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Brief Survey of U.S. Population Law

by Mrs. Harriet Pilpel

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With an Introduction to Law and Population
by Professor Richard Baxter*



Law and Population Programme
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Law and Population Series

- 1/ Law and Family Planning, by *Luke T. Lee*
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INTRODUCTION TO POPULATION LAW

by
Professor Richard Baxter
Harvard Law School

I take it that it is possible to some degree to orchestrate population—to increase it or decrease it through social controls, of which law is one, through incentives, disincentives, and so forth. One can, I think, through legal forces, legal pressures, and other legal developments, get something of a type of population that one wants.

A study of this sort raises the most profound questions about the social role of law. We know that law is in one aspect a language by which a community communicates with itself. The law may be declaratory of community standards and it may be constitutive of community standards. There is a continual interplay between these two, the views of the community influencing the law and the law influencing the attitudes of the community.

We may sometimes forget too that the law has a symbolic importance. The very fact that some sort of bounty is given for children may be not so much important for the economic value of the bounty which is given as for its symbolic value, the prize, the approbation which is given for having a large family.

Law performs an educational function. It sums up the views of the community and conveys those views to the community, acting with the aid of coercion in appropriate instances. The techniques of control are manifold. We have already talked about the removal of impediments, as by termination of laws against abortion and contraception. There are other techniques such as abstention from the introduction

of new prohibitions, the provision of new inducements, and the introduction of disincentives.

I submit that in a great many instances it will not be simply one of these techniques of the law, but a whole group of them which will be deployed. There will be a number of legal voices speaking—singing if you like—the whole constituting a chorus. It is the chorus that is heard, not the individual voices. It will be very difficult to determine what precise effect maternity leave alone, as distinguished from other legal benefits and inducements, has on population.

I think that one must be prepared to face the fact that there is no direct relationship between a particular technique of legal control and the increase or decrease of population. One must realize that there is a variety of processes at work and then inquire in a rather sophisticated way how the law communicates its standards to the community.

How can what I have said be brought to bear on the actual scope of the study? I think that Dr. Lee will have to be impressionistic and to cut off arbitrarily factors that do affect population but only marginally. When there is a somewhat smaller and more manageable base for research, it may be possible through an examination of the policies that have been pursued at various periods to find out not what individual techniques have done but what mixtures of controls may have had what effects.

BRIEF SURVEY OF POPULATION LAW IN THE UNITED STATES

by
Harriet Pilpel
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With reference to birth control, sterilization and abortion in the United States, we have passed through a succession of stages and as with all human history, each stage overlaps the one before. Most of the cases brought by the Planned Parenthood Movement have resulted in large leaps forward in liberalizing the laws. The first case I worked on when I started to practice law (considerably before 1947) had to do with an importation law which made it illegal (until this year) to import any article whatever for the prevention of conception. Dr. Hannah Stone, of whom some of you may have heard, was importing diaphragms from Japan for use and experimentation. My first assignment as a lawyer was, according to my then boss, Mr. Morris Ernst, very simple. He said: "The statute prohibits the importation of contraceptives. Dr. Stone is importing contraceptives. All you have to do is to show that she is not violating the law."

This was a very depressing assignment for me, and I was not clear how I was going to go about it. I did succeed in locating two precedents, as I recall. One was an ordinance of the city of Bologna in Italy in the 16th century which held that a statute prohibiting the letting of blood on the streets did not apply to leeches who were engaged in some kind of therapeutic activity. I felt this would be very helpful. The other was a U.S. Supreme Court decision which said that a law prohibiting the importation of labor under contract did not apply to a very important Anglican clergyman who had come over to preach at a very prestigious church in New York City. With these directly relevant precedents we went to court and we did succeed in persuading the Federal Courts in the New York area to hold that although the statute prohibited the importation of contraceptives it did not apply to physicians who were importing them for the purpose of protecting the life and health of their patients.

Now, in that brief experience, one sees the first two stages of the U.S. law on birth control; the first was the prohibition stage, the prohibition growing out of the activities of a gentleman all Americans know about named Anthony Comstock. In 1873 he succeeded in persuading the Congress of the United States to pass a law which prohibited in the Federal area all traffic in contraceptives. The law grouped

contraceptives with obscenity as a dirty, lewd, lascivious, disgusting, obscene article. As you know the Federal area of the United States covers importation and exports, the mails, and anything that goes between states; so the Comstock prohibitions covered these areas.

The states were not to be outdone in their zeal for morality, so about half of them passed little Comstock laws which applied to the areas where the states control, i.e., what goes on within their borders. Most of these laws, both Federal and state, were criminal laws: that is, they made it a crime to do the things that were prohibited. They also operated in *rem*, i.e., the contraceptives themselves were subject to forfeiture. The most ardent protector of morals was the State of Connecticut, which prohibited the *use* of contraceptives. As the U.S. Supreme Court pointed out many years later, this was a very difficult crime to detect. In fact, Justice Douglas suggested that short of putting policemen under beds or in the medicine cabinet, it would be quite difficult to prove that the crime of *use* was being committed. However, it was not difficult to prove aiding and abetting or conspiracy. So, from before 1940 to 1965, in the State of Connecticut, it was illegal to use contraceptives. Everybody who had the money to buy them used them anyway. But those who didn't have money had for the most part no access to family planning because there were no Public Health facilities in that state where contraceptives were available. Although more than half of the remaining states had anti-birth control laws, most of them did have some Public Health facilities for birth control.

Gradually, in the United States, we passed from the era of prohibition on moral grounds to the era of medical permissibility. Except in Connecticut and Massachusetts and despite the prohibitions on the law books, physicians were permitted to prescribe contraceptives for health and medical reasons. If you were well-to-do, your health was always threatened and you could always get contraceptives. If you were not quite so well-to-do, it was more difficult.

All of us at Planned Parenthood, which is the national Family Planning Organization of the United States (Planned Parenthood Federation of America, also known as Planned Parenthood—World Popu-

lation, which has 181 affiliates throughout the United States) worked for many years to overthrow as unconstitutional the very restrictive birth control laws of Connecticut and Massachusetts. In 1965, 25 years after the Connecticut law had been invoked to close all the family planning clinics in Connecticut, we succeeded. It took four tries; so you see how much it's going to take to change this kind of law. We went to the Supreme Court of the United States four times. However, we finally got a decision from the U.S. Supreme Court which really foreshadowed the Teheran Proclamation. The Court held that it was a fundamental human right to decide whether and when to have a child. That was in 1965. I think the decision may have had an influence on the Teheran Declaration. I hope it will have an influence in Ireland. Senator Mary Robinson said if I would get her a copy of that decision she thought it might help her because, although the Irish people were not particularly favorable to family planning, they have always been favorable toward human rights.* The Connecticut decision, I understand, may even have influenced the decision of the Italian Constitutional Court.**

In any event, the U.S. Supreme Court decision holding the Connecticut law unconstitutional started a wholly new era in the relations between law and family planning in the United States. Birth control was no longer solely a medical technique; it had now become a human right. Almost all the states with restrictive birth control laws changed their laws. The Federal Government, however, did not change the Federal laws until this year, 1971. However, what the law is on the books and what the law is in fact is often very different. And we at Planned Parenthood had succeeded over a period of years in getting the courts and the administrative agencies to say that the Federal statutes didn't apply to practically anything. Almost all Planned Parenthood activities fell within one or another permissible exception. The climax came in 1963 when a contraceptive company in St. Louis, Missouri, advertised (we don't have advertising

of family planning products in the United States, generally) a contraceptive with a big ad in 19 magazines with a circulation of 31 million readers. The ad basically said: If you are interested in planning your family, consider our product; if you want to know more about it, fill in the coupon below and mail it in. The coupon said: I am married, my name is so-and-so, and I wish to use your product (a foam) for family planning. Many thousands of these coupons were filled in by people in a nation which was hungry for family planning (we didn't have 181 affiliates then and there were very few public family planning facilities in 1963).

The St. Louis postmaster saw all these little packages going out from the company and familiarized himself with what they were. He then looked at the law (which was a mistake because the law said that no one could mail "any article whatever for the prevention of conception"); so he held up all the packages. This was during the administration of President Kennedy, who, though our first Catholic President, was also the first President to come out four square for family planning. His immediate predecessor, President Eisenhower, had said family planning was a personal matter with which the government should have no connection. President Kennedy, as I say, took a different position. It was clear that some solution would have to be found.

On behalf of Planned Parenthood, one of my partners and I went to Washington and met with representatives of the Federal Department of Justice, which is entrusted with the administration of the Federal criminal law (which this was), and also with representatives of the Federal Post Office Department. We said that the statute didn't apply to the St. Louis shipments of contraceptives. What happened then is, I think, typical of what happens when a law has become unenforceable. The government representatives took the position that if the law didn't apply here, they couldn't see how it could apply anywhere, and they did not feel they could write it off the books entirely. We replied that the law applied only when the Government could prove a shipment was for an illegal purpose, as for example, if a prostitute had requested a sample to use in her "profession." However, all these packages were being sent in response to coupons which said that the women who were asking for them were married and wanted to use them for family planning. Therefore, we argued, the law didn't apply. The government officials listened, and they shortly thereafter accepted our theory. They agreed that the law would only apply if they could prove that the shipments were for illegal purposes, and that they couldn't prove it. So all the samples went through, and I'm sure the St. Louis postmaster

* In the Irish Republic, there is now a bill pending to repeal the Irish law against contraception. Mrs. Pilpel spoke during the Spring of 1971 with Sen. Robinson who has sponsored the repeal bill, and was informed that the law has not yet been put into final form. She also heard from an Irish publisher that everyone in Ireland is so fond of Sen. Robinson that no one wants to "make her unhappy" so that the repeal bill may go through.

** Editor's note: This refers to the decision of the Italian Constitutional Court on March 10, 1971, declaring as unconstitutional the Italian law banning the dissemination of birth control information (Decision No. 49, Year 1971). The Law and Population Programme assisted Dr. Luigi de Marchi, the defendant, in the preparation of his brief.

from then on did not again assume that a statute necessarily means what it says.

Today in the United States we have more than 40 states which do something affirmative about family planning. There are states like Georgia which have a full-fledged family planning programme. There are states like New York where there is no state-wide family planning clinic programme but where the maternal-infant care units of the New York City Department of Health run very large family planning clinics. There have been really only two hold-out states: Massachusetts and Wisconsin, which still prohibit the sale or distribution of contraceptives to anyone who is not married. These laws are under attack, and the constitutionality of the Massachusetts law is now before our Supreme Court. That law was declared unconstitutional last summer by a Federal appeals court one week after the Massachusetts Supreme Court had declared it was constitutional. Since over 40 percent of illegitimate children in the United States are born to teenagers, these laws can and do have disastrous social consequences: They do not prevent extramarital intercourse; they merely proliferate its harmful results.

Thus in the United States we have gone from prohibition on moral grounds to permission on medical grounds and then to fundamental human rights. I agree that it is only within the last year or two that those of us who have been in this movement for many years knew that we had anything to do with population. Our entire stress has been on individual human rights. It happens to be my conviction that if the various governments of the world would make the exercise of individual human rights possible in the family planning area, we would probably have a solution to the population problem. Studies in the United States have indicated that people are having more children than they want and that if they were given decent contraceptive services at a price which they could afford (or for nothing) they would not have the many children which create an increasing population in the United States. I believe the same is true elsewhere.

Unfortunately, we hear talk now in the United States of compulsory birth control. I have always thought such talk unnecessary and dangerous. We have not yet made voluntary birth control really possible; yet there are people saying, for example, that every teenager who has been pregnant should be forced to have an IUD. If teenagers cannot even choose to have contraceptives it seems premature to urge that they be required to have them.

The problem of what should be the law about young people in the family planning area in the United States is a major problem today. This is not because

of the family planning laws which by and large say nothing about minors (usually defined as those under 21), but because of the general laws on medical practice in the United States. Physicians are very nervous about prescribing for or examining minors without parental consent—whether it be for birth control, a cold in the head, an allergy or an upset stomach—for fear of being sued for malpractice or technical assault. It has been such a problem that we now have a number of states in the United States which have provided specifically that minors do not need parental consent for family planning and/or for venereal disease treatment and/or for medical services in general, where in the doctor's judgment failure to treat the minors would be detrimental to their health.

We can compare the developments in the United States to a considerable extent with Japan.* Let us go for a moment to the question of abortion. Whereas in Japan abortion was legalized quite some time ago, in the United States you could not even seriously discuss the legalization of abortion until the decision of the U.S. Supreme Court in that Connecticut birth control case I mentioned before. No one who proposed an amendment of an abortion law was taken seriously, or if he was taken seriously he was simply not reelected. That is what happened in New York: Several sponsors of our abortion bills in the early 1960's just never came back to the legislature. However, we have an organization in the United States, called the American Law Institute, which is a group composed of judges, law professors and lawyers which develops model codes. The American Law Institute developed in the late 1950's a model penal code. As part of the model penal code it was proposed that abortion no longer be limited, as it was in virtually all states, to situations where it was necessary to preserve the woman's life (whatever that meant or means), but that it should also be permitted where necessary to preserve the woman's mental and physical health, to avert the birth of defective offspring, and in cases of rape or incest. That is the model penal code section on abortion. It was widely discussed but nothing happened with reference to any of the abortion laws until after the U.S. Supreme Court declared that family planning was a fundamental human right in 1965. Suddenly, then, the movement for abortion law reform in the United States became much more intense and began to succeed. In 1966, the State of Mississippi added rape as a ground for abortion (Mississippi is a southern state always very worried about rape). In 1967, Colorado and thereafter a num-

* See Lee, "Japan," in Lee and Larson (eds), *Population and Law* (Leyden: A.W. Sijthoff, and Durham, N.C.: Rule of Law Press, November 1971), pp. 3-36.

ber of other states also adopted the model penal code, i.e., amended their abortion law so that an abortion was legal not only to save life, but also to protect mental and physical health, to avoid defective offspring, and in cases of rape or incest. And there are now 13 states in the United States which have such a law, which is not so many out of 50, but it is a beginning. Much more important: Just a year ago the State of New York, with a majority of one vote in the lower house of its legislature, repealed its abortion law. The repeal was not complete, because the law still requires that all abortions be done by doctors and only through the 24th week of pregnancy. Subject to these requirements, we have now in New York abortion "on request"—which I much prefer as an expression to abortion "on demand" for many reasons, including the fact that doctors resent very much the expression abortion "on demand." After 24 weeks of pregnancy, the law is the same as it was before, i.e., abortion only to save the life of the woman. Two or three weeks before the New York law was passed, I was in Hawaii at a Family Planning conference which took place at the time that state repealed its abortion law. However, Hawaii has a residence requirement, and that means that at least theoretically, a non-resident of Hawaii is unable to get an abortion there. I gather women do go there from other States and give false addresses and say they are residents, but the residence requirement remains on the law books. The State of Alaska also repealed its abortion law, and two other state legislatures, one of which was Maryland, voted to repeal their laws but their governors vetoed the repeal law. In any event Maryland has a very liberally interpreted American Law Institute law. The State of Washington is the latest state to repeal its abortion law, which it did by popular referendum in November of 1970.

Interesting developments in the abortion field have also taken place in the courts. In 1969, the Supreme Court of California was presented with a conviction of a physician who was accused of violating the old California law, which permitted abortion only to save the mother's life. (California now has a modified American Law Institute law.) The Supreme Court of California held that the old law was unconstitutionally vague, and that it violated a basic constitutional right of privacy. In the Court's opinion it was a necessary deduction from the Connecticut birth control case that there was a basic human right to have an abortion as well as a basic human right to plan your family. The court talked of a basic right of privacy in matters relating to marriage, sex and the family. It should be noted that the Supreme Court of California is a very important court in the United States. It is a good court and it has great influence on other courts.

Shortly thereafter, a Federal court in the District of Columbia held that the Washington, D.C. statute which permitted abortion to preserve life and health was also unconstitutional, primarily because of vagueness, i.e., that nobody knew what it meant by stating that you could have an abortion only to save life or health, but also because the D.C. court too considered there is a basic right of privacy, a basic human right in matters relating to marriage, sex and the family.

After these two decisions, a great many other courts had cases involving the constitutionality of abortion laws, and I would say that about three-fifths of them held the statutes unconstitutional and the rest of them held them constitutional. The case from the District of Columbia was argued in the U.S. Supreme Court in January of this year. We are now awaiting the decision on the edge of our chairs.*

The abortion situation is of course more complex in some ways from a legal standpoint than the birth control situation. Whereas in the family planning area there is no obstacle to a woman having her basic human rights, there are some people who say that when it comes to abortion there is another human right involved, i.e., the right of the fetus. I myself believe this argument without merit. In any event, as you can see in the last three or four years, the situation as to abortion in the United States has changed markedly for the better.

Finally I should like to say just a few words about sterilization. The history of the laws relating to sterilization in the United States is totally different from the history of the laws relating to abortion and birth control. Sterilization as a technique was not widely known in the United States until this century. When it first became widely known many people thought of it as a cure for practically all of our social evils. It was thought that you could sterilize criminals and get rid of the criminal element; you could sterilize mental defectives and get rid of insanity and mental incompetence and so forth. Twenty-eight states passed laws providing for compulsory sterilization of criminals and/or mental defectives. Those statutes are still on the books although many of us believe they are unconstitutional. One of them has been declared unconstitutional, but unfortunately the Supreme Court had previously declared another one constitutional; so their unconstitutionality is uncertain. However, I do believe that all or many of these laws will be held to be unconstitutional eventually.

In addition to compulsory sterilization, which in my opinion infringes upon fundamental human rights, there is voluntary sterilization. Voluntary sterilization

* See the addendum attached.

can be a very important method of family planning for those who have completed their families or don't want children. There is only one state which has any law limiting the grounds on which people may seek voluntary sterilization: Utah. (Connecticut had such a law, but this was recently repealed.) There are three states which say how you may go about getting voluntary sterilization, what procedures to follow, etc. In some respects these laws seem to me cumbersome and unnecessary. In the other states there are no laws on voluntary sterilization, yet the doctors in the hospitals are very reluctant to grant voluntary sterilization. As to voluntary sterilization the problem in the United States is not the law but the fact that doctors and hospitals are afraid of being sued for malpractice or negligence, or "mayhem." Mayhem is defined generally in terms of anyone who deliberately hurts himself or another in a manner to interfere with that person's ability to serve the King. This doesn't seem to me, as a lawyer, at all relevant since the male sterilization operation doesn't interfere with anybody's ability to serve anyone, including his wife, and the female operation is still more removed from any mayhem implications. However, doctors worry about it; they are, I think, a little less nervous about sterilization operations as more and more of them are done. I am told that we have at least 100,000 voluntary sterilization operations in the United States every year, probably many more in 1970 than ever before.

We still do not have any basic population policy in the United States. President Nixon has made an excellent statement on family planning which has been something of a keynote of the present administration. Furthermore, the Congress of the United States recently passed a family planning bill which provides for the expenditure of a great deal of additional money for family planning services and family planning research. Our Federal Department of Health, Education and Welfare and our Office of Economic Opportunity make large sums of money available to the states for family planning programmes.

As of about a year ago it was estimated that there were still about five million women in the United States who did not have effective access to family planning programmes. The reports that we have had from the Planned Parenthood affiliates throughout the country and other family planning agencies through Planned Parenthood's Center for Family Planning Programs and Development indicate that a dent has been made in this figure of five million. I hope that we in the United States will continue in the direction in which we've been going to make voluntary family planning possible. If, as I said before, we make voluntary family planning possible, we will demonstrate. I feel certain, that the entire population problem in the United States can be met on a voluntary basis.

Addendum POSTSCRIPT

Since the foregoing paper was given, the United States Supreme Court on April 21, 1971 handed down its decision in *United States v. Vuitch*, a case in which the Government was appealing a decision by the District of Columbia district court holding the District of Columbia's abortion statute unconstitutional. The District of Columbia abortion statute states in pertinent part that:

"Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces or attempts to procure or produce an abortion or miscarriage on any woman, *unless the same were done as necessary for the preservation of the mother's life or health* and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years. . ."

(Italics ours.)

1. BURDEN OF PROOF

After deciding that the appeal was properly before the court, a majority of the Supreme Court consisting of Justices Burger, Black, Harlan, White and Blackmun* in a decision written by Justice Black held first that where a physician is charged with violating the statute, the prosecution has the burden of pleading and of proving *beyond a reasonable doubt* that the abortion was not "necessary for the preservation of the mother's life or health." Whatever else the decision means, this aspect of the holding reduces considerably any risk physicians may incur in connection with any abortion statute.

2. VAGUENESS

The Court then addressed itself to the question of whether the word "health" as used in the statute, was so vague that it failed to inform the defendant doctor of the charges against him in violation of the due process clause of the Fifth Amendment of the Constitution.

The Court noted first that the lower court which had declared the "life and health" statute of the District of Columbia unconstitutionally vague in the *Vuitch* case "apparently felt that the term was vague because 'there was no indication whether it includes

varying degrees of mental as well as physical health'." The Supreme Court majority observed that while neither the legislative history nor prior court cases had discussed the meaning of the term health, decisions subsequent to the lower court's decision in the *Vuitch* case had construed the District of Columbia statute to permit abortions "for mental health reasons whether or not the patient had a previous history of mental defects." The Court stated that it saw "no reason why this interpretation of the statute should not be followed." The Court also found that this intervening construction of the statute "accords with the general usage and modern understanding of the word 'health,' which includes psychological as well as physical well-being." In addition, the Court pointed with approval to the Webster Dictionary definition of health as "the state of being sound in body or mind," and said,

"Viewed in this light, the term 'health' presents no problem of vagueness. Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered."

Accordingly, the Court held that "properly construed, the District of Columbia abortion law is not unconstitutionally vague" and reversed the district court's judgment.

3. PRIVACY

The Supreme Court expressly declined to decide on any of the other grounds which were urged for affirmation of the district court judgment and, pointing specifically to the arguments based upon *Griswold v. Connecticut* (the Connecticut birth control case) to which the district court opinion had referred, the Court said: "since the question of vagueness was the only issue passed upon by the district court, it is the only issue we reach here." (The district court opinion had discussed *Griswold* and the right of privacy and the liberty aspect of the woman's right to determine whether or not to bear a child.)

4. SEPARATE OPINIONS

Justice Stewart, dissenting in part, contended that since "the practice of medicine consists of doing those things which in the judgment of the physician are necessary to preserve a patient's life or health," the reasoning of the majority of the Court should be extended to its logical conclusion, i.e., that a competent

* Two of the judges, Justice Brennan and Justice Marshall did not participate in the decision on the merits.

licensed physician should be wholly immune from being charged with the violation of the District of Columbia law. Justice White, on the other hand, in a concurring opinion, expressed the view that the majority decision means that "a doctor is not free to perform abortion on request without considering whether the patient's health requires it."

5. THE DOUGLAS DISSENT

In a dissenting opinion, Justice Douglas disagreed with the majority's conclusion as to vagueness and also discussed the constitutional right of privacy (which as indicated the majority opinion refused to reach). He noted that "Abortion touches intimate affairs of the family, of marriage, of sex, which" the *Griswold* case "held to involve rights associated with several express constitutional rights and which are summed up in the 'right of privacy'"

"Unless the statutory code of conduct is stable and in very narrow bounds." Justice Douglas feared that jurors will make decisions to convict on the basis of personal moral objections to abortion.*

6. ANALYSIS

The immediate question is what the impact of the *Vuitch* case will be on the many other abortion statutes in effect throughout the nation, some of which are the subject of cases in which appeals have already been docketed in the Supreme Court** and some of which are still being considered by the lower Federal and state courts. Although it is not possible at this time to formulate definitive conclusions in this regard, we do have the following observations:

(a) In the first place, the Court expressly declined to reach the basic constitutional issue—the right of privacy—that is raised in numerous cases. We think the analogy to the *Griswold* case, which dealt with contraception, is a compelling one where abortion is concerned and that the persuasiveness of the

* Justice Douglas also contended that the controversial nature of abortion leads to a danger that jurors will bring their personal biases to bear on cases involving prosecutions for abortion. It was in response to Justice Douglas's arguments on this point that the majority opinion in a footnote stated, "[T]here are well-established methods defendants may use to protect themselves against such jury prejudice: continuances, changes of venue, challenges to prospective jurors on *voir dire*, and motions to set aside verdicts which may have been produced by prejudice. And of course a court should always set aside a jury verdict of guilt when there is not evidence from which a jury could find a defendant guilty beyond a reasonable doubt."

** None of these will be argued before the October 1971 Term of the Court.

constitutional arguments based on *Griswold* is in no way diminished by the *Vuitch* case.

(b) Other constitutional arguments, including the contentions that the abortion statutes (1) violate not only the Ninth Amendment and the due process clause of the Fourteenth Amendment, but also the equal protection clause of the Fourteenth Amendment by discriminating against the poor; (2) constitute laws respecting an establishment of religion in violation of the First and Fourteenth Amendments; and (3) constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, are similarly unaffected by the *Vuitch* ruling.

(c) Further, the *Vuitch* decision focused exclusively on the vagueness of the word "health," although the District of Columbia statute also speaks of abortions that are necessary to preserve the life of the mother. This is of special importance since, apart from the ALI (American Law Institute)-type statutes that include health as well as life as grounds for abortion, most of the old restrictive abortion statutes (except that in Alabama and, by court decision, that in Massachusetts) permit abortions only where necessary to preserve the life of the pregnant woman. It seems likely from the Court's full discussion of the non-vagueness of the word "health" and its total avoidance of any discussion of the meaning of the word "life" in the District of Columbia statute that the Court may have reservations about the statutes which limit abortions to preserving "life" from the point of view of vagueness as well as for other reasons.

(d) It also seems likely that constitutional considerations having to do not only with the right of privacy, but also with these other constitutional provisions referred to above and with the concept of liberty as including a right to take steps to protect health, led the Court in deciding the question of vagueness in *Vuitch* to give a very broad reading to the word "health" in the District of Columbia statute. Where a statute only specifies preservation of "life" as a ground for abortion, the Court would not only be faced with a question of vagueness, but also with all the other constitutional questions.

7. SUMMARY OF THE *VUITCH* DECISION

In summary, then, the *Vuitch* case has established that in abortion cases the burden of proof beyond a reasonable doubt on all issues is on the state and not on the physician. It also established a very broad definition of health including mental health in the District of Columbia statute and held that so construed the statute was not unconstitutionally vague. Moreover, the *Vuitch* decision does not preclude a vagueness attack on the "life" statutes and the other constitutional issues in this area also remain open.

8. THE TWO ABORTION CASES WHICH WILL BE ARGUED BEFORE THE U.S. SUPREME COURT IN THE FALL OF 1971.

In addition to the *Vuitch* case, the United States Supreme Court has calendared for argument next fall abortion cases from the State of Georgia (No. 971 *Doe v. Bolton*) and from the State of Texas (No. 808 *Roe v. Wade*). In announcing its decision to review these cases, the Court stated that it was postponing consideration of the question of jurisdiction to the hearing on the merits. This means that the Court has not definitely decided that it has jurisdiction, but it will hear oral argument on both jurisdictional and the substantive issues.

As to the substantive issues: The Texas case involves the validity of a statute which prohibits abortion except for the purpose of saving the life of a

woman. Similar statutes are still in effect in over thirty states. The Georgia statute is a more or less typical American Law Institute statute which prohibits abortion except to save life, protect mental and physical health in cases of rape and incest, and to avert the birth of defective offspring. Twelve other states have statutes more or less similar.

In view of the decision in the *Vuitch* case discussed in the body of the memorandum, it is likely that the United States Supreme Court will not hold the Georgia-type statute unconstitutional for vagueness, but a vagueness attack may still succeed with reference to the kind of statute involved in the Texas case. Both cases will involve all the other constitutional issues raised in the abortion cases throughout the country, i.e., right of privacy, denial of due process, denial of equal protection, imposition of cruel and unusual punishment and perhaps others.

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LAW AND POPULATION PROGRAMME

MEETING OF THE INTERNATIONAL ADVISORY COMMITTEE ON POPULATION AND LAW
PARIS, FRANCE • APRIL 1 & 2, 1971

THURSDAY, APRIL 1, 1971

10:00-10:15 a.m.

Welcome

Dean Edmund A. Gullion
Fletcher School of Law and Diplomacy

10:15-11:00 a.m.

Progress Report

Dr. Luke T. Lee
Director, Law and Population Programme

11:00 a.m.-1:00 p.m.

Law and Population

National:

Mrs. Harriet Pilpel
Counsel to Planned Parenthood-World Population and
Senior Partner, Greenbaum, Wolff & Ernst

Basis for discussion: "Japan" – a chapter from the
forthcoming book, Law and Population (Leyden:
Sijthoff, and Durham, N.C.: Rule of Law Press,
1971).

International:

Mr. Thomas C. Lyons, Jr.
Deputy Chief, Analysis and Evaluation Division
Office of Population, Technical Assistance Bureau
U.S. Agency for International Development

Basis for discussion: "Law and Family Planning" –
background paper prepared for WHO's Expert
Committee on Family Planning in Health Services,
(November, 1970).

1:00-3:00 p.m.

Lunch

3:00-5:30 p.m.

Bilateral Family Planning Cooperation
Moderator: Dr. Arthur Larson
Director, Rule of Law Research Center
Duke University

Panelists:

Dr. Minoru Muramatsu
Chief, Section of Demography
Institute of Public Health
Japan

M. Jean Bourgeois-Pichat
Director, Institut National d'Etudes Démographiques

Ambassador Melquiades J. Gambou
Head, Division of Research and Law Reform
University of the Philippines

Mr. Philander Claxton
Special Assistant to the Secretary
on Population Matters
Department of State

7:00-9:00 p.m.

Reception

Chateau de la Muette
2. rue André-Pascal
Paris XVIe

FRIDAY, APRIL 2, 1971

10:00 a.m.-12:30 p.m.

Role of International Organization in Family Planning
Moderator: Professor Richard Baxter
Harvard Law School

Panelists:

Mr. John Edwin Fobes
Deputy Director General, UNESCO

Dr. Alexander Kessler
Chief
Human Reproduction Unit, WHO

Mr. Francis Bland
Consultant on Population Programme, OECD

Mr. Stanley Johnson
Liaison Officer with International Organizations,
I.P.P.F.

Mrs. Helvi Sipilä
Special Rapporteur of the U.N. on Family Planning
and Status of Women

12:30-2:00 p.m.

Lunch

2:00-4:00 p.m.
Future Direction?
Dr. Lee

Speaker:
Mr. Halvor Gille
Associate Director
U.N. Fund for Population Activities

International Advisory Committee on Population and Law

The Programme is under the general supervision of an International Advisory Committee on Population and Law meeting annually in different regions of the world. Its members are:

Mr. Georges Abi-Saab (*Geneva*)
Mr. Richard Baxter (*Harvard*)
Mr. F. E. Bland (*O.E.C.D.*)
Mr. Jean Bourgeois-Pichat (*I.N.E.D.*)
Mr. Philander Claxton, Jr. (*State Department*)
Ambassador Melquiades J. Gamboa (*Philippines*)
Mr. Robert K. A. Gardiner (*U.N.E.C.A.*)
Mr. Richard Gardner (*Columbia*)
Mr. Halvor Gille (*U.N.F.P.A.*)
Dr. Leo Gross (*Fletcher and Harvard*)
Mr. Edmund A. Gullion (*Fletcher*)
Miss Julia Henderson (*I.P.P.F.*)
Mr. Edmund H. Kellogg (*Fletcher*)
Dr. Dudley Kirk (*Stanford*)
Dr. Peter F. Krogh (*Georgetown*)
Dr. Arthur Larson (*Duke*)
Dr. Luke T. Lee (*Fletcher*)
Mr. Thomas C. Lyons, Jr. (*A.I.D.*)
Dr. O. Roy Marshall (*University of the West Indies*)
Mr. Bertil Mathsson (*U.N.E.S.C.O.*)
Father Arthur McCormack (*Vatican*)
Mr. Robert Meserve (*American Bar Association*)
Dr. J. De Moerloose (*W.H.O.*)
Dr. Minoru Muramatsu (*Japan*)
Mrs. Harriet Pilpel (*Planned Parenthood – World
Population*)
Mr. Marc Schreiber (*U.N. Division of Human Rights*)
Mrs. Helvi Sipilä (*U.N. Commission on Status
of Women*)