no prospect of viable existence.[24] Neither of these categories is numerically large, and none of the persons included are likely to bear children.

The rate of population growth would also probably not be significantly affected if society allowed parents to choose whether their new-born infants should survive. If parents could choose whether

22. *See generally* N. St. John-Stevas, Life, Death, and the Law 232-78 (1961); G. Williams, The Sanctity of Life and the Criminal Law 3-33, 248-350 (1957).

23. For a discussion of the development and enforcement of the English Infanticide Act see G. Williams, *supra* note 22, at 26-31.

24. Dr. Williams suggests that some deformities may be so "monstrous" that the entity may properly be considered nonhuman. *Id.* at 20-24. Often doctors do not do all they can to preserve the lives of terminal patients with painful illnesses or those of grossly deformed infants, but under present law they cannot actively terminate their existence.

defective children would live, most probably would permit only very seriously defective children to die,[25] and most would experience great mental anguish even under these circumstances. If serious defects are defined as those creating a substantial danger that the infant's quality of life will be adversely affected, a relatively small proportion of infants suffer them.[26] Many of these children either die quite young or live an institutional life and do not bear children; consequently, their long-term effect on population figures is slight. Others may lead relatively normal lives; as to these, the argument for preserving an opportunity for life is strongest.

Liberal permission to parents to commit infanticide probably would not have much more effect in the absence of a very great shift in society's sense of the value of an infant's life. In the first place, a modern society that would permit infanticide at parental discretion would certainly permit abortion. Families that knew they did not want children presumably would choose abortion, leaving as possible candidates for infanticide defective children, children of the "wrong" sex, and infants whose parents decide they do not want offspring after the time when an abortion becomes dangerous to the mother. In entirely different cultures, such as the ancient societies in which infanticide was common, the first two categories might be significant enough to affect the level of population. Killing a child because it turns out to be an undesired sex, however, now strikes us as unimaginable. Techniques for ascertaining sex and possible defects during pregnancy are fast improving. If these factors become a more common basis for destroying life, fetal life will be destroyed in the womb.

Although it has been contended that infanticide is less harmful to society than other intentional killings,[27] the primary argument for reducing the penalties for it is the psychological instability of many mothers in the postnatal period. Few persons would suggest that parents should be able to decide between the life and death of normal or even somewhat defective infants. Except for possible destruction of the most defective children,[28] infanticide is not now within the scope of morally acceptable methods of population control.

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25. Mongolism, heart lesion, and deafness are examples of serious defects not amounting to gross deformity.

26. D. CALLAHAN, ABORTION: LAW, CHOICE, AND MORALITY 91-109 (1970).

27. *See* G. WILLIAMS, *supra*, note 22, at 15-16.

28. *See* note 26 *supra* and accompanying text.

B. *Prostitution, Homosexuality, and Other "Deviant" Sexual Behavior*

Unlike the legalization of infanticide, legalization of prostitution and various forms of deviant sexual behavior is practically conceivable.[29] It appears highly improbable, however, that the present prohibitive laws have much direct effect on the population problem. There must be very few persons who prefer a partner or form of sexual activity that cannot lead to conception, but engage in intercourse leading to conception merely because the criminal law deters them from their real preference. It may plausibly be argued, nevertheless, that the relaxation of laws against homosexual behavior would strongly reinforce the relaxation of moral censure that already is taking place. If the laws were relaxed, persons with strong homosexual inclinations who now lead a normal sex life, not out of direct fear of the law but out of abhorrence for their "unnatural drives" or fear of social ostracism, might give freer rein to their inclinations. This is not the kind of change that usually occurs quickly; it operates subtly over a series of generations.

Perhaps the most relevant consideration at this point is that overpopulation undermines one aspect of the argument that homosexual and other deviant behavior is wrong because it does not produce children. If the argument is that society needs children, it is a sufficient answer that there are plenty of heterosexuals who will perform the acts necessary to produce the desired number. If the argument takes the form that sexual activity is in some natural law sense "meant" to produce children, however, then it cannot be refuted by population statistics.

C. *Contraceptives*

Even before *Griswold v. Connecticut*,[30] which in 1965 held invalid a Connecticut law forbidding the use of contraceptive devices,[31] it is doubtful that state and federal laws prohibiting the sale or use of contraceptives prevented most couples seriously intent on using them from doing so.[32] In a few states, including New York, contraceptives were theoretically available only to cure or prevent disease, not for birth control, but apparently this fine and ridiculous distinction had little

29. Deviant sexual behavior for this purpose excludes forms of deviance that involve sexual relations of adults with children. In respect to these, legal sanctions are necessary to protect the children.

30. 381 U.S. 479 (1965).

31. *See generally* N. ST. JOHN-STEVAS, *supra* note 22, at 50-115; G. WILLIAMS, *supra* note 22, at 34-73.

32. *See* Poe v. Ullman, 367 U.S. 497 (1961).

effect on sales. Although the federal Comstock Act, the relevant provisions of which were repealed in January 1971,[33] declared contraceptive devices and information about contraceptives to be nonmailable and prohibited their importation and transportation by common carrier, it had been interpreted not to bar the sending of the material for lawful uses. In *Griswold,* Justice Douglas's majority opinion made the point that the case "concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact on that relationship."[34] Nonetheless, it is extremely doubtful that the Court would uphold prohibitions on manufacture or sale of contraceptives, and apparently if these prohibitions remain on the books they are without much practical effect.

The principle that couples should be free to decide whether to purchase and use contraceptives seems firmly established and clearly right. Even if the state has a proper interest in discouraging "illicit" intercourse, or at least discouraging it among young people, the interest is not sufficient to justify a general prohibition of something that so intimately affects the sexual relations of married couples.[35] Moreover, the view of some persons that use of contraceptives is morally wrong[36] should not be imposed on others by legal coercion. The consensus on these points (reflected in the *Griswold* opinions) seems general enough to make detailed analysis of possible competing positions unneeessary.

It remains necessary, nevertheless, to consider laws that forbid advertising of contraceptives, limit their sale, and prohibit sales to minors. Anyone, including a minor, who is intent on purchasing certain kinds of contraceptives can do so without great difficulty. The restrictive

33. Act of Jan. 8, 1971, Pub. L. No. 91-662, *repealing* 18 U.S.C. §§ 1461-62 (1964). Unsolicited advertisements for contraceptives are still nonmailable matter.

34. 381 U.S. at 485.

35. This conclusion is strengthened by the absence of an acceptable method of enforcing a prohibition on use of contraceptives and by the probability that a prohibition on sale would be either unenforced or rendered ineffective by out-of-state sales. Additional support is supplied by the doubt about whether even "illicit" sex is the state's business. In Sturgis v. Attorney General, 260 N.E.2d 687 (Mass. 1970), the Supreme Judicial Court of Massachusetts upheld a statute forbidding doctors to prescribe contraceptive devices for unmarried persons and forbidding druggists to fill such prescriptions. Apart from its problematic constitutional status (*see* Baird v. Eisenstadt, 429 F.2d 1398 (1st Cir.), *appeal docketed,* 39 U.S.L.W. 3151 (U.S. Oct. 5, 1970) (No. 804)) this law seems most unwise, both because it probably cannot be effectively enforced, and because, insofar as it is effective, it is likely to cause unmarried couples to use less effective contraceptive techniques.

36. The official position of the Catholic Church is stated in the Papal Encyclical, *Humanae Vitae,* issued by Pope Paul VI on July 29, 1968. For criticisms of this position see THE CATHOLIC CASE FOR CONTRACEPTION 1969 (D. Callahan ed. 1970). *See also* Friedmann, *Interference with Human Life: Some Jurisprudential Reflections,* 70 COLUM. L. REV. 1058, 1063-64 (1970).

laws, however, may inhibit sales of condoms and jellies to those without high motivation to purchase[37] and make it less likely that those who are unaware of contraceptives will learn about them. It is much more difficult for minors to obtain devices that require a prescription or the aid of a doctor, such as oral contraceptives, intrauterine devices, or vaginal diaphragms. If more widespread availability would increase the use of contraceptives, presumably part of the increase would result from sales to persons who would otherwise refrain from sexual intercourse, but part would result from sales to those who would have intercourse with or without contraceptives. Although wider availability of contraceptives might have some limiting effect on conception, it alone would obviously accomplish much less than availability combined with extensive educational programs and free distribution of contraceptive devices.[38] Availability is probably less important than success in the technological quest for a simple, economical, reliable, and safe method of contraception. The arguments against advertising and more open methods of sale are that they would be offensive to sensibilities and might encourage illicit sexual intercouse, especially among the young. Whether these arguments are outweighed by the possible beneficial effect of a moderate reduction of pregnancies is not easy to decide.

D. Sterilization

The most effective form of birth control is sterilization of either the male or female.[39] Compulsory sterilization[40] is provided for in many states for special classes of persons, and sometimes sterilization has been made a condition for receiving a benefit, such as leaving an institution

37. For those who are lazy or easily embarrassed, putting a quarter into a machine may be preferable to asking for contraceptives at a drugstore. Limiting sales to drugstores also must make the price slightly higher.

38. There is some disagreement about the effectiveness of educational programs, even when coupled with free distribution of devices. In countries such as India there has been a discouraging reversion to traditional ways after temporary use of contraceptive devices, and the question has been raised whether many persons of low economic and social status have the motivation necessary to make contraception work. Education about use of contraceptives and free distribution of them may not reduce family size for persons who want large familes. *See generally* P. EHRLICH, THE POPULATION BOMB 81-94 (1968). A broader educational program encouraging limits of family size, however, may have a long-term effect. It is clear, as demonstrated by the reduction of the birth rate in France and other Western European countries through the widespread practice of *coitus interruptus*, that if the desire to limit family size is strong enough, the birth rate will decline even without artificial contraceptives.

39. Even sterilization is not 100% effective, since in rare instances the channels closed may reopen. *See* G. WILLIAMS, *supra* note 22, at 75-76.

40. *See* text accompanying notes 93-103 *infra*.

for the feebleminded, or for avoiding a penalty, such as imprisonment.[41] It may seem puzzling, therefore, that there has been any question about the permissibility of voluntary sterilization for contraceptive purposes but, in the past at least, serious doubts on this score have been expressed.[42] Since very few states explicitly permit or prohibit such an operation, its legality turns on the interpretation of more general criminal statutes.[43] There is some hoary authority—though not quite on point—that may be used to conclude that sterilization is a maim,[44] and it may be more broadly argued that sterilizing someone for contraceptive reasons is a criminal assault. The argument essentially is that sterilization is a serious physical invasion that is not justified by consent because it is against public policy. As recently as 1954, in England, Lord Justice Denning wrote in dictum:

> Take a case where a sterilisation [sic] operation is done so as to enable a man to have the pleasure of sexual intercourse without shouldering the responsibilities. . . . The operation then is plainly injurious to the public interest. It is degrading to the man himself. It is injurious to his wife and to any woman whom he may marry, to say nothing of the way it opens to licentiousness; and, unlike contraceptives, it allows no room for a change of mind on either side. It is illegal, even though the man consents to it. . . .[45]

Whatever may be the present situation in Great Britain, it is very unlikely that performance of a voluntary sterilization would be considered a crime in this country, except in the two states that have specific provisions to this effect.[46] Under the Model Penal Code,[47] a

41. For a discussion of whether "conditional" sterilization can be rationally distinguished from compulsory sterilization see note 95 *infra*.

42. *See generally* N. ST. JOHN-STEVAS, *supra* note 22, at 161-66; G. WILLIAMS, *supra* note 22, at 102-10; Note, *Elective Sterilization,* 113 U. PA. L. REV. 415 (1965). Contraceptive sterilization must be distinguisbed from therapeutic sterilization—to preserve physical healtb—and eugenic sterilization—to prevent the transmission of some hereditary disease. The propriety of the former is well established, the legality of the latter has been questioned much less than the legality of contraeeptive sterilization. For a case treating sterilization of a husband to prevent his wife from having a physically dangerous pregnancy as therapeutic see Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934).

43. *See* N. ST. JOHN-STEVAS, *supra* note 22, at 161-66; G. WILLIAMS, *supra* note 22, at 102-10.

44. *See* N. ST. JOHN-STEVAS, *supra* note 22, at 162-63; G. WILLIAMS, *supra* note 22, at 103-04; Note, *supra* note 42, at 427-29. The argument may take the form of reliance on a specific statutory definition of mayhem or its equivalent rather than its content at common law.

45. Bravery v. Bravery, [1954] 3 All E.R. 59, 68 (C.A.).

46. In Utah and Connecticut, sterilizations may be performed only for reasons of medical necessity. *See* CONN. GEN. STAT. ANN. § 53-33 (1958 & Supp. 1969) (repealed effective Oct. 1971); UTAH CODE ANN. § 64-10-12 (1953). A few other states have laws specifying conditions for the performance of voluntary sterilizations.

47. The comments on this provision of the Code indicate that the Code's approach reflects existing law but that placing this provision in the penal code is novel. MODEL PENAL CODE § 3.08, Comment 3 (Tent. Draft No. 8, 1958).

doctor may use force that would otherwise be unlawful[48] if he has a patient's consent and "the force is used for the purpose of administering a recognized form of treatment which the actor believes to be adapted to promoting the physical or mental health of the patient. . . ."[49] The central inquiry under the Code, therefore, for deciding whether contraceptive sterilization is a criminal assault is whether it is a "recognized form of treatment."[50] It would be very difficult to argue that an operation that has been performed on an estimated five percent of married white women between the ages of 18 and 39 and an estimated three percent of their husbands is not a recognized form of treatment.[51] In a majority of states, Blue Cross-Blue Shield and Medicaid Insurance benefits cover contraceptive sterilization,[52] and articles in the popular press have recently discussed sterilization as an increasingly common method of birth control without mentioning any possible legal impediment.[53] A California court recently declared that contraceptive sterilization is legal;[54] in many other states the legality of the operation is assumed and never becomes the subject of a court decision. Given these views on sterilization, it is virtually impossible to argue that it is not an appropriate and recognized form of medical treatment.

Whether a constitutional right to be sterilized can be derived from *Griswold* depends upon whether sterilization can be persuasively distinguished from the use of contraceptives. Sterilization involves a physical act that would be an assault if not for a legitimate purpose. If a couple chooses not to have children, however, and if sterilization is the

48. MODEL PENAL CODE §§ 2.11, 211.1 (1962). If bodily harm is serious, as would be the case with almost any medical operation, consent in and of itself does not excuse the actor who inflicts the harm.

49. *Id.* § 3.08(4). For an example of a state code following the Model Penal Code see N.Y. PENAL LAW § 35.10(5) (McKinney 1967).

50. If only the language of the Code is considered, it might be contended that even though contraceptive sterilization is a "recognized form of treatment," it does not promote "physical or mental health" in some narrow sense. Unless all cosmetic surgery is meant to be turned into criminal behavior, however, it must be assumed that "mental health" is to be given a broad meaning in this context.

51. *See* Presser, *Voluntary Sterilization: A World View*, REPORTS ON POPULATION/FAMILY PLANNING, July 1970, at 11.

52. For detailed information on health insurance coverage of contraceptive sterilization see the 1970 summary of Blue Cross-Blue Shield Medical Insurance for Voluntary Sterilization issued by the Association for Voluntary Sterilization, Inc.

53. *See* Klemesrud, *Sterlization Is an Answer for Many*, N.Y. Times, Jan. 18, 1971, at 24, col. 2; Wylie, *Birth Control for Men*, READER'S DIGEST, Jan. 1971, at 53; NEWSWEEK, Dec. 21, 1970, at 90, col. 1.

54. *See* Jessin v. County of Shasta, 274 Cal. App. 2d 737, 79 Cal. Rptr. 359 (1969). *See also* Jackson v. Anderson, 230 So. 2d 503 (Fla. Ct. App. 1970); Shaheen v. Knight, 11 Pa. D. & C.2d 41 (Lycoming County Ct. 1957).

most effective way of accomplishing this permissible purpose, it should be irrelevant that it involves a direct physical alteration rather than the physical changes caused by oral contraceptives or the physical inpediment to fertilization achieved by most other contraceptives. Sterilization, unlike castration, does not physically affect sexual functioning except to prevent conception. A law against sterilization, unlike one against use of contraceptives, can be enforced without invasions of the marital bedroom. In *Griswold,* Justice Douglas's rather opaque majority opinion emphasizes the unacceptability of the only possible way of ascertaining violations, but it is doubtful if in his view the constitutional right turns on this aspect of the law. The concurring opinions of Justice Goldberg[55] and Justice White[56] rely much less on invasion of the bedroom and stress the right of couples to control their family life absent a compelling state interest in regulation. These considerations seem as applicable to sterilization as contraception.

Sterilization, as well as continued use of a contraceptive by one spouse without the knowledge or consent of the other, may invade the rights of the nonconsenting spouse. Since sterilization of either sex is usually irreversible,[57] state prohibition may be justified unless both spouses have agreed. The probable irreversibility of sterilization distinguishes it from contraception, although this distinction may be obliterated for male vasectomies if reversal techniques measurably improve. A small proportion of those who agree to sterilization later regret their decision. Of course, no one can predict with accuracy the course of his future life. A 40-year-old husband with a wife and six children might be sterilized, lose all his family in some natural catastrophe, remarry, and wish to have more children. Irreversibility is a matter for individuals and their doctors to weigh very carefully, but throughout life everyone makes choices that foreclose other options permanently, and the magnitude of the decision to be sterilized is not a basis for state prohibition. If it is conceded that secular society should not control marital decisions about sexual relations and family size without some pressing social need, then clearly voluntary contraceptive sterilization agreed to by both spouses should be permitted by law.

None of the grounds for distinguishing a *Griswold*-based right to

55. 381 U.S. at 486.

56. *Id.* at 502.

57. *See* G. WILLIAMS, *supra* note 22, at 75. Sterilization of females is almost always irreversible. The figure for possible reversal of male vasectomies is now apparently close to 50%, and research efforts continue to try to develop techniques with a greater chance of reversibility for both males and females.

use contraceptives from a claimed constitutional right to be sterilized for contraceptive purposes is very strong. Apart from the possible extension of *Griswold*, contraceptive sterilization agreed to by both spouses should be permitted by law. Whether consent of both spouses should be legally required, however, is more arguable. The interests of the nonconsenting spouse can be substantially protected by making sterilization without consent of both spouses a ground for divorce.[58] Furthermore, it may sometimes prove impractical for a doctor to ascertain whether there is a spouse whose consent must be and can be obtained.[59] In any event, it would be difficult to read a requirement of consent of both spouses into the general criminal laws that now govern the subject in most states. In the past, some doctors have been reluctant to perform sterilizations because of doubt about its legal status.[60] Although these doubts no longer seem justified, it would be useful for states to remove any that linger by specifically authorizing contraceptive sterilization.[61] A statute permitting sterilization also could explicitly delineate any limits on the circumstances in which the operation could be performed.

The impact of sterilization on the birth rate is undoubtedly limited both by fear of its probable irreversibility and by a less specific but very deep-seated psychological resistance, particularly among males for whom a vasectomy represents a symbolic loss of masculinity. Favorable discussion of sterilization in the popular press undoubtedly has reduced and will continue to reduce this resistance in some degree, and an intensification of active educational and "promotional" efforts also will be effective.

E. Abortion

Of laws closely related to the birth rate, criminal prohibitions of abortion are the ones now most subject to attack and possible change. All states permit abortions to preserve the life of the mother.[62] Others

58. The state may want to protect a spouse who for religious reasons does not want a divorce or who will not get a divorce because a family split would harm existing children.

59. Advocates of voluntary sterilization have argued that hospital requirements of spousal consent prevent women whose marital status is uncertain or who have long since been deserted by their husbands from obtaining the operation.

60. The more significant fear is probably not of criminal prosecution but of some kind of civil liability beyond that applicable to normal operations. For a discussion of this subject see Note, *supra* note 42, at 430-39.

61. A statute should specify the limits of a doctor's civil liability. *See* Note, *supra* note 42, at 439-44. A carefully drawn statute would very likely have the further effect of displacing many restrictions on sterilization now set by hospitals themselves, except in the case of hospitals run by religious groups that have an absolute policy against contraceptive sterilization.

62. For a tabular summary of state laws see ASSOCIATION FOR THE STUDY OF ABORTION, INC., CHECKLIST OF ABORTION LAWS IN THE UNITED STATES (1969).

permit abortions under one or more of the following circumstances: Damage to physical health of mother, danger to mental health of mother, likelihood of fetal deformity, conception by rape, and conception by incest. Standards that refer to the life and health of the mother are, of course, open to varying interpretations about the precise nature of the dangers and the degree of risk that justify an abortion. If the word "health" is used, for example, does it include mental health, and does mental health include an assessment of social factors such as an already large family that may make another child burdensome? In the last few years, proponents of abortion liberalization have mounted an attack on these statutes in courts and legislatures. The main arguments for unconstitutionality have been that particular statutes are vague and that any prohibition of abortion violates *Griswold v. Connecticut*.[63] Until very recently, liberalization consisted of expanding the number of reasons for which abortion is allowed, but Hawaii and New York, followed by Alaska and Washington, have eschewed this approach and permitted abortions for any reason a patient and doctor consider sufficient.[64]

It has been estimated that over 69,000 legal abortions were performed in New York City during the first six months of the new law's operation.[65] In order to ascertain the effect of a liberalized abortion law on population, one would need to know the number of abortions terminating pregnancies that would have resulted in live births but for the change in law. Thus, one would have to subtract cases within the following categories from the total number of legal abortions: (1) Cases in which abortions would have been granted under prior law; (2) cases in which women would otherwise have had illegal abortions[66] or abortions

63. 381 U.S. 479 (1965); *see* Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970) (state law limiting woman's right to an abortion violates ninth amendment); Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis.), *appeal dismissed*, 400 U.S. 1 (1970) (woman has a constitutional right to an abortion); United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969), *consideration of question of jurisdiction postponed to hearing of case on its merits*, 397 U.S. 1061 (1970) (accepting vagueness argument); People v. Belous, 80 Cal. Rptr. 354, 458 P.2d 194 (Sup. Ct. 1969), *cert. denied*, 397 U.S. 915 (1970) (accepting vagueness argument and relying in part on a woman's constitutional right to have an abortion in some circumstances). *Contra*, Rosen v. Louisiana State Bd. of Med. Examiners, 318 F. Supp. 1217 (E.D. La. 1970) (rejecting both arguments).

64. These states still require that the abortion be performed by a licensed doctor. The statutes also sets limits on how late in pregnancy an abortion may be performed. Under N.Y. PENAL LAW § 125.05 (McKinney Supp. 1970-71) doctors could perform abortions in their offices, but subsequent to some deaths, article 42 of the New York City Health Code was adopted to stop this practice. Hawaii's statute requires that the operation take place in a hospital. HAWAII REV. LAWS § 453-16 (Supp. 1970).

65. *See* N.Y. Times, Feb. 7, 1971, at 70, col. 3.

66. *See* Lucas, *Federal Constitutional Limitations on the Enforcement and Administration*

in more permissive jurisdictions; (3) cases in which the permissive abortion law caused less contraceptive care;[67] and (4) cases in which for natural reasons a live birth would not have occurred. Since the likelihood that an abortion will be sought illegally or in another jurisdiction is probably greatest when the abortion would be allowed under a moderate law but not a restrictive one, it seems probable that the closer the law moves to abortion on request, the higher the proportion of legal abortions that would otherwise have resulted in live births. At least over a period of time, a broadly permissive law will have an effect beyond removing a specific deterrent to abortion; it will subtly influence the moral perspective of many people concerning abortion, so that abortion will more frequently seem to be an acceptable moral solution. Although the numerical contribution of a liberal abortion law to a reduced birth rate will be much less than the number of legal abortions, it probably will be fairly substantial. This estimate appears to be substantiated by the experience of countries like Japan.[68]

If a country has an underpopulation problem, one argument against free abortion is that it is a form of societal suicide. If a country is overpopulated, it can be argued that abortion contributes to societal health. There are many arguments for and against a permissive abortion law, however, apart from its effect on population.[69] Some of the arguments for liberalization are especially applicable to specific reforms while others, if persuasive, lead to abortion on request. Some of these arguments, simply stated, are: (1) A woman has a right to do what she wants with her body and to choose whether to bear children; (2) a woman's life and health are more important than the survival of an unborn fetus if these are in conflict; (3) unwanted pregnancies cause psychological hardships for women forced to complete them; (4) unwanted babies may suffer because they are likely to be a psychological and socioeconomic burden on families; (5) babies who are physically or mentally defective have a difficult existence themselves and are a burden on their families; (6) any law that permits some abortions and forbids others is inescapably vague in formulation and unavoidably inequitable

of State Abortion Statutes, 46 N.C.L. REV. 730 (1968). Even if the primary effect of abortion liberalization were to legalize abortions that are now illegal, one could argue that the law should not forbid what is socially useful, but should be brought into line with an accurate perception of social needs.

67. Although a completely permissive abortion law will greatly reduce the fear of unwanted pregnancy for those women for whom abortion is morally acceptable, it will not eliminate it, since most women would prefer to avoid abortions, if possible.

68. *See generally* D. CALLAHAN, *supra* note 26, at 253-77.

69. For a superb treatment of the many aspects of the abortion problem see D. CALLAHAN, *supra* note 26.

in application; (7) the administration of existing abortion laws discriminates against the poor, since the rich can get doctors to approve abortions on legal or supposedly legal grounds, leave the jurisdiction to get abortions, or afford a competent criminal abortion, but the poor have none of these options; (8) any restriction on abortion is unenforceable at a level of expenditure and invasion of privacy that society will tolerate, and sporadic or ineffective enforcement is bad, particularly when the effect of the law is to line the pockets of those who cater to the demand for illegal abortions; and (9) although a legal abortion involves some physical risks for the mother, legal abortions involve much less risk than illegal abortions, and a legal abortion also involves less risk than carrying a pregnancy through birth.

The arguments for restrictive abortion laws more or less correspond to those just outlined: (1) a fetus is an unborn human being that society must protect, if necessary, against the desires of the mother; (2) the life of the fetus is more important than the health of the mother;[70] (3) abortions themselves are psychologically traumatic;[71] (4) unwanted babies often become wanted and deeply loved; (5) little is known about the psychology of most defective babies, and there is no evidence that most would prefer not to have been born if they could have been given the choice;[72] (6) an element of vagueness may be unavoidable, but this is true of many necessary criminal laws; (7) inequities should be corrected insofar as possible, but those that unavoidably remain are not a sufficient reason for abandoning a restrictive law; (8) a desirable law should not be abandoned because it is hard to enforce; (9) abortion is an unnatural self-mutilation of the pregnant woman, and the risks of future pregnancies are higher after an abortion than after a live birth; and (10) permissiveness in this area will erode respect for life.[73]

If one values individual choice highly, the arguments for a

70. A more extreme view is that survival of the fetus cannot be sacrificed even for the life of the mother. This is the view of the Roman Catholic Church and apparently rests in part on an absolute proscription of the taking of innocent life.

71. To some extent this is a self-fulfilling argument, because illegality no doubt makes the experience more traumatic, but even in Japan, where illegality is not a factor, it is reported that most women feel guilty about abortions. *See* D. CALLAHAN, *supra* note 26, at 261.

72. People's attitudes about defective children are often the product of a sort of empathetic identification by which they feel how horrible it would be for them to be afflicted with a defect. It is obviously different, however, to be born with a defect and never experience life without it than to have the defect inflicted at some later time. Even in the latter instance, the capacity of persons to bear grave misfortune without long-term despair is often much greater than they would foresee.

73. The response to this argument is that since the fetus is not human life, abortion does not endanger the sanctity of life. There is no indication that respect for life has eroded in countries with permissive laws. *See* D. CALLAHAN, *supra* note 26, at 218-77.

restrictive law, apart from those that rest on fetal rights, do not justify a legal prohibition against abortion. The contention that the interests of the fetus must be weighed against those of the mother, however, is not so easily shunted aside. The issue whether a fetus has moral rights, and should, therefore, have legal protection raises the basic question of how the fetus is to be valued.[74] It is self-evident—though not to many partisans of this debate—that although science may suggest perspectives, it cannot tell us at what point a fetus acquires intrinsic value. Descriptions of a fetus as "innocent life" or as a "bit of vegetating unborn matter"[75] state conclusions, but do not persuade those of differing views. Clearly a fetus is not a fully formed human being, but neither is a live infant. If man is defined in terms of sensitivity of perception or rationality, an infant, like a fetus, is more potentiality than actuality. Indeed, this fact can be used to argue that infanticide should be less severely punished than ordinary murder.

Apart from conclusory statements that a fetus is not a human being and has no rights, two arguments are advanced to support the position that the legal protection enjoyed by the fetus should be withdrawn. One argument is that the law neither recognizes nor protects rights of the fetus. In support of this position it is asserted that the rights of the fetus do not underlie the laws against abortion, which were passed to protect the health of pregnant women at a time when abortions were much more dangerous than they are now. Moreover other legal norms, like those relating to wrongful death, do not treat the unquickened fetus as human. It is also claimed that by putting the life of the mother before the survival of the fetus the abortion laws do not accord the fetus full human rights. There is a serious defect in each of these three arguments. With respect to the first, a law may be supported by a reason different from the one underlying its passage.[76] With respect to the second, there may be reasons for providing one kind of protection but not another, and possibly fetal protection should be expanded to other areas of the law. With respect to the third, even if a fetus is not regarded as the equivalent of a human being, it may be considered close enough to have its interests accorded some weight. The second argument for withdrawing protection from the fetus is that it is not appropriate to impose on all persons the theological conclusion that a fetus is entitled to human life. This position seems persuasive only because a necessary distinction is not made. A law

74. *See generally* Gianella, *The Difficult Quest for a Truly Humane Abortion Law*, 13 VILL. L. REV. 257 (1968).

75. D. CALLAHAN, *supra* note 26, at 4.

76. McGowan v. Maryland, 366 U.S. 420 (1961).

may forbid persons from engaging in an activity simply because others, perhaps a majority, judge it to be against God's will for the participants. Thus, homosexual behavior may be forbidden because it is considered morally wrong, not because of its effect on nonparticipants or even because of any ascertainable secular harm to the participants. In regard to such prohibitions, the argument that it is wrong for one group to impose its theological suppositions on the rest of society is quite forceful.[77]

What is involved is quite different, however, when the issue is what entities are entitled to secular rights. If the use of religious criteria in this respect constitutes a theological "imposition," it is one that cannot be avoided if a high proportion of the population is religious. Everyone must have criteria for ascertaining the respective value of entities. For any seriously religious person, these criteria will be related to his religion. Thus, when a religious person says infants' lives are as sacred as those of adults, or slavery is wrong because humans are equals, or killing cows is all right, his conclusions are implicitly theological. If a majority of society thought cows were as valuable in God's eyes as humans, would it not be perfectly appropriate for them to protect the lives of cows by law, even though a significant minority did not share their view? If a significant minority of society decided that infanticide, or killing "useless" members of society without their consent, was all right, would the majority not be justified in continuing to impose their contrary judgment by law even though their judgment rested on a theological premise? In sum, as long as all that is asserted is that a fetus is entitled to some or all of the rights of human beings[78]—the rights themselves being defined in secular terms—it seems irrelevant whether the conclusion is drawn from theology or biology.[79]

Both because of the large numbers of persons who do not think the fetus has moral rights beyond whatever rights the unconceived may have and because of my personal uncertainty about this question, I would

77. *Cf.* Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963).

78. When a theological premise is used not only to protect the rights of an entity that cannot protect itself, but to value its rights more highly than those of someone of admittedly equal status, the problem is more difficult. For example, one might believe that a fetus is no more valuable in God's eyes than a prospective mother, but consider its survival more important because it, unlike the mother, has not been baptized. This position has been attributed to the Roman Catholic Church (*see* G. WILLIAMS *supra* note 22, at 193) but the attribution is apparently inaccurate. Noonan, *An Almost Absolute Value in History*, in THE MORALITY OF ABORTION 51, n.173 (J. Noonan, ed. 1970).

79. Thus, an establishment clause argument is untenable against a law protecting fetal rights.

prefer to leave the choice of whether to have an abortion to the individuals involved; consequently, I support a permissive law. This view is greatly strengthened by the impossibility of effective and fair enforcement of a restrictive law with tolerable investigative methods. Yet there is no conclusive refutation to the position that a fetus has certain rights, and a person who holds this view may sensibly support a restrictive law.[80] If the argument is advanced that a restrictive statute rests on the right of the fetus to life, it is improper for a court to hold that a woman has a constitutional right to an abortion.[81]

Although abortion is a more complex issue than use of contraceptive devices or contraceptive sterilization, the trend toward liberalization of the abortion laws will probably continue, and the population problem is one very powerful argument for movement in this direction.

III. AN EVALUATION OF PROPOSED CRIMINAL PROHIBITIONS

Although the elimination of rules that prohibit persons from doing something they wish to do might contribute to a reduction in the birth rate, there is no assurance that this would solve the problem of overpopulation. Overpopulation will still occur if the total of children desired is greater than the total that is good for society. Some children might not be wanted if parents made a rational calculation of the advantages and disadvantages.[82] Consequently, education about the use of contraceptives and about the benefits to individual couples of limiting family size may be reasonably effective, since the appeal is essentially to self-interest. The problem is quite different for couples that prefer a large family even after carefully weighing all the personal factors involved. Although both overpopulation and the resulting ecological problems have a negative effect on the quality of life, the number of children in one family is not going to influence the impact of those problems on the parents. Thus, overpopulation does not provide a self-interested reason

80. A person who thinks the fetus has some rights, however, might prefer a permissive law for a variety of reasons. He might not want the state to decide between permissible and impermissible abortions or he might consider legal abortions a lesser evil than illegal abortions. For a summary of the shifts in the position of Father Robert Drinan see D. CALLAHAN, *supra* note 26, at 436-37.

81. For a thoughtful discussion of this point see the opinion of Judge Ainsworth in Rosen v. Louisiana State Bd. of Med. Examiners, 318 F. Supp. 1217 (E.D. La. 1970). *But see* cases cited note 63 *supra*.

82. It is often thought that poor people would have smaller families if they were aware of how their standard of living could thereby be raised. For a family living on welfare with benefits increased for each child, however, that premise may not be accurate. It is also true that some poor parents value children so highly that they would simply prefer to make the economic sacrifice involved.

for refraining from having children.[83] Altruistic appeals to the social good are made, but altruism has limited long-term effectiveness as a spring for social action. Plainly, the motivation to have children is a complex one, and it may be that extensive emphasis on the desirability of small families will alter some of the positive associations connected with having larger families, such as the feelings that many children are proof of one's masculinity or feminity and that the greater the number of children the better the chance of "immortality" through a line of descendants. If a consensus were reached on the appropriateness of small families, the possibility of social embarrassment might also inhibit some of those who would otherwise prefer more children.

Although extensive educational efforts may change social attitudes toward having children, the extent to which education, joined with the provision of acceptable, free, safe, and effective means of avoiding birth, can reduce the birth rate depends largely on how many unwanted children are now being born. One study has indicated that among married couples, 22 percent of births from 1960 to 1965 were unwanted by at least one spouse and seventeen percent were unwanted by both spouses.[84] If it is true that nearly twenty percent of children born are not wanted, perfect contraception would bring the birth rate down very close to replacement level[85]—the level necessary to replace the child-bearing generation.[86] Since some population experts do not believe that such a high percentage of births are unwanted, they are skeptical that informational programs and the provision of free or cheap means of preventing birth will reduce the birth rate to a desirable level.[87] If, in fact,

83. The same is true of air pollution, which does not provide a self-interested reason for not driving a car.

84. Bumpass & Westoff, *The "Perfect Contraceptive" Population*, 169 SCIENCE 1177 (1969). This figure is thought to be biased in favor of wanted babies, since after birth parents may identify babies as wanted who were not wanted, and the sample excluded babies born to unmarried mothers, of whom presumably a much higher percentage are not wanted.

85. Of course, as long as some potential parents have religious or moral scruples against using a particular kind of contraceptive, even the combination of complete information, perfect effectiveness, and free provision would not lead to use.

86. Replacement rate must not be confused with zero population growth. Because of the present age distribution in our population, if replacement level were now reached and maintained, it would be 60 or 70 years before population growth ceased. *See* Frejka, *Reflections on the Demographic Conditions Needed to Establish a U.S. Population Growth*, 22 POPULATION STUDIES 379 (1968).

87. *See, e.g.*, Blake, *Population Policy for Americans: Is the Government Being Misled?* 164 SCIENCE 522 (1969). When one estimates the birth rate that would ensue from effective voluntary choice, it is important to remember that some couples want children hut are unable to have them. A reduction in births from improved contraceptives, is likely to be offset in part by an increase in births from improved fertility drugs.

the self-interested behavior of individual couples leads to larger families than are good for society, then the argument is strong that legal rules should be used to limit family size.

A. Compulsory Contraception, Sterilization, or Abortion

The most straightforward use of legal rules to reduce the birth rate would be to prevent women from giving birth by requiring use of contraceptives, sterilization, or abortion. This could be accomplished either by force—putting a sterility drug in the water supply or dragging pregnant women to the operating table—or by imposing criminal penalties on those who fail to do what is required. Another possibility would be for the law not to specify how a woman is to avoid birth, but simply to penalize her, and possibly her husband as well, if she has more children than allowed. This approach would leave the means of avoiding birth up to the couple involved.[88]

These approaches present common issues for discussion, but certain practical and moral differences merit initial attention. A law requiring use of contraceptive devices is not practical in the present stage of technology. Since none of the existing methods, apart from complete abstinence, is completely effective,[89] it typically would be impossible to ascertain if a pregnancy resulted from a failure to use the contraceptive or a failure of the contraceptive. Even if it could be established that a device was not used in the proper way, it usually would be very difficult to distinguish between intentional non-use, negligent failure, as when a woman forgets to take a pill, or non-negligent accident, as when an intrauterine device is expelled without a women's knowledge. This is certainly not an area in which strict liability or punishment for negligent acts or omissions is appropriate, and it would be difficult to find clear proof of intentional "wrongdoing." These practical barriers could be

88. Both Louisiana and Mississippi do make it criminal for women to have more than one illegitimate child. LA. REV. STAT. § 14:79.2 (Supp. 1970); MISS. CODE ANN. § 2018.6 (Supp. 1970). When a state forbids abortion and it, or other states, permits fornication, statutes like these are almost certainly unconstitutional under Robinson v. California, 370 U.S. 660 (1962), since the "status" of pregnancy, acquired without any wrongful act, leads to birth without any intervening volitional act, and the only method of halting this progress is legally proscribed. If a state were willing to require persons to have abortions, this objection would be removed—though the present statutes of Mississippi and Louisiana would still be subject to attack on equal protection grounds. Forbidding all women to have a third child would, indeed, be tantamount to requiring women with 2 children to abort any subsequent pregnancies.

89. *See* Segal & Tietze, *Contraceptive Technology: Current and Prospective Methods*, REPORTS ON POPULATION/FAMILY PLANNING, Oct. 1969, at 1. That the most effective methods, oral contraceptives and intrauterine devices, also involve the possibility of unpleasant or harmful side effects is another argument against requiring their use.

largely overcome by technological advances. Pills or injections that would need to be taken only once a month are now under clinical evaluation, and researchers foresee the possibility of an implant beneath the skin from which the body would absorb a contraceptive agent at a constant rate for many months or even for years.[90] If a contraceptive pill or implant were of long-lasting effect and its operation could be altered easily, then it would be possible for persons to be required to ingest the pill or receive the implant periodically in front of public officials, as is now done, for example, in a methadone maintenance program. There also has been discussion of the possibility of placing a sterilizing agent in the water supply and giving an antidote to those permitted to have children, though no one knows whether or when such an agent might be discovered.[91] Developments like these would make it possible for the government to compel contraception, a form of regulation that would now be absurd.

So long as any substantial part of the population views abortion not only as morally wrong but also as "murder in the womb," required abortion will be even less acceptable to many people than required use of contraceptives or required sterilization.[92] If abortions could be safely performed up to the time of birth and if abortions up to that time were socially acceptable, however, required abortion would not present the same enforeeability dilemma as required use of contraceptives. This is because it is an extraordinarily rare occurrence for a women to go through an entire term without realizing she is pregnant. Abortion becomes increasingly risky, however, after the first trimester. In addition, some people who believe the fetus has no rights during that period take a different view after quickening—when the fetus first moves—or after viability—when if born it might survive. It is not extraordinary for women to go through two or three months of pregnancy without being aware of their condition, and ignorance on occasion extends to quickening. Since it would be difficult to know if a woman who failed to come forward during the first trimester did so intentionally or out of ignorance, required abortion would be practical only if the state were willing to compel abortions at least well into the second trimester.

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90. *Id.* Gilmore, *Something Better Than the Pill?,* N.Y. Times, July 20, 1969, § 6 (Magazine), at 6.

91. When one considers how difficult it is to get water fluoridated, one can imagine the likely political palatability of this proposal. For an analysis of some of the difficulties with the idea of a substance in the water supply see Djerassi, *Birth Control After 1984,* 169 SCIENCE 941 (1970).

92. Some persons who do not condemn use of contraceptive devices regard abortion as wrong; others who think both are wrong would regard abortion as a greater evil.

It is apparent that if birth control is to be mandated, the most practical approach at the present time is compulsory sterilization; this is the method states have chosen when they have wished to prevent particular classes of persons from reproducing. Since sterilization is irreversible[93] or reversible only by an operation that could be made illegal, a government could compel sterilization of those with a certain number of children, preventing them from further procreation. Compulsory sterilization of men with a given number of children was once proposed but rejected in India.[94] Much more striking is the fact that nearly half of the states in this country provide for compulsory[95] eugenic sterilization designed to restrict the spread of such characteristics as insanity, feeblemindedness, and habitual criminality.[96]

The essential objection to a broad form of compulsory sterilization, as well as to compulsory contraception or abortion, is that it would be a very severe interference in an area of human behavior generally considered within the range of choice of a husband and wife. Many of the arguments based on individual rights for permitting abortions would apply equally against imposing sterilization. Moreover, compulsory sterilization would presently involve a physical invasion of the body, actual and symbolic,[97] and for some people it would violate religious rights and duties.

In *Buck v. Bell*,[98] the Supreme Court sustained compulsory sterilization for genetic purposes with Justice Holmes's famous epigram,

93. Irreversibility presents a special problem. If it were suddenly decided that a population increase were desired, those already sterilized would be precluded from having children. Even if general policy did not change, individuals in the class not allowed to have children would be unable to return to the class allowed to have children, as, for example, if a sterilized man's wife and 2 children were killed and he remarried a young woman without children.

94. *See* Berelson, *Beyond Family Planning*, STUDIES IN FAMILY PLANNING, Feb. 1969, at 1, 4-5.

95. Conditioning the granting of probation or release from a civil institution upon sterilization is not quite compulsory sterilization, but when institutional confinement is the only alternative, the pressure to accept sterilization is very great. It may well be that in terms of constitutionality conditional sterilization should be treated like compulsory sterilization. In one case, 3 judges of the Nebraska Supreme Court upheld a statute under which some inmates of a state institution for the feebleminded were released only if sterilized. Two judges thought the statute violated substantive due process, and 2 others found it unconstitutionally vague and standardless, but the statute survived since a 5-man majority is necessary in Nebraska to invalidate a statute. *In re* Cavitt, 182 Neb. 712, 157 N.W.2d 171 (1968).

96. *See generally* N. ST. JOHN-STEVAS, *supra* note 22, at 160-97; G. WILLIAMS, *supra* note 22, at 74-111.

97. Compulsory vaccination also involves some bodily invasion, but it is much less significant.

98. 274 U.S. 200 (1927).

"[t]hree generations of imbeciles are enough."[99] In *Skinner v. Oklahoma ex rel. Williamson,*[100] it struck down the compulsory sterilization of a class of habitual criminals on a rather narrow equal protection ground, but the opinion commented more generally, "we are dealing here with legislation which involves one of the basic civil rights of man. . . . The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. . . . Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty."[101] In *Griswold,* Justice Goldberg wrote in concurrence, "Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born to them."[102] These statements, although dicta, confirm the rather obvious proposition that compulsory sterilization is a very severe infringement of liberty. Given a pressing social need, a broad compulsory sterilization statute would probably pass constitutional muster, but the need for control and the ineffectiveness of gentler means would have to appear much greater than they do now.

The same factors militating against the constitutionality of a compulsory sterilization statute make it even more unlikely that such a statute would be enacted. It would face opposition not only because of its direct impairment of liberty but also because of the fear that control of the number of children would be the first step toward control of the genetic character of children—an even more frightening prospect for many people. Some militant members of minority groups already have attacked birth control efforts on the grounds that they are designed to suppress the growth of minorities and divert attention from real social evils; it is certain that they would greet a proposal of compulsory control with much sharper opposition. A more limited compulsory sterilization statute, such as one directed to welfare mothers with a given number of children, might face less political opposition, but it would operate in a discriminatory manner against the poor and, therefore, indirectly against minority racial groups. It is highly doubtful that it would survive

99. *Id.* at 207. It is not certain that *Buck v. Bell* would survive recent emphasis on the right of individuals to control of their bodies. A modern attack on a statute authorizing compulsory genetic sterilization would probably be directed not only to the importance of this right, but also to the uncertainty about the genetic qualities of the offspring of any class of persons and the vagueness that usually characterizes standards for deciding who may be sterilized. *See, e.g., In re* Cavitt, 182 Neb. 712, 717, 157 N.W.2d 171, 177 (1968).

100. 316 U.S. 535 (1942).

101. *Id.* at 541.

102. 381 U.S. at 496-97.

a constitutional challenge, which would include an equal protection as well as right of privacy argument. In any event, a statute of limited scope probably would not have substantial impact on the general birth rate.

Given traditional notions of the family, compulsory birth control for unmarried persons might seem acceptable. Anyone making this proposal, however, would have to contend with several factors, including the probable irreversibility of sterilization, the impossibility of compelling use of contraceptives, the unacceptability of requiring abortions, and the inequitable operation of the rule on various economic and racial groups. Moreover, if the traditional family further disintegrates, more unmarried persons may want to have children. In summary, a direct limitation on normal births is not now, and is not likely soon to be, a socially acceptable method of population control.

B. Prohibition of "Artificial" Conception

If prohibition of normal conceptions and births is not feasible, the law might impose strict prohibitions on procreation by other means. These prohibitions would not conflict with religious duties, but they would certainly narrow the range of choice for childless couples. Artificial insemination, practically a development of this century, is one method by which a couple unable to conceive in the usual fashion may have children.[103] The only argument against insemination with the husband's semen (A.I.H.) has been that it is unnatural. This is essentially a religious judgment and an inappropriate basis for secular restriction.[104] One might argue, of course, that since there are enough naturally conceived children, any artificial method should be forbidden. There is a serious inequity, however, in imposing the burden of population control on those unfortunate enough not to be able to have children in the usual way, especially when one considers the great joy a wanted child can bring to a couple. Moreover, such a prohibition would be as difficult to enforce as laws against abortions.

Whether a child born of artificial insemination with a donor's semen (A.I.D.) is a bastard has not been treated uniformly; in most states the child's status is unclear. The prospect of having a bastard child is itself a powerful disincentive, but the law could go further and make the practice criminal. A prohibition against A.I.D. would not be as difficult to enforce as one against A.I.H., but it would still be difficult.

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103. *See generally* N. ST. JOHN-STEVAS, *supra* note 22, at 116-59; G. WILLIAMS, *supra* note 22, at 112-45.

104. The main legal question that has arisen from A.I.H. is whether a divorce can be based on nonconsummation after a child has been conceived.

Tenable secular arguments against A.I.D. include: (1) the husband will resent the child;[105] (2) a child who discovers his method of birth will be deeply upset; (3) having a child unaware of his father's identity creates a danger of incest, particularly when one donor's semen is used for many prospective mothers; and (4) the fraud about fatherhood that underlies A.I.D. is socially harmful. The population control argument may add weight to these arguments. There are relatively few couples who want to have a child conceived in this way, and it is inequitable to impose population control on them if the practice would otherwise be accepted. Since I find population control of marginal significance here and believe the desire of couples to conceive by this method outweighs the negative arguments, I would oppose criminal sanctions and approve legitimizing the children.

It will soon become possible to fertilize an egg cell in a laboratory and then implant it in the mother's womb.[106] It may be difficult to distinguish this practice legally from more traditional artificial insemination. A much more radical innovation would be test tube embryos nurtured by artificial means until birth. The problem of what the attitude of the government should be toward this method of procreation is extraordinarily complex. Arguments against allowing it are the uncertainty of the effect on children born in this way and the absence of any need for more children. The possibility of genetic control that this method of procreation promises is greeted by warm enthusiasm or deep abhorrence, depending on the observer's reaction to control of human characteristics.[107] For those who strongly favor equality of the sexes, freedom from pregnancy would be a powerful step toward female emancipation.

If the government prohibited the creation of "artificial" babies, the immediate effect would be to limit population. Permitting artificial conception might eventually lead in the same direction, however, by altering women's roles so that family and children would be less central and by getting the government involved in regulating the production of babies so that subsequent control of natural births might be politically more palatable.

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105. Evidence on this point is inconclusive, but the information available does not appear to support it.

106. *See* NEWSWEEK, Nov. 23, 1970, at 120; N.Y. Times, Oct. 29, 1970, at 1, col. 3.

107. For 2 thoughtful treatments of this subject see Friedmann, *Interference With Human Life: Some Jurisprudential Reflections*, 70 COLUM. L. REV. 1058 (1970) and Golding, *Ethical Issues in Biological Engineering*, 15 U.C.L.A. L. REV. 443 (1968). For an excellent review of the prohlems of drafting appropriate legislation to deal with scientific developments sce Grad, *Legislative Responses to the New Biology: Limits and Possibilities*, 15 U.C.L.A. L. REV. 480 (1968).

IV. A Few Suggested Alternatives

At the beginning of the article, it was suggested that compulsory measures should generally be employed only if other means fail. Not surprisingly, many of the most vociferous advocates of population control are hesitant to endorse general compulsory sterilization. Among the suggestions for use of the law to reduce the birth rate are some "milder" compulsory measures, such as raising the permissible age for marriage, increasing the waiting period for marriage, and raising the age at which children can leave school. More seriously mentioned are financial disincentives for large families, such as limiting the income tax exemption to two children.[108] The financial incentive-disincentive approach creates some difficulties. If no family is to be allowed to live below a certain minimal level, disincentives will be least effective for those already living at that level. On the other hand, a truly effective incentive-disincentive system will least affect the very affluent, who can afford to spend a great deal for anything they really want, and this system might with some justice be attacked as grossly inequitable. One possible tax reform would be to eliminate advantages that married couples enjoy as compared with single persons, but since few people marry for tax reasons, it seems unlikely that this change would significantly reduce the number of marriages. More generally, the great monetary expense of raising a child and the personal sacrifices usually required make one very skeptical that any moderate financial incentive or disincentive would affect the decision of whether to have a child.[109] It may be that financial incentives would have a greater effect on choice of residence and thus would be better employed in the area of population distribution than population control.[110]

The main thrust of the proponents of population control has been for government spending to encourage contraception. The federal government could go beyond spending money on programs permitted by state law and effectively sidestep restrictive state laws by financing clinics to provide abortions.[111] Federal legislators, however, probably

108. *See* Packwood, *Incentives for the Two-Child Family*, TRIAL, Aug./Sept. 1970, at 13. For an excellent survey of the possibilities and their respective drawbacks see Berelson, *supra* note 94.

109. Family allowance programs in Europe have not been effeetive in their aim to raise the birthrate. *See* Packwood, *supra* note 108, at 9-10.

110. *See* Spengler, *supra* note 9, at 529.

111. The federal government might attempt to go further on the theory of protecting a constitutional right of privacy and pass legislation eliminating restrictive state abortion laws. *See* Packwood, *supra* note 108, at 16. It is difficult to predict confidently how the legislation would far

would not want to risk the affront to the states that would be involved in these clinics.

In conclusion, it is possible that at some future time compulsory birth control in this country will be absolutely necessary to deal with a severe population problem, and measures that now seem morally and politically unacceptable will move within the range of practical choice. We do not yet know, however, what can be accomplished by elimination of restrictive abortion laws, intensive education about contraception and sterilization, free provision of contraceptive services, and further improvements in contraceptive technique.[112] Until these avenues and methods employing moderate utilization of legal rules have been exhausted, and until we are certain that a long-term and gross discrepancy exists between the number of children desired and the number society can support, it is premature to suggest that we must make a choice between social deterioration or extinction and a severe restriction on human liberty.

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against a constitutional challenge that it goes beyond the limits of federal power. *Cf.* Katzenbach v. Morgan, 384 U.S. 641 (1966).

112. *See generally* Berelson, *supra* note 94.