

POPULATION CONTROL

**Civic and
Constitutional
Concerns**

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POPULATION CONTROL

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WILLIAM B. BALL

Population Control: Civic and Constitutional Concerns

THE QUESTION AS CONTROVERSY

The press reports that a controversy over government birth control is raging in the land,¹ but the press is wrong. Some people who have been interested in the question have been raging,² but the controversy has not. The controversy is dead, and government birth control programs are here to increase and multiply. Their proponents have won a spectacular victory; their potentially large opposition has not so much suffered a defeat as been unaware of it. The situation, however, needs evaluating, first of all, as an event having potentially strong effects upon interreligious peace.

In considerations of religion and the public order, the civil peace and the keeping of it are important. Certainly the focus of American church-state relationships today should be more upon making hinges and joints to connect group and group (and lubricating these) than upon perfecting the political efficiency of our separate parts. If the byword in intergroup relationships today is "understanding," understanding implies not only the comprehension of the other party's case,

¹ For a summary of the conflict in the winter of 1966, see *Sharp Retorts Greet Birth Control Statement*, *The Catholic Messenger*, Nov. 24, 1966, p. 1.

² See, e.g., full-page advertisement of the Hugh Moore Fund, *N.Y. Times*, Dec. 18, 1966, Sec. 4, p. 14E.

but a willingness to communicate our own understanding of our own case. Religious leaders are coming around to this understanding of understanding slowly. Some undoubtedly feel that a self-evident case is only weakened by explanation, while others perhaps feel that statements by top religious leaders—like statements by leaders of state—are best suited to the dignity of office of the spokesman when expressing simply principles and conclusions.³ Some such expressions, however, may contain accusations, or confront the belief or practice of an important segment of the community, or call for social or political action. It should be *de rigueur*, in such instance, that before, as a part of, or after the pronouncement, the whys, the arguments, the evidence, should be brought forth—if not by the spokesman, at least by his organization. Otherwise, particularly where religious leaders speak (and especially where they speak to a religiously plural society), it is possible that their unexplained pleas will appear arbitrary, as attempted religious or moral impositions. This can be harmful to interreligious peace—a peace that is eminently worth having.

On November 14, 1966, the Catholic bishops spoke out against governmental promotion of birth control.⁴ Their lengthy statement, which will be examined below, defended certain freedoms of families, called upon government to foster good social and economic conditions for family life, and then spoke paragraphs of warning against the activity of government in promoting birth control. The bishops saw such activity as a threat to rights of privacy, to personal and familial freedom, and they called for “a clear and unqualified separation of welfare assistance from birth control considerations.” They said that “government activities increasingly seek to persuade and even coerce the underprivileged to practice birth control.” They called for popular action in opposition to birth control programs at every level of government.

This statement was an argument, complete in itself, but by virtue of its assertions it plainly opened the door to a national debate. This debate was never forthcoming. The statement was at once taken under fire, with volleys of questions and accusations being directed to the bishops following November 14. The questioners were left begging, and the accusers unrefuted. The public—and the specially

³ See, e.g., reference to population control in President Johnson's State of the Union Message to the Congress, Jan. 10, 1967, 113 CONG. REC. 29.

⁴ Statement, *Government and Birth Control*, in U.S. BISHOPS SPEAK 3 (1967).

exhorted Catholic public—having been called to “oppose vigorously and by every democratic means” state and federal promotion of birth control—were left with nothing but the dying echo of the trumpet call. Far from being provided with any sort of detailed information on the issues by the statement’s authors who had raised them, or guidelines to the action sought, the Catholic laity of the United States never heard another word about the whole subject.

This surprising refusal or neglect to attempt to make the bishops’ case before the American public was unfortunate in two ways: while default in the defense of the statement went far to permit discrediting of what the bishops had said on the government birth control issue, it also unnecessarily created the impression that having “laid down the law” and hurled a threat in the teeth of public administrators who were programing birth control, nothing more need be said. Eloquent though the statement had been, a cast of ipse dixit would attach to it unless an effort were carried out in forums of opinion and broadly in the community to attempt to persuade the public of the reasonableness of the statement’s assertions. Such an attempt would not have added fuel to flames: good argument usually reduces anger and dilutes bitterness. It is the fiat—unexplained and unknown in terms of what political threats it may conceal—that triggers the fears which trigger wrath.

It should have been realized that some explanatory follow-through was peculiarly demanded in this situation, since birth control, as a private practice, is most popular, and since the new governmental activities promoting birth control growingly enjoy a presumption of beneficence in the United States. The ready identification of the bishops’ statement with Catholic doctrine on the morality of contraception was perhaps initially unavoidable.⁵ Due to the fame of the

⁵ Roman Catholic opposition to repeal of statutes penalizing the practice of birth control, the sale of contraceptives, etc., upon the ground that contraception is immoral has been the subject of widespread discussion in the United States during recent decades. See generally BROMLEY, *CATHOLICS AND BIRTH CONTROL* (1965); PFEFFER, *CHURCH, STATE, AND FREEDOM* (rev. ed. 1967) 230-32. Heightening public attention at the present time to the question of the morality, under Catholic doctrine, of contraception has been the appointment of a Papal commission to examine into the question. In 1959, in their statement on population, *Explosion or Backfire?*, the Catholic bishops had stated that “the promotion of artificial birth prevention is a morally, humanly, psychologically and politically disastrous approach to the population problem.” While giving social, political and psychological reasons in support of this conclusion, the bishops

"Catholics-and-birth-control" question (traditionally a question of the morality of contraception), it was easy for the casual listener to assume that this was naturally what the bishops, in their November 14 statement, were talking about—or that that was what they were really getting at, this time under the thinnest guise of a supposed concern about governmental invasions of the privacy of the poor.⁶

It can at any rate now be concluded that the default of the Catholic Church (or of Church staff officials whose duty it is to carry forward policy) on the subject of government birth control programming may prove to have been of historic moment because the Catholic Church alone, among all bodies in the American society, probably possessed the means to bring government birth control into public question and to cause its proponents to attempt to make their case for it. Without regard to the issue of whether the programs in question are for ill or for good, the result of such inquiry and such shifting of the burden of proof, so to speak, might have been a rejection of the programs by the public, or a careful circumscription thereof. As matters stand now, it will be seen that what began as a plea by pro-government-birth-control forces simply to "make available" (through government help) birth control services "to those who need them but can't afford to pay for them"⁷ may result in something far different and with little dreamt of social consequences.

The pro-government-birth-control forces, on their part, appeared well content to avoid debate or dialogue upon the issues twice raised publicly⁸ by the Catholic bishops. The Department of Health, Education, and Welfare, which, in June, 1966, pledged its vigorous support for birth control programs,⁹ at the same time announced that it would sponsor "a series of regional and State meetings" to

had asserted their "fundamental reason" to be the fact that artificial birth prevention is violative of God's law.

⁶ For discussion of the point see Ball, *Government Birth Control: Reply to George M. Sirilla, S.J.*, 12 CATHOLIC LAW. 203 (1966).

⁷ The phrase is of universal currency today.

⁸ On August 24, 1965, through testimony of the author, *Hearings on S. 1676 Before the Subcommittee on Foreign Aid Expenditures of the Senate Committee on Government Operations*, 89th Cong., 1st Sess., pt. 2-B at 1295 (1965); and in the statement, *Government and Birth Control*, *supra* note 4.

⁹ See, Address of Wilbur J. Cohen, Under Secretary of Health, Education, and Welfare, *Family Planning: One Aspect of Freedom to Choose*, Health, Education, and Welfare Indicators, June, 1966, p. 1.

discuss "service requirements, training needs, and scientific factors entailed in family planning programs throughout the United States" and "to inform State and local governments, as well as local institutions, as to what help they can get from the Department in developing family planning programs." While Catholic diocesan officials throughout the land were subsequently invited to participate in these meetings, in no instance were they, or any known advocates of the bishops' position, offered roles as principal participants in any of the meetings. The principal speakers at the regional conferences were, without exception, persons favorable to government-sponsored birth control programs. This was, of course, entirely in keeping with the objectives of the meetings, as clearly announced by the Department. While the meetings undoubtedly served to advance their stated objectives, they did not offer scope to what had emerged as an important point of view on government birth control activity. Thus they, too, failed to advance full discussion of the issues, representative of all major points of view in the community.

The response of numerous critics of the bishops' statement, following its issuance on November 14, is analyzed below, but (considered solely as relating to the quality of the public discussion of the issues) has consisted mainly of efforts to put the bishops upon their proof,¹⁰ accompanied by much denunciation of the bishops' position. While some of the most vehement denunciation of that position appeared in Catholic journals, much of it came from leaders of other religious faiths¹¹ some of whom had been closely identified with the interfaith dialogue.¹²

It may be said that the intervention of the Catholic bishops in the government birth control issue has resulted in a most serious inter-religious rupture, harm to a fragile ecumenism, and even a relighting of old fires of anti-Catholic hostility. The essential question is not, however, the rupture: no principle of ecumenism commands religious leaders to remain silent where conscience commands them to speak out in the name of the good of the community. The charge which

¹⁰ See, e.g., editorial, *The Prelates' Accusation*, New York Times, Nov. 17, 1966, p. 46.

¹¹ See, e.g., editorial, *Did the Bishop Blunder?*, The Christian Century, Nov. 30, 1966, pp. 1464-65.

¹² E.g., Robert McAfee Brown, in signed statement sponsored by the Hugh Moore Fund, New York Times, Dec. 18, 1966, Sec. 4, p. 14E.

has been made, that the bishops' statement of November 14 constituted an attempt to impose upon persons of other faiths Roman Catholic teachings on the morality of contraception through disabling government to provide family planning services,¹³ shows lack of acquaintance with the background of the statement and, in fact, with the statement itself.

First, the statement can certainly be regarded as a logical development of views earlier expressed by the American hierarchy upon the integrity of the family,¹⁴ the inviolability of the right of generation,¹⁵ the dignity of the individual,¹⁶ and the need to delimit any activity of the state which has high potential for the dehumanizing of society.¹⁷ The statement could properly be described as simply an amplification of these themes. The statement's particular attack on government birth control programs for the poor, in other words, can be seen in an established context of the concerns mentioned above just as readily as it can be said to use that context as a mere pretext for striking again at the issue of the morality of contraception.

Second, the text of the statement, taken in its entirety, is, upon its face, a most detailed argument against population control *qua* population control and as against promotional activity by government to induce indigent people to limit their families. The statement thus can be ascribed to these concerns, and in view of that fact it must be admitted that the statement can stand on some basis other than the morality of contraception issue. Indeed, the statement received some very warm praise for its defense of the right of privacy,¹⁸ while virtually every one of its critics, in the course of condemning the

¹³ "To attack the modest efforts of welfare agencies of the government to disseminate birth control information and assistance is an attempt to inhibit intelligent public service programs and make them conform to the specific doctrine of a specific creed. I decry and oppose such an attempt by Catholics or anyone else." Rabbi Maurice N. Eisendrath, as quoted in *The Catholic Messenger*, Nov. 24, 1966, pp. 1, 3.

¹⁴ See *The Pastoral Letter of 1919*, in GUILDAY, *THE NATIONAL PASTORALS OF THE AMERICAN HIERARCHY, 1792-1919*, 307, 311-314 (1923).

¹⁵ See *Explosion or Backfire?*, Statement on Population Issued by the Bishops of the United States, 1959, p. 2.

¹⁶ See *Discrimination and the Christian Conscience*, Statement of the Bishops of the United States, 1958, p. 1.

¹⁷ See *Religion, Our Most Vital National Asset*, Statement of the Bishops of the United States, 1952, p. 4.

¹⁸ See editorial, *The Bishops and Privacy*, *Washington Post*, Nov. 16, 1966, p. A24.

bishops for not having documented their charges of governmental coercion of the poor, admitted that any such coercion would be undesirable. Thus they admitted the correctness of a major point of the statement; and that point is clearly independent of any question of the morality of contraception.

Thirdly, birth control activity as a concern of government is something very new in the nation,¹⁹ and it should be thought at least conceivable that somebody in the United States might seek to evaluate this new activity from the point of view of concerns for human freedom. The fact that those who raised these concerns and thereunder initiated the questioning of this major and novel activity are religious leaders should not disqualify their effort—even considering the fact that the same religious leaders had been notably preoccupied with a very different moral issue involved in the subject of birth control.

Lastly, a word needs to be said in more general terms with respect to charges of “imposing morality.” Religious leaders characteristically seek to “impose morality” in the same and only sense in which the November 14th statement of the Catholic bishops can be said to have attempted to “impose morality.” In the areas of civil rights, nuclear warfare, the separation of church and state, the war in Vietnam, and capital punishment, religious leaders have passionately pleaded that specific civil consequences should be made to flow from moral presuppositions which these leaders have preached. The fact that a given religious group may be the only group holding a certain moral view should in no sense be deemed to preclude its speaking out. Catholics who have criticized the bishops’ position on government birth control activity should be aware that, as an attempt to impose Catholic morality upon others, it is foreseeable that the Catholic Church may soon be the only religious body possessing the belief that abortion should be considered morally unjustifiable where there is, for example, risk that the child would be born with grave physical or mental defect.²⁰ Should the fact that they alone might so regard such abortion be deemed to preclude them from condemning it?

The essential question *vis-à-vis* the bishops’ position is whether it

¹⁹ See, Address of Wilbur J. Cohen, *supra* note 9 at 1,2.

²⁰ Such risks are given as grounds for justifiable abortion in Section 230.3(2) of the Model Penal Code of The American Law Institute. MODEL PENAL CODE PROPOSED OFFICIAL DRAFT 189-90 (1962).

can be reasonably regarded as being in the interest of the good of the community. That, in turn, depends upon two things: (1) the rational basis for the charge by the bishops respecting the allegedly coercive nature of government birth control programing toward the poor, and (2) the rational basis for the proposal that government foster birth control among the poor. The first is evidently important, because it is virtually the sole point selected for criticism by critics of the bishops' statement. The second is important because the achievement of the common good may justify coercion, as has been seen in laws pertaining to traffic safety, health, or fair housing. While upon the first, the bishops are put upon their proof, upon the second, the proponents of government birth control are put upon theirs. If the charge of coercion, when examined, were even found baseless, sound public policy would still require that the installation of government-sponsored birth control programs should have clear and adequate justification.

THE BISHOPS' POSITION AND THE PRIMARY QUESTIONS

The keystone statement of the bishops' declaration is their own quotation from the Second Vatican Council's *Constitution on the Church in the Modern World*: "For in keeping with man's inalienable right to marry and generate children, the decision concerning the number of children they will have depends on the correct judgment of the parents and it can in no way be left to the judgment of public authority."²¹

The bishops asserted that government's "stepped-up intervention in family planning"²² had prompted them to recall the foregoing "warning" by the Council. They then said that freedom to determine family size may be undermined, not only through such social factors as poverty and disease, but particularly where "persons or agencies who control welfare benefits or represent public authority, presume to influence the decision as to the number of children or the frequency of births in a family."²³

At this point in their statement, the bishops felt it necessary to provide definition of the concept of parental freedom to determine family size, perhaps lest a shorthand description of this as a "freedom

²¹ *Government and Birth Control*, *supra* note 4, at 4.

²² *Ibid.* ²³ *Id.* at 5.

of choice" be taken to mean a freedom of choice between state-prescribed birth control methods. The latter view of free choice the bishops rejected as "a narrow concept of freedom,"²⁴ adding that they felt birth control not to be a matter of "universal obligation."²⁵

While the statement then moves on to the particular charges which have been the source of so much comment, it may be ventured that the chief focus of all comment should be the two main assertions of the bishops up to this point: (1) that decisions as to the number of children people will have "can in no way be left to the judgment of public authority,"²⁶ and (2) that such freedom of decision is "undermined" where welfare agencies or public officials "presume to influence"²⁷ such decision. It is submitted that, before arraigning the bishops on charges of lack of "documentation,"²⁸ "proof,"²⁹ "evidence,"³⁰ or "specificity"³¹ in their statement, critics of the statement should address themselves to these two points. They ought, in other words, to tell the public: (1) whether they believe that a decision as to family size may, in any way, be left to the judgment of public authority (and, if so, in what way) and (2) whether they believe that persons controlling welfare benefits or representing public authority participate in that judgment if they attempt to influence such decision.

Here, it is believed, is the heart of the matter, the philosophic questions which are antecedent to any such questions of fact as whether coercive tactics are actually being employed in this or that publicly sponsored birth control program. Unhappily, the limits of the role of the public authority in respect to the matter of the judgment in question are left largely undefined by the proponents of government sponsorship of birth control programs for the poor. A confusion is created by virtue of two points which they simultaneously

²⁴ *Id.* at 6. ²⁵ *Ibid.* ²⁶ *Id.* at 4. ²⁷ *Id.* at 5.

²⁸ See, e.g., Gallagher, *What Happened in D.C. Last Week?*, Catholic Review, Nov. 20, 1966, p. 5.

²⁹ See, e.g., Boyle, *Critique of Birth Control Lacked Hard Facts*, Catholic Messenger, Nov. 24, 1966, p. 7.

³⁰ See, e.g., editorial, *Birth Control is Voluntary*, Pittsburgh Post-Gazette, Nov. 18, 1966, p. 17.

³¹ "The most serious misunderstandings will almost inevitably result from lack of clarity and specificity in the statement of the Catholic bishops of America issued on Nov. 14." Robert F. Drinan, S.J., as quoted in the National Catholic Reporter, Nov. 30, 1966, p. 1.

advance: (1) that population control is a necessity, and (2) that no coercion must be exerted in achieving it. I speak here of a "confusion," not of a necessary conflict between the two points. At least in the abstract, it is possible to envision a population control which is voluntary—that is, one in which masses of individual persons practice family limitation and where all of them do so completely in response to an autonomous judgment that they wish to. Looked at from the point of view of government, this could involve either no governmental activity at all, or it could involve *solely* a faithful adherence to the much touted prescription for government action in relation to birth control programs for the poor: to "*make available* birth control information for those who need it and can't afford to pay for it." Confusion arises out of the fact that there are substantial reasons for doubting that the "make information available" program is remotely the kind of program which the proponents of government birth control programs actually seek (even allowing so extraordinary a meaning to attach to the word "information" as to deem it to include the furnishing of materials and of instruction in how to use them). It must therefore be asked: what kind of program do the proponents seek? Then further questions are posed: will such programs prove coercive? If so, is such coercive effect justifiable in the light of the benefits to the common good which it is reasonably expectable will be derived from the program?

In attempting to answer these questions, caution must obviously be taken in speaking of "*the* proponents" and "*the* programs." There are differences in the structure and scope of programs now taking place under local, state, and federal sponsorship, and there obviously may exist some difference in view among proponents of government-sponsored birth control programs as to what the scope of the programs should be. Nevertheless, examination of the mass of testimony presented thus far at the Gruening Committee hearings (the most extensive public hearings thus far to have taken place on government birth control activity),⁸² as well as examination of hundreds of articles, policy statements and other public testimony on the subject, reveals a movement in the United States whose program at the least calls for local, state and federal governmental funding of, fostering,

⁸² See *Hearings on S. 1676 Before the Subcommittee on Foreign Expenditures of the Senate Committee on Government Operations*, 89th Cong. 1st Sess., pts. 1-5 (1965), 2nd Sess., pts. 1-5A (1966) (hereinafter referred to as *Hearings*).

and/or operating of projects among the poor, as a part of health or welfare services, designed to popularize family limitation among the poor and to provide birth control materials and services to them. Although, of late, statements favoring such programs have been careful to expressly state that coercion must be avoided, there has been little discussion of the coercion issue.

THE COERCION ISSUE

Coercion Arising from Calls for Population Control

In predicting just how a social program will in fact be carried out it is legitimate to inquire into exactly what its proponents expect to accomplish. With respect to birth control programing by government the administration and impact of programs intended to achieve personal health benefits should differ widely from those intended to operate as a population control program. Although, as will be seen below, considerable difficulty is encountered in the effort to classify birth prevention techniques as "health" measures (they are sometimes described as such in a vague, nonmedical sense of some sort of "societal" health²²), a birth control program designed to provide such personal health benefits would appear to carry a lower potential for pressuring the poor than a program (whether legally classified as a "health" program or not) whose intended aim is the reduction of population levels. It would seem only logical to say that if the aim of a program is to save mankind from imminent disaster, the program should be pursued with a method and zeal altogether distinguishing it from a program whose only aim is the personal comfort of those choosing to obtain an ordinary health benefit. Since few of the existing programs contain really specific limitations against forms of pressuring the indigent to become informed about, or to carry out, birth prevention, the general understanding of the intendment of the programs becomes important to consider.

The main aim of birth control programing in the United States appears indeed to be to save mankind from imminent disaster—the expected population deluge. While some emphasis is placed upon the

²² E.g., Chapter III, Section B, p. 12, Maine Public Assistance Policy Manual, Mar. 1, 1966.

aim of improving individual health through family limitation, the principal argument backing a major role for government-sponsored-or-financed birth control programs is that unless the world population growth rate is drastically cut, mankind is faced with disaster unparalleled in its history.

While a few quotations cannot convey the full effect of the now widespread literature pressing this view, the following statements are representative of it and can, if heeded, create nothing but a psychology of the most extreme emergency in the face of the most swiftly descending total catastrophe. So to describe these writings is by no means to characterize them as hysterical. They are now a strong factor in American public opinion; the question for the moment is not whether the statements are correct but rather what government policy they inevitably invoke.

Senator Ernest Gruening, in his opening statement as chairman of the Senate subcommittee which has been conducting hearings on the "population crisis," warned: "If our population growth does not stabilize, we may reasonably assume that we will lose the freedoms, privileges, and good life we enjoy today."⁸⁴ Representative Morris K. Udall, described by Senator Gruening as a "pioneer" in the field of population control, has called population a "time bomb" and compared present population growth to a "floodtide" which "wrecks havoc."⁸⁵ He stated in 1964: "This presidential year we shall debate medicare, civil rights, big government, control of nuclear bombs, and all the rest. But looking ahead three or four presidential elections, I venture to predict that the population bomb may soon overshadow all the other issues."⁸⁶

Senator Joseph S. Clark, long an advocate of government birth control activity, at the Gruening Committee hearings spoke of the population explosion in these terms: "In my opinion, with the exception of the problem of war and peace, this is the most critical matter which confronts our country today."⁸⁷

Dr. John Rock, a leading exponent of population control, foresees a disastrous transformation of human society as a result of uncontrolled population growth: "The time has come for all Americans to face the fact that unchecked expanding of human numbers seriously

⁸⁴ *Hearings*, pt. 1 at 11 (1965).

⁸⁵ *Id.* at 64.

⁸⁶ *Id.* at 68.

⁸⁷ *Id.* at 76.

threatens the future of mankind, and threatens the life of man as we know it today on this planet.”³⁸

Reflecting upon Dr. Rock's statement, Senator Frank E. Moss, a sponsor of Senator Gruening's population control bill, S. 1676, said that “an unchecked population growth into the next century and beyond will in the end cause indescribable human misery.”³⁹ To the failure to check population he had already linked world famine, houselessness, tyranny, and war.⁴⁰

Describing himself as a “demographic Paul Revere” who for a long time had cried in the night, “The people are coming—hundreds of millions; billions of them,”⁴¹ Robert C. Cook, president of the Population Reference Bureau, has similarly predicted every sort of social evil as the result of the population explosion,⁴² adding:

The population crisis is world-wide and it is going to need all of the skill and imagination and available resources to lick it in the time available, which is very short. Nobody knows just when the point of demographic no return will be reached in the stress areas, but it is not far in the future. It is that moment when mushrooming population growth makes disintegration and despair unavoidable.⁴³

General William H. Draper, Jr., vice chairman of Planned Parenthood-World Population, envisions population as a “bomb” which must be defused “so that mankind does not multiply itself into oblivion.”⁴⁴ General Draper said that if the population rate is not slowed down, “our grandchildren may well find life on this planet intolerable. Like cancer cells multiplying in the human body, it will, unless slowed down, destroy our present day civilization just as surely as would a nuclear conflict.”⁴⁵ John D. Rockefeller, III, chairman of the board of the Population Council, testifying before the Gruening Committee, said that “no problem is more urgently important to the well-being of mankind than the limitation of population growth. As a threat to our future, it is often compared with nuclear warfare.”⁴⁶ Secretary of the Interior Stewart L. Udall has stated that unchecked population growth in the United States will result in shortages of

³⁸ As quoted at the Gruening hearings by Senator Moss. *Hearings*, pt. 1 at 96.

³⁹ *Id.* at 97.

⁴⁰ *Ibid.*

⁴¹ *Id.* at 428.

⁴² *Ibid.*

⁴³ *Id.* at 489-90.

⁴⁴ *Hearings*, pt. 2-A, at 622 (1965).

⁴⁵ *Ibid.*

⁴⁶ *Id.* at 831.

water, the need to "ration" recreation areas, and complete deterioration of the quality of life in our society.⁴⁷

From these expressions certain conclusions seem clear: (1) Birth control can scarcely be regarded as essentially a health measure; health is a lesser included purpose of the universal birth control programs envisaged. Rather these programs are deemed to perform their primary function as constituting the indispensable weapon for the control of population levels. (2) Population control is totally imperative for mankind. (3) The magnitude of the threat to society posed by the population explosion renders population control a proper public, or governmental, activity. (4) The potential magnitude of the problem bars acceptance of any firm *principle* that population limitation through birth control is to be voluntary; in the face of the total disaster portended by the population explosion public policy can scarcely encompass the giving of unlimited sanction to personal option in family size, even though it would be desirable for all mankind voluntarily to conform itself to some norms for family size consensually established as sufficient at least to ward off the main impact of the population explosion. Rather the public policy logically resulting from the twofold claim that a total disaster threatens, reversible only by birth control, must be one which says, in effect: "Voluntary, if voluntary works, and if it works soon—compulsory otherwise."

Whether the voluntary approach will "work" leaves wide open the question of who will determine, and according to what standards, what is meant by "work." This problem (to which further reference is made below) represents one of the great, empty arcades honeycombing the assumption of birth control as the answer to the assumption of population disaster. There is, at any rate, sufficient evidence at the present that the determination of family size is (in the eyes of proponents of government birth control activity) a matter so gravely affected by the public interest as to render completely unacceptable the position of the Catholic bishops, that decisions as to family size "can in no way be left to the judgment of public authority."⁴⁸

What is needed, however, at this juncture, is a genuine opportunity for the American people to make a choice of public policy between these two alternatives. This choice cannot really be made so long as the population control program is befogged in euphemisms

⁴⁷ *Id.* at 947-951.

⁴⁸ *Government and Birth Control*, *supra* note 4, at 4.

about personal "family planning," promoted as merely a "make information available to those who want it" program, simplistically represented as basic "hygiene," or propagandized in the familiar grossly emotional imagery portraying the half-dead indigent mother of nine, "with another on the way." This is not at all to say that these euphemisms and portrayals are dishonest: they in fact appear to be believed with an intensity characterizing a faith. Nor can such choice be made where opponents of government birth control activity attempt to create the impression that an aggressive army of state-backed welfare agents is about to be unleashed upon the poor with instructions to twist arms and browbeat—"coming at the poor," as one Catholic prelate stated in a radio interview November 14, "with food in one hand and a bunch of contraceptives in the other." Caricatures of this sort not only needlessly provoke ire; they in fact obscure the true nature of the danger over which they noise alarm. I think it a truth to say that by and large American proponents of population control *want* the entire program to be voluntary and *do* desire to see better levels of health achieved by families, as well as the many other good things that they predict will flow from large-scale family planning—a term which, to them, embodies a high ideal unifying public and personal responsibility. Consequently, the Catholic bishops jarred a nation's sensibilities when they stated that "government activities increasingly seek aggressively to persuade and even coerce the underprivileged to practice birth control."⁴⁹

The use of the term, "coerce," has become the focus of most of the criticism of the statement which has ensued.⁵⁰ However, the internal logic and dynamism of population control by family limitation implies the legitimacy of coercion. If our society employs coercion even to enforce esthetic zoning, it should not blanch at employing it to save mankind from the predicted total catastrophe of overpopulation. It could be pointed out that—responding to all sorts of different pressures, fears, threats, and dislikes—our polity has embraced in its law food rationing, epidemic control, war manpower controls, censorship, rent control, traffic control, price control, crop control, and dozens of other plainly coercive schemes. Yet the population control movement has not yet proceeded in this country to the point of

⁴⁹ *Id.* at 8.

⁵⁰ Other significant areas of the statement (*e.g.*, the privacy issue which it raised) were very little explored in the ensuing comment.

acknowledging the role that coercion logically would play in its programs. What might be called the "mind" of that movement is in a state of becoming. It has not caught up with its own contradictions. It is less a conspiracy than a reaction. It sees the coming inundation; it thinks it knows, in general, what now has to be done; it is frantically working to get that done, and it is impatient with those who interfere by resisting the solution or saying that the solution will involve substantial evils.

The bishops' use of the term "coercion" must be viewed in light of these long-term tendencies natural to family planning programs. The use of the term was particularly appropriate because of some features of the programs immediately under consideration. The employment of this concept must be seen (a) in terms of the broad spectrum of meanings by which "coercion" is properly defined, (b) in terms of the fact that the bishops saw government birth control programs as programs dealing, not with society in general, but with a single and most subject class, namely, the poor, and (c) in terms of the extreme sensitivity which the statement manifested toward sexual and familial privacy. The interrelatedness, in the statement, of the three elements—coercion, the poor, and privacy—is striking. Each accentuates the other. The very prostration of the poor invests the governmental presence before them with a weight lacking in its relationships to the general community. Rights of privacy are always accentuated where government is a potential invader; but the privacy of the dispossessed may call for special protection.

Coercion as Arising from Expressions on Policy

1. *Defining coercion.* Two matters are preliminary to consideration of the wide variety of meanings given the term "coercion": first, the acknowledged propriety of coercion in many circumstances; second, the failure of the bishops to document their charge of coercion.

Our society does not hold governmental coercion of human beings to be a necessarily evil thing; at least, both in morals and in constitutional law, we recognize such coercion as licit in many situations. It is only unreasonable governmental coercion to which we object—coercion too great in degree in relation to a proper object, or coercion of even the mildest degree, if it tends to an evil result. It is coercion of the latter type to which the bishops' statement is directed. Putting aside, for the moment, considerations respecting an asserted

"evil result," it must be admitted that the measuring of a social tendency is at best an imprecise business: a tendency disproved in opinion polls may still be very real; a tendency proved in polls may not exist. Those who err in pointing out social tendencies may have based their errors on evidence; those who are proved dead right in their predictions may not have had a shred of evidence on which to go—but instead correct intuitions, or a remembrance of history, or evidence not admissible in court, but true and solid nonetheless.

One of the most common criticisms of the bishops' statement has been of its failure to "document" its charges of coercion. Following NCWC's testimony of August 22, 1965, before the Gruening Committee, it is reported that Secretary of Health, Education, and Welfare John W. Gardner had requested NCWC to bring to his attention any concrete examples of coercion of the poor in HEW birth control programs. Gardner stated that not a single complaint had been filed.⁵¹ James Reston, discussing this in his syndicated column, recited that NCWC had been invited "to provide any *evidence* that the welfare agencies were coercing poor families to practice birth control" and said that Secretary Gardner "insists that no such *cases* have been presented to him."⁵² The Catholic magazine *Commonweal*, correctly noting lame defenses of the bishops' November 14 statement after it was issued, added: "One would think so serious a charge [of coercion] ought to be documented."⁵³

These criticisms overlook the fact that the statement was, in its nature, a declaration of principle and a public warning in terms of principle. As in the case of many state papers, the statement should not be necessarily deemed deficient by its omission of a supporting evidential record. Second, however, the "evidence" supporting the bishops' charge cannot be realistically limited to documented case histories. The bishops' critics on the "documentation" issue did not, it should be noted, state what kind or quantity or case history evidence of coercion would have satisfied these critics. Welfare recipients are not usually constitutional lawyers or persons well educated to their rights. They are not likely to come forward with complaints of coercion, not only because of that fearful weakness of "bargaining

⁵¹ As reported in *The Catholic Messenger*, Nov. 24, 1966, p. 1.

⁵² *The Sunday Bulletin*, Nov. 20, 1966, Sec. 1, at p. 20. (Emphasis supplied.)

⁵³ *Commonweal*, Dec. 2, 1966, p. 246. And see Boyle, *Critique of Birth Control Lacked Hard Facts*, *The Catholic Messenger*, Nov. 24, 1966, p. 5.

position" on their part which is discussed later in this article, but also because here, as in many other situations, a person, though in fact coerced, may not know it. Secretary Gardner's plea to "show us the cases" is most unrealistic: no indigent person is likely to come forward, crying "I was coerced!" and file a complaint to that effect.

It must be stressed that the use of the proscription, "There shall be no coercion," in governmental birth control regulations, is virtually meaningless. Much is made in public arguments at the present over such strictures in, for example, the Department of Health, Education, and Welfare's policy statement on family planning.⁶⁴ Recitations such as this do not render a program noncoercive. Unless, in fact, they are elaborated into practical and specific guidelines, they are not capable of being carried out. A caseworker, for example, who is provided no working definition of "coercion" may well feel that only if he makes harsh threats to the welfare client, or denies the client food or money, is he "coercing" the client. Caseworkers may well believe that initiating discussion of birth control with the client, promoting birth control with the client, attempting to persuade the client to pursue birth control practices, leading and guiding the client in this area generally—for the client's good and that of society—are practices which cannot possibly be described as "coercive."

⁶⁴ The January, 1966, HEW policy statement on "Family Planning and Population Programs" recites: "Programs conducted or supported by the Department shall guarantee freedom from coercion or pressure of mind and conscience. There shall be freedom of choice of method so that individuals can choose in accordance with the dictates of their conscience."

Guidelines for family planning programs issued by the Office of Economic Opportunity, three months subsequent to the Catholic bishops' statement purported to offer more specific protection against compulsion than OEO policy had previously expressed, by prohibiting giving of information where the client states it to be against his or her "moral, philosophical or religious beliefs," or the giving of medical supervision or supplies where they have not been requested. The guidelines also state that use of family planning services shall not be a prerequisite to receipt of any other benefits under the Economic Opportunity Act. A warning sign, moreover, must be posted in *family planning centers* saying that no one is allowed to force the assisted person to participate in family planning programs. As will be seen, this well-intended protective regulation does not actually come to grips with the coercion issue as raised by the bishops. Their view of compulsion in the program did not center on fears that other program benefits would be expressly conditioned on participation in family planning programs, or upon coercion as to method (relating to "moral beliefs"), or upon any idea that "medical supervision or supplies" would be thrust upon a person.

The Catholic bishops, as I have noted, pointed to the coercive tendency of the programs in question. They did not assert that the "coercion" posed by the programs amounted to coercion in law. Similarly, in the statement of the attorney who had spoken for NCWC before the Gruening Committee in 1965 on the same topic, no such assertion was made; rather, he said that the programs presented a maximum "potential for coercion."⁵⁵ The point of both statements was not that the programs were unconstitutional, but rather that they were bad policy because they presented evident dangers to constitutional rights. Nevertheless, the law of coercion is instructive in relation to the charges made by the bishops, and as will be seen, is supportive of their position rather than weakening to it.

Coercion is a term of a broad spectrum of meaning in the law. Coercion, duress, and undue influence are closely related in legal definition.⁵⁶ In the law of contracts a finding of coercion, or duress, does not depend upon objective tests of what act or threat produces a state of fear, leading, compulsively, to given acts.⁵⁷ As has been noted in connection with duress: "Age, sex, capacity, relation of the parties, attendant circumstances, must all be considered. Persons of a weak or cowardly nature are the very ones that need protection."⁵⁸ Closely related is undue influence. The *Restatement of Contracts* comments: "Where one party is under the domination of another, or by virtue of the relation between them is justified in assuming that the other party will not act in a manner inconsistent with his welfare, a transaction induced by unfair persuasion of the latter, is induced by undue influence and is voidable."⁵⁹ In the determination of undue influence, as in the determination of duress, the *Restatement* stresses the relationship of the parties. In its comment upon the foregoing definition of undue influence, the *Restatement* notes:

The relationships that ordinarily fall within the rule are those of parent and child, guardian and ward, husband and wife, physician and patient, attorney and client, clergyman and parishioner. In each of these cases, however, it is a question of fact whether the relationship in a particular case is such as to give one party dominance over the other, or put him

⁵⁵ *Hearings*, pt. 2-B, at 1295 (1965).

⁵⁶ See CLARK, *PRINCIPALS OF EQUITY* 538 (1937).

⁵⁷ See *RESTATEMENT, CONTRACTS* § 492, comment a (1933).

⁵⁸ *Ibid.*

⁵⁹ *RESTATEMENT, CONTRACTS* § 497 (1933).

in a position where words of persuasion might have undue weight and even though none of the relations enumerated above exist, if the relationship in fact was such that there was dominance or justifiable trust and confidence, the result is the same as if it were based on one of the relationships enumerated above.⁶⁰

Influence, therefore, is considered "undue," giving rise to rescission of contracts, where a relationship of confidence may be deemed to exist between the parties, and one of the parties is in a position of weakness in relation to the other, and where there is in fact unfair persuasion. No sound reason dictates a distinction (so far as the determination of undue influence is concerned) between the relationships particularly described in the foregoing discussion and the client-caseworker relationship in public assistance or antipoverty programs. And a coercive influence, arising from that relationship, would seem to be of greater social significance than a situation where such an influence was solely a matter of private law. Whether, in the client-caseworker relationship in which the caseworker uses persuasion upon the client to gain the latter's agreement to limit his family, the influence will be deemed "undue," will, of course, depend upon whether one regards the result of the coercion as evil or not. The Catholic bishops felt that the end was evil: they condemned any efforts of the public authority which would "presume to influence the decision as to the number of children or the frequency of births in a family."⁶¹

American constitutional law similarly reveals sensitive concern upon the part of the courts in situations where individuals are placed in a relationship to government. It is of course, ridiculous to suggest that anyone has made the argument that all relationships between government and persons involve coercive elements. Yet, although the Supreme Court in its recent decisions on religion in the public schools held the practices in question violative of the "no establishment" clause of the First Amendment,⁶² it surrounded this holding with extensive discussion of coercion. In *Engle v. Vitale* the Court pointed out the "indirect coercive pressure" resulting "when the power, prestige and financial support of government is placed behind a par-

⁶⁰ *Id.*, comment a.

⁶¹ *Government and Birth Control*, *supra* note 4, at 5.

⁶² *Engel v. Vitale*, 370 U.S. 421 (1962); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

ticular religious belief. . . .”⁶³ In the subsequent *Schempp* decision, the Court alluded to expert testimony in the trial record showing psychological harm alleged to be done to children by the religious practices there in question.⁶⁴ The Court, stressing a doctrine of governmental “neutrality” in religion said that a reason for this neutrality was found in the “free exercise” clause of the First Amendment, which “recognizes . . . the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state.”⁶⁵ It can even be argued that the Court’s formal holding, on the “no establishment” ground in these cases, was itself grounded on the expressed concern of the Court over coercion. The Court no doubt recognized that coercion, in the premises, was a matter most difficult of proof. It would be no simple thing to get child witnesses to provide reliable answers (in relation to public school religion programs) to such questions as: “Were you coerced? Did you *feel* the teacher made you or wanted you to recite the Bible verses?” Defendants in these cases argued vigorously that the programs were not coercive, since any pupil might be excused from participation. In the *Schempp* case, the trial court had nonetheless found the practices compulsory since school attendance was compulsory and since the exercises were conducted under the authority of the state.⁶⁶ Certainly it will not be argued that the poor do not come to public assistance programs other than through compulsion—the compulsion of poverty—that they do not then occupy a position of relative weakness in relation to the state, and are fully as dependent and as naturally susceptible to influence in that relationship as are children in schools, and that where an agency identifiable by the indigent client as the state *promotes* birth control with the client, there is as much compulsion, in the legal sense, as was found to exist in the prayer and Bible-reading cases.

Advocates of a major role for government populational control activity often create confusion by presenting two contradictory pictures of the poor. In pleading that government move speedily on a

⁶³ *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

⁶⁴ *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 209, 210 (1963).

⁶⁵ *Id.* at 222.

⁶⁶ *Schempp v. School Dist. of Abington Township*, 201 F. Supp. 815, 819 (E.D. Pa. 1962).

large scale for population control, they specify the poor as the target group for such activity. It is in the ranks of the poor (here, and in the underdeveloped countries) where the undue breeding is taking place. Typical of the reasons given for uncontrolled propagation by the poor is that given by Dr. Murray Grant, in a paper delivered at the Boston University Symposium on Population Growth and Birth Control:

The poor and the very poor are likely to have limited education. This may even extend into illiteracy. It is therefore risky to assume that a public health message of information actually reached them, or if it did, that it was understood. Again, by their estimation, their lives are occupied with more pressing matters—they cannot be bothered with these seemingly unimportant items.⁶⁷

Clifford C. Nelson, president of the American Assembly, expressing concern over the question of “quality” or society’s “stock,” states:

. . . [W]e do know something about social quality, and in the United States, at least, it seems that the smaller the income the larger the number of children. We learn that the best educated segment of the population is replacing itself, as is the middle group, so-called. But the poorly educated or non-educated are breeding well above replacement level, and studies show that they have more unwanted children than the better educated. Large numbers of the under-educated are nonwhites among whom birth rates are about one third higher than those for whites.”⁶⁸

The Southern Assembly’s 1964 report on “The Population Dilemma” speaks of the need for birth control services among the poor, “who lack either the means and/or the knowledge to exercise control over their family size.”⁶⁹

A mass of similar statements describe the poor as “ignorant,” “careless,” not “wanting” the children they breed, too pressed by poverty to exercise “social responsibility” in limiting their families. Leaving aside the dark motif of eugenicism which runs through many of these statements as well as the correctness of their observations, they necessarily entail the conclusion: the poor are affected with the most thoroughgoing weaknesses of will, of intelligence, and of confidence. But, as the bishops’ statement so clearly implies, birth control

⁶⁷ *Hearings*, pt. 3-A at 1362 (1965).

⁶⁸ *Id.* at 1599.

⁶⁹ *Id.* at 1528.

programs cannot be premised on this kind of assessment of social need. Such an assessment views the presumed beneficiaries of these programs in a light that places them in an especially weak position in the presence of the caseworker, or the family planning agent. This is a situation in which disparity of status and position is so extreme that very little promotion indeed, on the part of such agent, will be needed in order that we may justly say that influence amounting to compulsion was exerted.

As though anticipating this conclusion, population control proponents present a second, and wholly contradictory, image of the poor: that of self-reliant citizens well able to exert good judgment and make sound choices, if only given the right chance. Although the proponents generally admit, and even insist (as is seen below), that the caseworker should "motivate" the client, no compulsion or undue influence is deemed to arise. The conclusion can only mean that the indigent person is now regarded as someone well able to think for herself in the interview—intelligent, self-reliant, and by nature possessed of capability of resistance to caseworker salesmanship.

A description of the poor as socially weak and highly dependent is the one that accords with reality. Worklessness, disrupted family life, shelterlessness and illness—including much mental illness⁷⁰—are their lot. To say all of this is to argue neither for nor against the pursuing of population control programs among them; it is to argue simply that any government *promotion* of birth control among the poor crosses the line separating the genuinely free from a greater or lesser degree of the compulsory.⁷¹

What, then, of the argument by which Professor D'Antonio⁷² and others have confronted the bishops, that the poor are "coerced" when government permits their poverty to deny to them family planning information which the more fortunate are able to pay for? Professor D'Antonio has well summarized this argument:

A major point to be made here is that the poor, the downtrodden, the underprivileged have little or no freedom—they lack *money* which per-

⁷⁰ See HARRINGTON, *THE OTHER AMERICA* 132 (1962).

⁷¹ "Of course the dissemination of birth control information is not neutral. To ask people to consider an alternative to what they are doing is not a neutral request. It implies value judgments about the alternative(s) to be suggested." D'Antonio, *Birth Control and Coercion*, *Commonweal*, Dec. 2, 1966, p. 248.

⁷² W. V. D'Antonio, University of Notre Dame.

mits certain kinds of choices, especially material choices; and they lack knowledge, language, ideas which permit a whole series of choices with social consequences. Government-sponsored family planning clinics at home and abroad would provide them with knowledge and facilities, thus widening their range of choices, and as I see it, their freedom.⁷⁵

The flaw in this argument is that it rests on the "make available" proposition: government simply includes birth control as one *available* welfare service. But that is the program which practically nobody wants. Population control proponents tell us that if you simply leave birth control programs on the counter, so to speak, for anyone to take or not take as she pleases, the ignorant, irresponsible, and unmotivated poor will not choose to take. And how will such a mere "make available" program constitute any defense at all to the population threat as they have described it? Their very argument is that civilization will die of population if government does not go beyond a drily passive role of "making available" birth control information without promotion.

2. *Expressions on Policy.* Professor Donald N. Barrett, a Catholic supporter of government-sponsored birth control activity, told the Gruening Committee that the "basic dilemma" in this area "is the matter of coercion and possible invasion of privacy."⁷⁶ He said that birth control programs in India "attract comparatively small numbers of clients unless the programs' inducements are made rewarding in ways other than family planning." He then wondered "how strong can incentives be without being coercive?" and noted that "the amount of influence upon a potential client is recognized to be a very delicate question, requiring supervision and limits if the program is to avoid the accusation of coercion, in spite of desperate need."⁷⁶ He also raised the question of "the situation where husband and wife disagree on family limitation and family size values," adding: "The intrusion of Government representatives in a persuasive way can simply exacerbate the disagreement."⁷⁶ But a program which lacked "incentives," he felt, would be diminished in effectiveness.⁷⁷ Under questioning Barrett noted that "all social work or casework involves influence by the caseworker upon the client", and wondered at what

⁷⁵ D'Antonio, *supra*, note 71, at 247.

⁷⁶ *Hearings*, pt. 2 at 389 (1966).

⁷⁶ *Ibid.* ⁷⁶ *Ibid.* ⁷⁷ *Ibid.*

point "influence" became "coercion." He concluded that "there have to be more solid guarantees that the influence is not coercive."⁷⁸ Acknowledging that he was not a lawyer, he did not go on to specify of what the "solid guarantees" should consist.

Showing similar sensitivity to the "coercion" issue was Reverend Dexter L. Hanley, S.J., who warned the National Conference on Family Planning on May 6, 1966: "Great ingenuity and persistent efforts will be required to eliminate indirect coercion . . ." (in government birth control programs).⁷⁹ Father Hanley, frequently cited by proponents of population control as a Catholic spokesman generally favorable to their position, now heavily qualified his earlier very broad endorsement of that position⁸⁰ with expressions of concern over coercion. As in the case of Professor Barrett, however, he failed to spell out realistic brakes upon coercive influence in the premises.

Other spokesmen for governmental promotion of population control have seemed less concerned over the coercion issue. Senator Gruening, on June 22, 1965, personally placed in the record of his Committee's hearings a proposal to use food, in a country threatened with famine, as an inducement to enter birth control programs. The proposal was that of Dr. David D. Brodeur to amend the Agricultural Trade Development and Assistance Act of 1954 so as to provide that "U.S. surplus agricultural commodities be made available to foreign governments to give to their nursing and expectant mothers, to induce such people to attend family planning and health service clinics."⁸¹ Brodeur's proposal stressed the need for "motivation": But the greatest need in family planning is not financing, or proper, effective methods. It is motivation, or inspiring the illiterate and semi-literate to see the need for limiting fertility. Food for family planning is aimed at solving this problem.⁸²

Bearing continually in mind that it is the poor who are the deemed targets (or beneficiaries) of government population control efforts, keeping in mind a working definition of coercion, and again (as yet)

⁷⁸ *Id.* at 398.

⁷⁹ Hanley, *Religious and Political Values in Population Policies*, CONFERENCE BULLETIN (National Conference on Family Planning: Partners for Progress), May 5, 1966, at p. 5.

⁸⁰ *Ibid.*, and see generally Ball, *Government Birth Control: Reply to George M. Sirtilla*, S.J., 12 CATHOLIC LAW, 216 (1965).

⁸¹ *Hearings*, pt. 1, at p. 117 (1965). ⁸² *Id.* at 118.

reserving any judgment whatever upon whether the coercion is for good ends or ill—the preoccupation with the need to motivate the poor deserves closer attention. Implicit in this is the acknowledgment that the poor do not themselves seek birth control services. This factor, in itself, diminishes the “voluntary” nature of the program. Certainly it erases the “merely make available” image of the program. The employment of *ad personam* motivational techniques among the poor in population control programs is one of the things that distinguishes these programs from present⁸³ Medicare programs, for example. People can take or leave the benefits offered by Medicare without the suggestion on anyone’s part that an insistent threat to mankind dictates the necessity of employing special motivational techniques to bring about conformity to program aims.

The 1963 report of the National Academy of Sciences, “The Growth of World Population,” stresses the motivational factor in terms of the time of optimum susceptibility of mothers to birth control guidance: “One critical time at which advice can easily be given and most readily accepted is and will remain the last few months of the first pregnancy and the first weeks immediately following birth. Preliminary instruction can readily be added to the teaching program in ‘mothers’ classes’ during pregnancy. . . . The need is to add family planning as an integral routine part of such welfare programs.”⁸⁴

Dr. Robert Cook, whose comments have been earlier cited in this article, pointed out to the Gruening Committee that there is no great need to “sell” people the techniques for the control of epidemic and infectious diseases, but that “selling” people birth control “represents a different kettle of fish,” due to countervailing popular psychological factors.⁸⁵ The 1964 conference of the Southern Assembly on “The Population Dilemma” stressed its special wish to see birth control services “made practical” for the poor, but noted that “many people lack motivation to control their fertility.” It called, therefore, for “social research into ways of achieving mass acceptance of family planning.”⁸⁶ Professor Philip M. Hauser, addressing the Pacific Northwest Assembly at its 1964 conference on population, said: “To formulate appropriate population policy and take necessary action requires changes in established attitudes and behavior,” and he ad-

⁸³ *I.e.*, Spring, 1967. ⁸⁴ *Hearings*, pt. 1, at 201-02 (1965).

⁸⁵ *Id.* at 490. ⁸⁶ *Hearings*, pt. 3-A, at 1528 (1965).

vocated the taking of steps to provide the necessary personal motivation among the poor.⁸⁷

The Rice University Alumni Assembly's final report on "The Population Dilemma," in 1964, minced no words about promotion of birth control among the poor as the *sine qua non* of any successful population control program. It said that "the U.S. Government should take steps to have such information [on birth control] reach every potential parent in the country. The campaign should be planned with care and delicacy, but done on a massive educational scale."⁸⁸ No mere "making available" program would suffice with the poor: "In order to reach those lower class people who seem hardest to educate, but most likely to overproduce, 'Madison Avenue' advertising agencies' tactics should be enlisted in a continuing campaign."⁸⁹ The Rice Assembly resolved that "research should be more aggressively undertaken toward . . . ways of achieving mass acceptance of family planning."⁹⁰ In a similar vein, Bernard Berelson, vice president of the Population Council, addressing the New England Assembly on the Population Dilemma, warned against "persuading people to do something against their desires" in family planning, but then stated that "we have underplayed the utility of the mass media."⁹¹

A voluminous body of additional evidence calls for the aggressive use of psychological techniques aimed particularly at the poor (both on a class-beamed basis and in personal casework) in order to get them to practice birth control.⁹² It is evident that the poor will be subjected to attempts at psychological persuasion to accept birth control at two levels—the level of the individual and the level of the

⁸⁷ *Hearings*, pt. 3-A, at 1542 (1965).

⁸⁸ *Id.* at 1556. ⁸⁹ *Ibid.* ⁹⁰ *Ibid.* ⁹¹ *Id.* at 1574.

⁹² Katherine B. Oettinger, Chief of the Children's Bureau of the U.S. Department of Health, Education, and Welfare stated that the Bureau, in 1965, was awarded a grant "to find answers to these two basic questions: 1. Why do some low-income families totally reject family planning or accept it only on a limited or temporary basis? 2. How do prevailing community attitudes and the individual's own psychology work to promote or impede the adoption of birth control measures?" Address before the Fall Conference on Family Planning Clinics, Sept. 9, 1965, reprinted by Children's Bureau under title, *THIS MOST PROFOUND CHALLENGE*, 5 (1965).

community of the poor. The first we have examined in the light of coercive effect. As to the second, this article makes no attempt to assert that the use by government of modern technological devices of mass persuasion can be identified as coercive. At the same time, it does not assert the contrary, but merely points to an area of utterance which awaits scrutiny in terms of law. It is not Orwellian fictionalizing to point to the near certainty of conditioned reflex which modern communications techniques are able to stimulate and to measure.⁹³

Following motivational pilot projects developed by Planned Parenthood, the Office of Economic Opportunity now provides funding for "family planning workers, to conduct group discussions, make contact with interested poor persons, in their homes, utilize available audiovisual aids. . . ." ⁹⁴ The description concludes: "Even such uncomplicated measures as provision of transportation or baby-sitting help can provide more effective utilization of existing services of the poor." ⁹⁵

A critical point, with respect to the question of pressuring of the poor, is the power of caseworkers to initiate discussion. This power is an important power for leading and guiding the client. Nothing but confusion results from attempts to mask it as being *simply* the means whereby the "availability" is made known, since, as has been pointed out, "availability" is not the program which population control proponents feel is going to save mankind. While disavowing overreaching, the proponents make the power to initiate discussion a point of insistence. The poor, it is said, cannot be relied upon to raise, in welfare interviews, questions concerning their habits of reproduction, nor, apparently, do they typically tend to regard their "breeding" as presenting a problem in which they desire to involve the caseworker.

⁹³ See generally, TCHAKHOTIN, *THE RAPE OF THE MASSES* (1940); ELLUL, *PROPAGANDES* (1967). Ellul illumines the point: "The tendency toward psychological collectivization is the *sine qua non* of technical action. . . . The problem is to get the individual's consent artificially through depth psychology, since he will not give it of his own free will. But the decision to give consent must appear to be spontaneous." ELLUL, *THE TECHNOLOGICAL SOCIETY* 409 (1964).

⁹⁴ *COMMUNITY ACTION FOR HEALTH: FAMILY PLANNING 2* (Office of Economic Opportunity, 1966).

⁹⁵ *Ibid.*

While the power to initiate discussion is often assimilated to a "right to know," it is, in fact, the practical means to trigger and implement the motivation so strongly urged. In the City of New York, in 1966, it was recognized that relief clients were not strongly responding to the city's birth control program, presumably due to its ban on initiation. The ban was dropped and the expectation then expressed was that the number of women taking courses in how to use contraceptives would double.⁹⁶

Although little attention has been directed to initiation of discussion as a step in compulsion of the client, the question has not been wholly ignored. In the course of the controversy in Michigan in 1965 over state-sponsored birth control services Rupert Kettle, director of the Kent County Board of Social Welfare and a supporter of state birth control legislation, opposed giving welfare workers a power to initiate discussion, stating that initiation "is inherently coercive, because the caseworker has a life-and-death power over the welfare recipient."⁹⁷ Pennsylvania's public policy twice in the past rejected case-worker initiation. Its regulations of 1947⁹⁸ and 1966⁹⁹ expressly prohibited initiation, in each case after extended public discussion of the issue.

But proposals going beyond psychological motivational schemes are beginning to be advanced by population control proponents. Removal of tax exemption for children at some point in family size has been suggested,¹⁰⁰ as well as taxation directly penalizing births in excess of a state-determined number,¹⁰¹ and the use of the com-

⁹⁶ See Robinson, *Welfare, Birth Control and Fear*, New York Times, Dec. 25, 1966, Sec. 4, p. 8E.

⁹⁷ The State Journal (Lansing), Apr. 8, 1965, p. 2.

⁹⁸ Memorandum SR-61, June 13, 1947, to Executive Directors of Public Assistance Programs from Frank A. Robbins, Jr., Secretary of Public Assistance, Commonwealth of Pennsylvania.

⁹⁹ "No staff member shall initiate discussion of birth control with a public assistance recipient." Commonwealth of Pennsylvania Office of Public Assistance Memorandum No. 870, Supplement No. 2, Aug. 28, 1966.

¹⁰⁰ *Hearings*, pt. 3-A, at 1585 (1965).

¹⁰¹ *Id.* at 1587. "It's not enough to have the contraceptive pill. People must be willing to take it—in many cases not merely to prevent the birth of unwanted children, but also to prevent the birth of deeply wanted children. The time may not be far off when some societies may find themselves forced to tax families for more than a minimal number of offspring." Dr. Robert C. North, in

pulsory school attendance system for requiring a sex education of children which includes birth control.¹⁰² Professor Albert P. Blaustein has suggested the restructuring of American law in several areas in order to stimulate population control. He states that "what is specifically not wanted are State-imposed population controls" and that "a law directly limiting the number of children which a family can have would be repugnant to American ideals." He then, however, goes on to say: "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."¹⁰³ Blaustein advocates raising the age at which people can marry.¹⁰⁴ He considers abolition of the marital and child tax deductions,¹⁰⁵ as well as striking the refusal to have children from the legal grounds for annulment. He also alludes to possible changes (unspecified) in the laws involving joint bank accounts, land ownership, and inheritance.¹⁰⁶

Far more drastic, but possibly prophetic, was the submission to the Gruening Committee by Dr. Joseph D. Beasley of the Tulane University School of Medicine. He posited certain "obligations of parents and society to the child prior to its conception" which he would apparently render legally enforceable. The first of two of these was:

Prior to conceiving, parents of a first child should be married and should have had sufficient experience of marriage in a childless state to establish with reasonable certainty that their marriage will be permanent.¹⁰⁷

The head of the Family Planning Association of Great Britain, Sir

address to symposium on population, University of California Medical Center, Jan. 10, 1966, as reported in *New York Times*, Jan. 16, 1966, p. 4.

"We might even go so far as to predict that by the year 2000 many countries will have reached such a population density that no further increase can be tolerated. A marriage certificate might then bear two coupons entitling the couple to produce two children, no more. Restrictive tax measures, such as an income tax graduated more heavily as the number of children increases, or even temporary sterilization by court order, might be utilized by countries under desperation. Temporary sterilization of the female by implantation of a progesterone capsule would be effective enough." Professor Bentley Glass, address, "What Man Can Be," before American Association of School Administrators Convention, Atlantic City, Feb. 12, 1967 (unpublished), at p. 7.

¹⁰² *Id.* at 1625. ¹⁰³ *Hearings*, pt. 2, at 466 (1966). ¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.* ¹⁰⁶ *Ibid.* ¹⁰⁷ *Hearings*, pt. 2, at 494 (1966).

Theodore Fox, warning that "excessive breeding" was bringing about "a new Noah's flood," has called for directly coercive governmental action where "the public refuses to see that family limitation is in their interest." Here, he said, "the argument can be strengthened by taxation . . . or even by bonuses for not producing children above a certain number." Fox added: "There could even be penalties for producing too many, for irresponsible parenthood. . . . Unquestionably, the more dangerous the situation is allowed to become, the nastier will be the remedies."¹⁰⁸

Thus it must be concluded that the Catholic bishops were clearly right in stating that state-sponsored birth control programs for the indigent are designed to see to it that eventually birth control will become the norm for the poor because the state so wills it, regardless of what their predisposition might prove to be. What remains to be discussed are the results likely to flow from these programs. Such a discussion will help us to determine whether one can justify intrusive state action intended to so influence the poor. Such discussion must involve (a) a more thorough scientific and social discussion of the programs, and (b) a weighing of them in terms of the right of privacy and a related "human-ness" of state and authority.

TOWARD BIOCRACY?

At the outset are encountered four major areas of deficiency in public knowledge. As of the time of this writing it can be said that the public does not comprehend (1) that the scientific assumptions in favor of population control are challenged by contrary scientific opinion; (2) that population control is an experiment rather than a program of relatively certain effect; (3) that attached to population control are other, related programs which have been scarcely evaluated in the public forum; and (4) that the programs are, in an important sense, standardless.

(1) *Contrary opinion.* The Gruening Committee hearings have provided a potentially excellent national forum for discussion of all the important issues relating to population control. While study of the volumes of reports of the Gruening Committee hearings shows that Senator Gruening and his staff have carefully selected for pub-

¹⁰⁸ New York Times, Dec. 18, 1966, p. 87.

lication in these volumes materials justifying his position and including very little which has appeared in print to the contrary, the Senator has nevertheless shown both warm courtesy and a careful fairness to all who have appeared as witnesses. Surprising has been the fact that, at the end of two years of hearings, only one out of more than eighty witnesses appearing was a witness "adverse" (in the words of Senator Gruening) to population control.¹⁰⁹ This is "surprising," because new though the issue of population control is, other adverse witnesses are to be found. It may be ventured, however, that the fact that the overwhelming predominance of testimony in the Gruening hearings record favors population control is not due to lack of other testimony but rather, on the one hand, to the organizational skill, cohesiveness, and enthusiasm of the population control movement and, on the other, to the almost total lack of any organized movement in opposition to population control. Cats may look at kings, and lawyers—even in this age of technology—may still wonder out loud over internal contradictions in testimony, nonresponsiveness of answers to questions propounded, or absence of a material witness from the stand.

Jan O. M. Broek, conscious of the argument often advanced for population control, that "poverty is a direct result of 'teeming millions' crowded in space," (*e.g.*, the United States has one acre of arable land per capita, whereas China and India have only one-half acre per capita), argues that wealth or poverty do not depend upon density of population, but upon what people do with the land they have. He compared the arable land per capita of the following relatively wealthy nations with China: United Kingdom, 0.4 acres; Federal German Republic, 0.4 acres; Belgium, 0.3 acres; Switzerland, 0.3 acres; Netherlands, 0.2 acres.¹¹⁰ The geographer George F. Carter¹¹¹ advances information and argument directly contradictory to the statements of proponents of population control with respect

¹⁰⁹ The reference was to the author. *Hearings*, pt. 4, at 811 (1966).

¹¹⁰ Broeck, *Progress in Human Geography*, in *NEW VIEWPOINTS IN GEOGRAPHY* 34 (1959).

¹¹¹ In testimony before House Committee on Appropriations, Commonwealth of Pennsylvania, June 29, 1966, reprinted in *WHAT ABOUT PENNSYLVANIA'S FAMILY PLANNING PROGRAM?* 19 (Ad Hoc Committee on Family Planning and Public Assistance in Pennsylvania, 1966).

to the population explosion and its effects respecting the supply of food and natural resources. Impressed with the knowledge explosion now in progress, he presents a completely optimistic picture of future life on the earth, unaided by mass population control. He denies that the nightmares of the proponents of population control—food shortage, water shortage, recreation space cramping, air pollution, and so on—are population problems at all. Moreover, he looks with considerable skepticism at population predictions. Noting that populations are falling in Eastern Europe in the face of labor shortages, he states: "It seems that population trends are not one way, that there is nothing inevitable about them, and that tinkering with abortions and pills can have some startling results."¹¹² Carter's conclusion is that "we should not be stampeded by alarmists that insist that we are about to run out of space or of resources, or even of wilderness areas of recreation. . . . The earth and its resources are ample for any realistically foreseeable future population."¹¹³

The economist Bela Kapôtsy does not consider it possible to talk in terms of world population explosion, but rather sees different nations and different areas of the world as having different population densities (many very low) accompanied by a variety of different social results related thereto. He describes the radical decline in annual population increase in Hungary as a "national calamity."¹¹⁴

These samplings of a far larger but unassembled and unpropagandized body of responsible opinion are disturbing and should give pause in the headlong pursuit of governmental population control.

(2) *Experimentation*. Further giving pause is the fact that the program is, in many senses, an experiment, both medically and socially. It is to be feared that anxiety to move the program forward has seriously overshadowed concern about what the program may bring in these terms. Medically, there appear to be contradictions in the urgings of population control proponents: the "personal health" image of the program rejects birth control on a mechanistic, collective basis comparable to mass vaccination.¹¹⁵ Yet the asserted urgency of population control would appear to preclude genuine casework; and, especially, the shortage of physicians would preclude

¹¹² *Id.* at 21. ¹¹³ *Ibid.*

¹¹⁴ Unpublished paper, "600 Million Would Be Right," 6 (1966).

¹¹⁵ See, e.g., testimony of Calderone, *Hearings*, pt. 3-A, at 1327 (1965).

genuine personal medical attention to individuals. This being so, mass pill or IUD distribution may amount to a mass medical experiment. Testimony, for example, is abundant as to the yet unknown physical effect of oral contraceptives.¹¹⁶ Almost nothing is known today about the long-term effects of these drugs. As little is known about possible social results of sustained efforts to reduce population levels. Senator Gruening has described the efforts as involving "great areas of uncertainty,"¹¹⁷ with many "unknown factors."¹¹⁸ He has called his population control bill "an exploratory operation,"¹¹⁹ adding: "No one can foretell exactly what the results will be, to what extent they will be beneficial, to what extent they will raise other problems."¹²⁰

Much human progress, including medical progress, has been the result of a courageous willingness to experiment. This consideration must not, however, distract public attention from the fact that population control, as an experiment of government, is an experiment which will, in fact, occur principally *among the poor*. This conjunction of poverty with governmental experimentation has been the subject of no pondering whatever in the affluent American society, and seems thus far not to trouble its conscience.

(3) *Related programs.* A third aspect of population control upon which there has been almost no public focus is that of related programs. Birth control, as population control, appears to require auxiliary programs. A key auxiliary is sex education of the young—a manifestation of the population control movement which only now is appearing. The Department of Health, Education, and Welfare has stated that it considers sex education "in the schools" (beginning in elementary school) as an aspect of the national concern for birth control.¹²¹ The Department considers this to include, not merely

¹¹⁶ For a summary, see testimony of Dr. Frank J. Ayd, Jr. before House Committee on Appropriations, Commonwealth of Pennsylvania, June 19, 1966, reprinted in *WHAT ABOUT PENNSYLVANIA'S FAMILY PLANNING PROGRAM?* 9 (Ad Hoc Committee on Family Planning and Public Assistance in Pennsylvania 1966).

¹¹⁷ *Hearings*, pt. 2-B, at 1307 (1965).

¹¹⁸ *Id.* at 1305.

¹¹⁹ *Ibid.*

¹²⁰ There appears to be general agreement that present knowledge of the medical and behavioral aspects of human reproduction itself is far from complete. See *Family Planning: One Aspect of Freedom to Choose*, Health, Education, and Welfare Indicators, June, 1966, p. 7.

¹²¹ *Id.* at 14, 15; *REPORT ON FAMILY PLANNING* (U.S. Dept. of Health, Education, and Welfare) 26, 27 (1966).

study of the sexual development of human beings but value orientations relating to "responsibilities" pertaining to that development. Disavowing prescriptions of sex education curricula by the federal government, the Department nevertheless urges federally funded curriculum development "to stimulate school districts to work successfully" in this area.¹²² Such a program is, however, one of major implication involving such problems as the teaching of moral, ethical, and spiritual values in the public schools, parental rights, use of the compulsory school system to instruct adolescent and preadolescent children in the "how" of sexual intercourse, as well as birth prevention. It would be difficult to imagine a more value-charged subject than sex education of the young—a subject next to which Regents' Prayers or Lord's Prayers in the schools would seem to pale in significance. Inherited "family values," we are warned, must change in the face of population dangers. As Donald J. Bogue has put it: "Fertility levels are greatly influenced by the family values inherited by children from parents and religious leaders. The time to begin the program of education and guidance which these children need in order to live in the demographic world of the twenty-first century is not the year 2000, but *now*." ¹²³

Another related program is sterilization, deemed by major population control spokesmen as merely another useful (in given circumstances) method of birth control.¹²⁴ These spokesmen are undeniably correct: sterilization "works" in the sense that it is a birth preventative. Far more difficult problems pertaining to the uses of sterilization as an acceptable social program (see the discussion of compulsion above), to the short-term and long-term psychological and physical effects of sterilization, as well as social effects of large-scale sterilization have been little discussed in the public forum. Here, as in the case of proposals for sex education in the public schools, are opened up wide areas of deficiency in present public knowledge.

(4) *Standardlessness*. What I describe as a "standardless" character attaching to population control programs relates to four things: (a) the lack of any concrete definition of "family planning" (the

¹²² *Family Planning: One Aspect of Freedom to Choose*, *supra* note 120, at 14.

¹²³ *Hearings*, pt. 1, 409-10 (1965).

¹²⁴ See, e.g., Fact Sheet on Voluntary Contraceptive Sterilization (Association for Voluntary Sterilization) (1966).

term by which population control is most popularly designated), (b) the lack of certainty with respect to the kind of legal authorizations necessary for government-sponsored population control programs, (c) the lack of certainty with respect to territorial jurisdiction of governmental units to promote population control, and (d) the lack of certainty in the qualifications of those who are to be caseworkers, or other agents, in carrying out population control programs.

Lack of definition of the key term, "family planning," employed in so much governmental programing, obviously may leave very broad, or indeed almost boundless, the power of the agents who are to carry out the programs. Some programs provide no definition.¹²⁵ Others describe it as "a method of protecting the health of the people."¹²⁶ One proposal speaks of it as "an action program in which individual families attempt to develop their full potential for physical, mental and social well-being in the interests of better personal, family and community health."¹²⁷ Related to lack of definition of the term "family planning" has been the employment in some states of vague terminology relating to the previously discussed power of caseworkers to initiate discussion. In Pennsylvania a state family planning directive permitted initiation in any instance in which a staff person discovered "serious problems of family functioning."¹²⁸ Under the same provision the burden was placed upon this state agent (1) to judge of the "inability of parents to limit the number of children born to them" (2) to judge whether this would be "in accordance with their own interests," and (3) to judge whether this would be "in accordance with the health or welfare of family members."

Lack of certainty with respect to legal authorization for population control programs pertains both to the definition of the programs themselves as well as to the further questions of whether programs

¹²⁵ "Family planning" is undefined in New York's regulations. New York Policies and Standards Governing Provision of Medical Care, Section 1400, April 20, 1965, State of New York, Department of Welfare.

¹²⁶ See, e.g., Policy Statement on Family Planning, Utah State Department of Health, June 16, 1965.

¹²⁷ 1964 Memorandum on Family Planning, Pennsylvania Department of Health.

¹²⁸ *Policy of the Department of Public Welfare Concerning Family Planning*, Office of Public Assistance Memorandum No. 870, Commonwealth of Pennsylvania, 1965.

so novel and distinctive as population control programs may be made law merely by executive order and without specific enabling legislation. This question, too, has been the subject of very little public discussion.¹²⁹ As was pointed out in a memorandum submitted by the NCWC Legal Department to the Office of Economic Opportunity, the issue would appear to be one worth public consideration.¹³⁰

A third problem pertaining to "standardlessness" is the question of the role of given governmental units in population planning. Domestically, does population density in State A create a legally acceptable rational base for population control by State B? The question is not academic. In 1965, while the nation's population went up 1.2 per cent, that of Pennsylvania increased only 0.1 per cent, thus tying Pennsylvania with Kansas as the sixth slowest growing state in the Union.¹³¹ Yet in December of that same year Pennsylvania's Department of Public Welfare embarked upon a broad birth control program for people on public assistance upon the stated justification of the "world-wide population explosion."¹³² The problem has an international dimension: has Nation A (with a declining, stable, or even fast-growing population) a responsibility to control its population level in the interest of a proper *world* population level? It was asked at the population conference of the Associated Colleges of the Midwest: "What are the implications of viewing the United States as an interacting demographic unit?"¹³³ The question was well worth asking, but it has been little discussed.

Finally, "standardlessness" is seen in the matter of qualification of those state, or state-supported agents, who are to carry out government population control programs. Even without involving the concept of the soul, it would probably be generally agreed that sexual relationships and human generation are matters going beyond chem-

¹²⁹ See exchange on this question between Secretary of Health, Education, and Welfare Gardner, Senator Metcalf, and Senator Gruening. *Hearings*, pt. 4, at 809-11 (1966).

¹³⁰ "I also suggest clear legislative authority be given for such programs as are established." Hanley, *supra* note 79, at 6.

¹³¹ See testimony of Carter, *supra* note 111, at 17.

¹³² *Policy of the Department of Public Welfare Concerning Family Planning*, *supra* note 128.

¹³³ *Hearings*, pt. 3-A, at 1585 (1965).

istry and mechanics and profoundly involve the entire psychological nature of the human being. These are scarcely areas for the untrained. But what training should be required? This will depend upon what is being dealt with. If it is a matter simply of human plumbing, then persons who are not physicians may conceivably be trained to perform the requisite demonstrations, fittings, and so on. If it is a matter which would properly be described as having important medical implications, then the services of a physician (not merely his remote "supervision") may be required. If it is believed that human sexuality, personality, reproduction, interpersonal relationships, or family life are extremely complex, intensely interrelated, and psychologically consequential, then training of a still higher order would seem requisite, demanding yet greater knowledge, sensitivity, and empathy upon the part of those who would presume to play the role of counselor.¹⁸⁴ Few publicly admit that "family planning" counseling is simply a matter of mechanics, and most would admit that it actually calls for the third kind of training described.¹⁸⁵ But such training scarcely admits of rapid, mass population control. Medical manpower is simply lacking, and the cost of it (even were it available) would probably be impossibly high. The problem, so far as public assistance birth control programs are concerned, is complicated by the fact that a large percentage of public assistance case-workers are persons of relatively little training.

These areas of seeming uncertainty affecting population control programing were not discussed in the statement of the bishops, but they present considerations which—like the matter of compulsion—must be weighed in the balance with the incursions upon privacy to which the bishops did address themselves. As to the latter, the bishops reasoned that if decisions as to family size can be in any way left to the judgment of public authority,¹⁸⁶ the privacy of parents is necessarily involved. Again, at this point, reference must be made to the views of proponents of population control. While, as noted, they deny the bishops' charges respecting coercion, they do not, on the whole, contradict the fact that individual privacy is decidedly

¹⁸⁴ See generally, STERN, *THE THIRD REVOLUTION* (1954).

¹⁸⁵ See testimony of Calderone, *Hearings*, pt. 3-A, at 1329 (1965).

¹⁸⁶ *Government and Birth Control*, *supra* note 4, at 4.

involved in the programs. They appear rather to say that, the involvement of the privacy of individuals in the programs is entirely justified by the ends sought by the programs in the absence of any overreaching by the state. Certainly there would seem to be little room for denial of the statement of Justice Douglas in the *Griswold* case, that the marital relationship is "intimate to the degree of being sacred."¹³⁷ While marriage is frequently not involved in birth control programs for the poor, the sexual relationship is, and of its nature, it is one of the most intimate and private of all human relationships. While in raising the issue of privacy in discussing government birth control, the bishops provoked comment that they had previously failed to bespeak a like concern for rights of privacy in other areas (e.g., wiretapping), there would appear to be nothing but good to be served by their having caused attention to be focused at least on questions of rights of privacy which are possibly involved in population control.

The "broad right to inviolate personality"¹³⁸ is receiving a gradually expanded recognition in the law,¹³⁹ and it is an object of increased concern by the Congress and the public.¹⁴⁰ It must always be borne in mind that the control of population ultimately means the exertion of reproductive control in one individual's life. Unless it is to act to control population by mass handout methods involving no casework, the state can scarcely proceed with the client in this area without inquiry into the client's familial and medical picture—including history of pregnancies, marital status, frequency of sexual intercourse, menstrual history, experience in use of contraceptives, and so on. The point here stressed is not that the state may

¹³⁷ *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

¹³⁸ *Lopez v. United States*, 373 U.S. 427, 456 (1963) (dissenting opinion of Mr. Justice Brennan).

¹³⁹ See extensive discussion of recognition of the right in opinion of the Court in *Griswold*, *supra*, note 137 and in the concurring opinions therein of Justices Goldberg, Harlan, and White.

¹⁴⁰ See, e.g., *Hearings on S. Res. 234 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess. (1958) (wiretapping and eavesdropping); *Hearings on S. Res. 39 Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. (1965) (invasions of privacy by government agencies).

not make such inquiry but that these are matters which are private if the word "private" is to have any meaning whatever.

Yet it is not clear that proponents of population control consider these matters to lie within the ambit of privacy. They thus set the stage for this position: if, in the interest of population control, it were necessary to employ what even the proponents would acknowledge to be coercion, those sexual matters to which this coercion opened the door should not necessarily be deemed "private" in character. It is, of course, true that human sexuality has long been a matter within the domain of the law, and, in that sense, public in certain respects (*e.g.*, the civil law pertaining to impotence as a ground for annulment of marriage). Moreover, as the criminal law pertaining to rape (for example) makes clear, not all sexual expression can be said to be unaffected (because "private") by the public interest. Indeed, the right to beget children has been limited in the asserted interest of preventing society from "being swamped with incompetence."¹⁴¹ Accordingly, the Supreme Court in *Buck v. Bell*¹⁴² upheld the sterilization of feeble-minded persons despite the due process and equal protection clauses of the Fourteenth Amendment. Under such a rule it would seem that government may terminate reproduction of persons to promote the public welfare without consideration of whether their "privacy" is involved or not involved. And such a rule seems no great step away from a rule which would permit the government to widen both the class of those whose procreative power might be limited and the circumstances in which it might be restricted in order to secure those population levels which are scientifically deemed the highest which society can tolerate and still survive in a healthful, orderly, and peaceable condition. Implicit also in the rule of *Buck v. Bell* is a recognition of the power of the state to impose such a limitation, not only in the interest of limiting numbers but also in the interest of improving the quality of our human stock. Indeed, it is not possible to think of number control without quality control. It is widely assumed among population control proponents that, since those not in poverty are "obviously" the more able, intelligent, and industrious members of society, popula-

¹⁴¹ Per Holmes, J., in *Buck v. Bell*, 274 U.S. 200, 207 (1927).

¹⁴² 274 U.S. 200 (1927).

tion control among these social "contributors" would be less desirable than among the poor (who are poor because they assumedly do not possess these qualities). Since limitation must be exerted somewhere in society, let it therefore be pursued among the "noncontributors," the poor.

What is invoked by the concept of population control is one aspect of that new domain of human activity described as "biological engineering." Engineering requires engineers, and engineers require standards. Population control proponents call insistently for the achieving of "proper" population levels. In the matter of establishing population levels, we may speak of a "scientific" determination of such levels, but it will still be human beings who will make the awesome determinations. These indeed can be made, and the required levels achieved. Engineering is fully capable of attaining its goals according to its "tunnel vision."¹⁴³ But engineering is never able to assess its single result in a total context of social result. Jacques Ellul sees as inevitable (but does not welcome) the complete triumph, by the year 2000, of a "biocracy"¹⁴⁴ of which population engineering will be a feature: "In the domain of genetics, natural reproduction will be forbidden. A stable population will be necessary, and it will consist of the highest human types."¹⁴⁵ Aware that a willed devotion to technology—uninhibited by any other considerations than engineering results—can, in fact, bring this about, Ellul warns that the resulting society will necessarily be "the harshest of dictatorships." "In comparison," he says, "Hitler's was a trifling affair. That it is to be a dictatorship of test tubes rather than of hobnailed boots will not make it any less a dictatorship."¹⁴⁶

The position on government birth control activity expressed by the American Catholic bishops brings ultimately into focus questions such as these, as well as fundamental questions respecting the nature of the human being, of human liberty, of the role of the state, of the poor, and of the providence of God. It is an historic misfortune that, prior to setting the nation's course in the direction of population control, discussion was not had of such course in terms of these ques-

¹⁴³ See Schurr, *Reflections on Biological Engineering*, Christian Century, Oct. 26, 1966, p. 1300.

¹⁴⁴ The term is that of A. Sargent as quoted in ELLUL, *THE TECHNOLOGICAL SOCIETY* 432 (1964).

¹⁴⁵ *Ibid.*

¹⁴⁶ *Id.* at 434.

tions. Even as unfortunate was the failure of the largest church of the world's most powerful nation to do more, in terms of discussion of these questions, than to issue a statement.¹⁴⁷

¹⁴⁷ The movement to push population control appears to have been, by contrast, a masterpiece of organization. For example, consider only the series of population conferences taking place in 1963-65: the Pan-American Assembly (Cali, Colombia), San Francisco Assembly (San Francisco, Cal.), Palm Springs Assembly (Palm Springs, Cal.), Southern Assembly (Biloxi, Miss.), Pacific Northwest Assembly (Cottage Grove, Ore.), Mid-America Assembly (Columbia, Mo.), Great Plains Assembly (Lincoln, Neb.), Rice University Assembly (Houston, Tex.), New England Assembly (Chestnut Hill, Mass.), Wingspread Assembly (Wingspread, Wis.), Southwestern Assembly (Houston, Tex.), Rocky Mountain Assembly (Logan, Utah), Minnesota-Dakotas Assembly (Moorehead, Minn.).

These conferences had almost identical agendas, correctly (in the author's view) described as "couched in such a way as to assume a certain viewpoint, to avoid consideration of other viewpoints, and to direct the answers towards certain conclusions." (See Minority Reports, Wingspread Assembly, *Hearings*, pt. 3-A, at 1591.) They presented, quite uniformly, as chief speakers, national leaders of the population control movement.

Such conferences are costly and take extensive organizational work. They have undoubtedly had major impact on public opinion. A disturbing note is the fact that some highly published pro-population control conferences have been underwritten by pharmaceutical companies prominently engaged in the manufacture of contraceptives. To what extent opinion formation on the population question has been an emanation of the financial interests of drug companies is an important unknown in the overall question and one which should not be deemed irrelevant to the work of the Gruening Committee.

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