

ARGUENDO:

The Legal Challenge of Population Control

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IT IS OBVIOUS THAT OVERPOPULATION is the most critical social problem of our time. As such, it is necessarily the greatest legal problem of our time and the greatest challenge which faces the legal profession today. Since the population problem is fast becoming the population crisis, it is essential that our laws and our legal order must now be subject to reexamination. We dare wait no longer in studying, formulating, and augmenting the proper and precise laws and legal machinery both to help restrain the population growth and to alleviate the ills inherent in overpopulation and unwanted population.

But we must, in our quest for the best laws, be wary of the trap of talking solely in terms of population curtailment. We must take as our guiding principle the words of population expert, John D. Rockefeller, III: "Our constant goal is and must be the enrichment of human life, not its

EDITOR'S NOTE: *The following is extracted from a statement by the author to the Subcommittee on Foreign Aid Expenditures of the U. S. Senate Committee on Government Operations (Hearings on S. 1676, March 2, 1966). Hearings on the population crisis were held during 1966 and 1967 under the chairmanship of Senator Ernest Gruening. Professor Blaustein has added the footnotes for the convenience of readers of the REVIEW.*

restriction.”¹ In other words, our new laws on the population problem must at the same time make for a better society.

The laws and legal structure which must now be studied and developed—and changed—fall under four broad, generalized classifications.

First: We must have legislation designed to close the knowledge gap and to provide the governmental administrative machinery to handle the population problem. This is the necessary first step and we are fortunate in having this type of bill before your committee at this time.

Second: We need laws designed to encourage family limitation.

Third: We need legislative changes and changes in legal rules in light of the newly perceived and newly recognized social value of population control.

Fourth: We need laws to help alleviate the problems inherent in a society with a greatly expanded population—problems involving conservation of natural resources and the like.

The keystone of our American democracy is the principle summarized and adopted as the theme of the 1954 Columbia University Bicentennial. It reads: “Man’s right to knowledge and the free use thereof.” With this principle there can be no reasoned dissent. The bill before this committee, S. 1676—I wish that the number for this new declaration of freedom were S. 1776—is the vital, necessary first piece of legislation in the first category. It is the logical legislative follow-up of the efforts of able lawyers who, with the cooperation of equally able men of medicine and demography, have fought outmoded laws in legislative halls and courtrooms in order to advance birth control knowledge. The importance of the dissemination of this vital knowledge—the closing of the knowledge gap—has already been ably presented by many other, better qualified witnesses. I can add nothing to this part of the dialog except to express support.

As to the fourth category—dealing with laws to alleviate the problems of a much expanding population—there is likewise little reason to comment. There already exists a vast literature on what laws must be passed to revitalize our cities, save our water reserves, prevent air pollution, and so forth. However, we might also want to think at some point in terms of new tax laws providing depletion allowances or other incen-

1. J. D. Rockefeller, III, *A Citizen's Perspective on Population*, 6 INTERCOM. 14 (1964).

tives in order to encourage the kinds of production we will need for our new expanding population.

But little has yet been said or done about the second category, laws to encourage family limitation, and the third category, legal changes which should be made in light of the new social value of population control.

Laws designed to limit population growth must meet two criteria: they must, first, actually accomplish that objective; and, second, they must do so without reducing the significance of human life and the value of individual dignity. Such laws must not be enacted on an ad hoc basis. They must not be based on a "feeling" on the part of legislators that these laws can do the job; such laws must not come in response to emotion-based public sentiment or reaction. Rather, they must be laws based upon study and analysis—the results of efforts of lawyers, working together with men of medicine, demography, sociology, and so forth.

And what is specifically not wanted are State-imposed population controls. A law directly limiting the number of children which a family can have would be repugnant to American ideals. The lawyer's job today is to find the best laws to encourage population limitation, at the same time minimizing the number of unwanted children and advancing the Great Society.

We have already heard legislative proposals that any woman who bears two illegitimate children should be sterilized following a court order. We have already heard proposals that welfare payments should be denied for the support of those who have illegitimates. But would such laws have any effects? Even disregarding our ideals and our other social values, certainly we should not pass laws of this type until we analyze their effects and know that they will work to curtail population.

Desirable laws designed to encourage family limitations must be analyzed under four headings: (a) age; (b) economics; (c) knowledge; and (d) medicine. And in regard to all four, it seems that a good part of the solution will come from laws encouraging education. Now to each of these four areas of consideration:

A. We start with age. There is a definite correlation between marriage age and population growth. One of the best ways to help limit the population explosion is to encourage proper delays in marriage. And this is certainly not an evil.

The tendency to marry young is peculiar to the United States, among the advanced countries of the world. Only in Asia is there a marrying young pattern comparable to that of the United States. More girls marry

at age eighteen than at any other. Half of all brides this year will be under twenty. Further, it has been estimated that half of all young men in America are married before they are twenty-five.² And not only are they marrying young, but they are having their first babies soon after marriage and are having their children closely spaced. One-half of all mothers have their first child at age twenty-one. And it is interesting to note that the average mother has her last child by age twenty-six,³ and that there is a very sharp reduction in child production which comes before age thirty.⁴ So it is a serious business to consider raising the marriage age in order to reduce population growth.

Unfortunately, when one speaks about the marriage-age situation it is also necessary to speak about unwanted, unplanned first children. Sociologists have estimated that at least one out of every six brides is pregnant on her wedding day. And probably one-third to one-half of all teen-age marriages involve pregnancies.⁵

One law-legislative solution is to raise the age at which persons may marry. Certainly, it should be no less than eighteen. Those states that permit marriages below that age should increase the figure to eighteen. Equally important is not lowering age limitations which already exist, despite pressures in that direction. Kentucky has not changed the age at which its children may be married, but it has, I believe, taken a step in the wrong direction by lowering the legal age from twenty-one to eighteen for the purchasing of homes, opening of charge accounts, etc.⁶ The waiting periods between announcing intention of marriage and the actual marriage ceremony should also be increased by law and that law should be enforced.

Probably the best way to raise the marriage age is through laws fostering more education. By building more schools, by providing more scholarships, by raising the compulsory education age, and so forth, we can keep children in school longer. And this will limit the exploding population in still another way. Education has long been recognized as

2. *What Happens to Teen-Age Marriages?*, 19 CHANGING TIMES, THE KIPLINGER MAGAZINE 6-7 (Nov. 1965).

3. *The Facts of Social Life (Updated)*, 9 AM. BEHAV. SCI. 33, 34 (Oct. 1965).

4. R. C. Cook, *New Patterns in U. S. Fertility*, 20 POPULATION BULL. 113, 130-31 (1964).

5. See, J. IND. ST. MED. ASS'N and J. MARR. AND THE FAMILY, as quoted in *supra*, note 2, at 8. Reference also personal correspondence between the author and various sociologists.

6. KY. REV. STAT. 2.015, ch. 21, § 1 (1964).

a regulator of fertility. Those with more schooling are far more likely to plan activities more efficiently, and this includes family size. And more education also makes for a better America.

This would make a good beginning—a good beginning which further study and investigation can make still better.

B. Let me talk about economics. Almost all the countries in our Western civilization, outside of the United States, have, at one time or another, adopted family allowance systems in order to prevent population declines. But what economic measures should now be taken to encourage family limitation?

It has been said that increased availability of mortgage credit, plus social security benefits, unemployment and disability compensation, minimum wage laws, and so forth, do encourage early marriages and more children. However, it is not consistent with our ideas of the Great Society to take away any of these benefits. Nor is it demographically certain that curtailment of any of these benefits would limit any significant population growth. Certainly, studies by lawyers, public opinion experts, demographers, sociologists, economists, and so forth, are necessary to know what effect such laws actually have on our population growth.

We do know as a fact that population declined in an earlier era when legislation forbidding child employment reduced the value of children as income-earning assets. What does this mean to us in terms of future laws? Shall we further change child labor laws? This is certainly something that must be investigated. We also know that working women have fewer children than those who are not employed. Thus, from the point of view of population control, as well as our struggle to achieve the equality of all citizens, removing discrimination against women in employment is of great importance.

The population problem also calls for a reexamination of our tax structure. Should we continue to have a marital deduction? We now allow a \$600 income tax deduction per child. Should this be continued? Will its repeal actually have an effect on population growth? My point is that we should find out first, before taking away such a deduction because we “think” it might have a population-reducing effect. I am inclined to think that the better alternative is to create a tax deduction for money spent on education. But I am not really sure about the effect this would have on population growth. Certainly, we should find out.

C. Knowledge: Under this heading we must think about ways to close the knowledge gap other than those provided for under the present bill. Here we must think in terms of laws setting up state medical clinics and social agencies where data on population control can be disseminated to those who want such information. And we must think about laws which will speed the communication of knowledge. At the same time, we must phrase such laws with care, with appropriate precision, so that those whose moral or religious convictions are opposed to contraception will be free *not* to take advantage of such information or such services. This is best done in advance—and not at a time when a legislature is being rushed to pass such legislation.

D. Medical: Under this heading must come the further study and analysis of laws connected with abortion and sterilization. Much intelligent legal work has already been done. More must be done. Here we start with the realization that there are probably more than 1 million illegal abortions per year in the United States and that at least 5,000 women lose their lives annually through such practices.⁷

We are told by the very great population expert, Dr. Alan F. Guttmacher, that the “abortion laws in the United States make hypocrites of all of us.”⁸ And another expert tells us that when it comes to abortion, that he knows “of no other instance in history in which there has been such frank and universal disregard for criminal law.”⁹ Dr. Guttmacher also criticizes what he calls our “national crazy-quilt pattern of legislation”¹⁰ on the laws governing sterilization. He says “most of us do not know whether we are being legal or illegal when we carry out a sterilization without strict medical necessity, such as a serious heart disease.”¹¹

Steps in the right direction have been taken by the highly respected American Law Institute in its model penal code. And there is legislation in Virginia and in a number of other states which must be examined as possible models for the future. This is not testimony now advocating the passage of laws on either abortion or sterilization, but it is a plea for further study as to the possible role of such laws in our society.

7. Studies quoted in J. M. Kummer, *The Problems of Abortion: The Personal Population Explosion*, in *THE POPULATION CRISIS AND THE USE OF WORLD RESOURCES*, 274, 275 (S. Mudd ed. 1964).

8. *Id.* at 278.

9. TAUSSIG, *supra* note 7.

10. A. F. GUTTMACHER, *BABIES BY CHOICE OR BY CHANCE*, 59 (1959).

11. Alan F. Guttmacher, *The Place of Sterilization*, 268, 271, in Mudd, *supra* note 7

Lastly is the recommendation that we reconsider and reevaluate all our laws in light of the newly recognized objective of population control. Laws are expressions of our social values. And quite properly, in the days before the automobile, our social values were such that we made it a greater crime to steal a horse in Texas than to steal a horse in Massachusetts. Today we have this new social value of population limitation—a value which did not exist at the time that our present-day laws were put into effect. As each new law is proposed, it must be analyzed in view of this new objective. And the time has come to engage in a comprehensive study of *existing* laws in light of our population goals.

A few moments ago, I mentioned the new law of Kentucky which has reduced the legal age from twenty-one to eighteen. Kentucky is the first state to have done so, although several other states have set the legal age at eighteen for women, while keeping the legal age at twenty-one for men. My immediate reaction is that such laws tend to increase population. When those who are only eighteen are permitted to buy homes, open charge accounts, and obtain loans under their own signature, school dropouts and early marriages may be encouraged. Let us find out. Let us think about the relative effect on population control before we pass such laws. Of course, it is a good argument on the other side to say that if a person is old enough to vote and join the Armed Forces then he is old enough to enter into contracts. But I suggest that the social value of population limitation was not considered in the passage of this law. And it should have been.

There are many laws which need reconsideration in light of our social desire to limit population growth. Marriage laws have already been noted, but we must also consider laws on divorce and on annulment. In many jurisdictions, annulments will be granted if one of the parties refuses to have children. Is such a legal rule valid in view of today's thinking? We need to reexamine our laws concerning illegitimate children. And, very important, we must reconsider our family support laws. What rules shall we enact regarding the financial responsibilities of fathers of both legitimate and illegitimate children? We must reevaluate our welfare laws and the way relief payments are handled. We must also examine our criminal laws dealing with such matters as the age of consent and homosexuality. Should we make changes in laws on joint bank accounts, on laws involving land ownership, on laws dealing with employment, on laws dealing with inheritance? I believe that we will want to make changes in all of these laws after we restudy them in view of the population problem.

Perhaps more important is our further consideration of the education laws. At what age can we permit dropouts? How much compulsory schooling—at what kinds of schools—should be demanded? Is it advisable to give single persons preference in obtaining scholarships? And we should even look into the question, as has been suggested by one group of demographers, as to whether we should continue to have coed junior and senior high schools or replace them with all-boy or all-girl schools.

There is almost no limit to the number of laws which should be re-examined in view of the additional criterion of the social value of population control. This should make us take even stronger steps to enforce the laws prohibiting racial discrimination. For as we provide employment for, and advance the education of, the nonwhites in our population, we shall have an automatic reduction in numbers of children—as well as making for a better and more prosperous America.

In his essay on "Population, Space, and Human Culture," Henry B. van Loon states: "The scientist and the lawyer must work together closely in the interest of mankind: the scientist to give us facts, the lawyer to help us make them useful."¹² And the sociologist wants to give us surveys of knowledge and attitudes or practices concerning reproduction so we can find out what people really know, believe, and do. As Julian Huxley has pointed out, "public opinion is ready."¹³

We have reached the stage where we must bring all of our disciplines together so that we, in this great developed country can implement a sound population policy—one which can then be readily transferred as part of our great contribution in helping the lesser developed nations of the world.

12. H. B. Van Loon, 25 L. & CONTEMP. PROB. 397, 405 (1960).

13. J. Huxley, *Too Many People*, in OUR CROWDED PLANET, 223, 229 (F. Osborn ed. 1962).