Volume 15 | Issue 4 Article 4

1970

Population Policies of State Governments in the United States: Some Preliminary Observations

Edwin D. Driver

Follow this and additional works at: https://digitalcommons.law.villanova.edu/vlr

Part of the Family Law Commons, Legislation Commons, and the Medical Jurisprudence Commons

Recommended Citation

Edwin D. Driver, *Population Policies of State Governments in the United States: Some Preliminary Observations*, 15 Vill. L. Rev. 818 (1970).
Available at: https://digitalcommons.law.villanova.edu/vlr/vol15/iss4/4

This Symposia is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

Driver: Population Policies of State Governments in the United States: So

POPULATION POLICIES OF STATE GOVERNMENTS IN THE UNITED STATES: SOME PRELIMINARY OBSERVATIONS

EDWIN D. DRIVER†

I. INTRODUCTION

THE PRINCIPAL ISSUE in population policy in the United States during the past five years has been the priority of family planning for public sector support, *i.e.,* the level of family planning expenditures relative to public need and to total public expenditure.[1] More recently, the issue of liberalizing or abrogating antiabortion laws has become prominent. Two inferences which may be derived from discussions of these issues are that efforts of governments in the United States to influence the birth rate are new[2] and that effective measures are necessarily direct ones. Consequently, indirect measures are rarely discussed and are even presumed to not exist. Speaking of indirect measures, or "hidden policies," Duncan remarks:

> It would be a mistake to confine attention to edicts, measures, programs, and pronouncements that are explicitly (if only partially) directed to the production of demographic change. We have lots of policies in this country that affect population but are not generally thought of as population policies per se. In a variety of ways, we subsidize childbearing (income tax exemptions, for one). Land and agricultural policies over the decades have had profound impact on the distribution of rural population. A good argument can be made that the U.S. has definitely had an expansionist population policy throughout its history, and especially since World War II.
>
> The point here would be to identify programs and legislative provisions that are demographically relevant, even if only in-

† Professor of Sociology, University of Massachusetts; Consultant on Social Science, The Ford Foundation; A.B., Temple University 1945; Ph.D., University of Pennsylvania, 1956.

1. Corsa, *United States: Public Policy and Programs in Family Planning,* 27 STUDIES IN FAMILY PLANNING 1 (Mar. 1968). *See also* PRESIDENT'S COMMITTEE ON POPULATION AND FAMILY PLANNING, POPULATION AND FAMILY PLANNING: THE TRANSITION FROM CONCERN TO ACTION (Nov. 1968) (H.E.W. pamphlet).

2. Thirty years ago Congress gave serious attention to a program of family allowances in order to raise the birth rate. Although general bills were never approved, bills to benefit military personnel were approved. *Hearings on S. 2467 Before the Subcomm. on Family Allowances of the Senate Comm. on Military Affairs,* 77th Cong., 2d Sess. (1942). The Government's contribution to family allowances from September 1942 to June 1943 totaled $446,822,777.22. U.S. WAR DEP'T FIRST ANNUAL REPORT OF THE OFFICE OF DEPENDENCY BENEFITS, FISCAL YEAR ENDING June 30, 1943 1 (1944).

Published by Villanova University Charles Widger School of Law Digital Repository, 1970

> directly so. There is no cut-and-dried method of doing this. It requires digging for sources, imaginative combination of bits of data, and a lot of plain old analysis — sociological, economic, political, demographic. Again, hardly anyone does this kind of work, except in such spectacular cases as Dutch migration policy. The challenging task would be to *discover* what has, in fact, been the population policy of the U.S., whose interests were being served by it, and what levers of power they pushed to see that these interests were served.[3]

Whether intended or not, indirect measures employed by governments or their subdivisions may affect the birth rate. An especially interesting example is the observation of how an "open door" policy of state mental hospitals dramatically raises the birth rate of the clientele.[4] Perhaps more significant in a statistical sense, is the way in which policies on deferment from military service and their administration[5] have influenced the birth rate. What is needed, then, is a complete inventory and assessment of the whole range of indirect as well as direct policies in the United States and elsewhere.

This paper does not attempt such an inventory. Rather, it focuses on a few of the many policies of state governments which might influence reproductive behavior and the birth rate. While some attention is given to state policies which are directly related to conception control and birth control, major attention is given to the indirect measures. These include policies governing marriage, the taxation of personal income, inheritance, the dissolution of marriage (separation and divorce), and remarriage.

The paper is divided into three parts. First, the states are compared with regard to each type of written policy and an index is

---

3. Letter from Otis Dudley Duncan, Director, Population Center, University of Michigan, Ann Arbor, Michigan to Edwin D. Driver of Sept. 19, 1969.

4. Shearer, *Unexpected Effects on an "Open Door" Policy on Birth Rates of Women in State Hospitals,* 38 AM. J. ORTHOPSYCHIATRY 413 (1968).

It would be valuable for some researcher to examine the fertility implications of policies and practices of the whole array of public and private institutions. For example, how is fertility affected by policies governing visits to the more than 250,000 persons incarcerated in our federal and state prisons? On prison policy, *see Conjugal Visiting: A Controversial Practice in Mississippi,* 3 CRIM. L. BULL. 280 (1967).

5. In Talcott v. Reed, 217 F.2d 360, 363 (9th Cir. 1954), the court noted that the respondent cited General Hershey's Operation Bulletin No. 57, issued to local boards, in his brief as follows:

> . . . that pregnancy is a status over which the registrant does have control, and is therefore not a claim which can be classified under "hardship" such as sickness, death, or any extreme emergency beyond the registrant's control . . .

The judge thought the contents of this bulletin to be morally and legally wrong. "It obliquely charges the youth of the land with corrupting the family relation into a way of avoiding service for cowards." J. GOLDSTEIN & J. KATZ, THE FAMILY AND THE LAW: PROBLEMS FOR DECISION IN THE FAMILY LAW PROCESS 380 (1965).

Driver: Population Policies of State Governments in the United States: So

developed to denote the degree to which the states are anti-natalist. Secondly, some fragmentary evidence is given to suggest that the policies do in fact influence reproductive behavior. And thirdly, there is a brief note on some trends in population policies at the state level.

II. THE CONTENT OF SELECTED STATE POLICIES

*A. Policies Governing Marriage**

The states and territories differ somewhat in their written rules governing marriage.[6] There are rules pertaining to common-law marriage; the ages at which persons may marry, with or without parental consent; medical examination prior to obtaining a marriage license; the waiting period between the application for and the obtaining of a license, or between the receipt of the license and the formal marriage ceremony; and the degree of kinship between the parties to the marriage.[7]

1. Common-Law Marriage

Common-law marriage, or the agreement of a couple to live together and to define themselves to others as man and wife without going through a formal ceremony of obtaining a license and appearing before a judge or clergyman is completely recognized in 15 states and territories; only conditionally recognized in 9 states and not recognized at all in 25 states and territories.[8]

---

* Many of the statistics stated in this section are found in Parnell J.T. Callahan, THE LAW OF SEPARATION AND DIVORCE 2-32 (1967). This section of the paper is simply a highly summarized version of extensive legislation.

6. The evolution of the legal rules since the colonial period is discussed in Monahan, *State Legislation and Control of Marriage,* 2 J. FAM. L. 30 (1962).

7. *See generally* GOLDSTEIN & KATZ, *supra* note 5.

8. Common-Law marriage is recognized in the following states: Alabama; Colorado; Florida; Georgia; Idaho; Iowa; Kansas; Montana; Ohio; Oklahoma; Pennsylvania; Rhode Island; South Carolina; Texas; and the District of Columbia. PARNELL J.T. CALLAHAN, THE LAW OF SEPARATION AND DIVORCE 3-4 (1967) (Table I) [hereinafter cited as CALLAHAN].

Common-law marriage is recognized conditionally in the following states (the date before which such marriage must have been entered into is indicated in parentheses following each state): California (before 1895); Indiana (before January 1, 1958); Michigan (before January 1, 1957); Mississippi (before April 5, 1956); Missouri (before March 31, 1921); Nebraska (before March 21, 1921); New Jersey (before December 1, 1939); New York (before April 29, 1933); and South Dakota (before July 1, 1959). CALLAHAN, *supra* note 8, at 4, Table II.

Common-law marriage is not recognized in the following states: Arizona; Arkansas; California; Connecticut; Delaware; Hawaii; Illinois; Kentucky (Common-law marriages valid only for the purposes of the Workmen's Compensation Law); Louisiana; Maryland; Massachusetts; New Hampshire; New Mexico; North Carolina; North Dakota; Oregon; Tennessee; Utah; Vermont; Virginia; Washington; West Virginia; Wisconsin; Wyoming; and Puerto Rico. CALLAHAN, *supra* note 8, at 4, Table III.

Published by Villanova University Charles Widger School of Law Digital Repository, 1970

2. *Age at Marriage*

As of November 1, 1969 the minimum age of marriage[9] for the female, with consent of the parents, ranged from 13 years in New Hampshire and 14 years in seven other states (Alabama, New York, South Carolina, Texas, Utah, Vermont, and the Virgin Islands) to 17 years in Washington and 18 years in Kansas. For the male the range was from 14 years of age in New Hampshire and 15 years of age in Missouri to 18 years of age in 37 jurisdictions. The modal ages are 16 years for the female (38 jurisdictions) and 18 years for the male (37 jurisdictions).[10]

The range in the minimum age at marriage which is permissible without parental consent is the same for males and females, varying from 18 years to 21 years.[11] The modal ages are 18 years for the female (36 jurisdictions) and 21 years for the male (44 jurisdictions).

3. *Medical Examinations*

A medical examination to ensure that the applicants for a marriage license are free of syphilis or other venereal disease is required in every state except Maine, Minnesota, Nevada, South Carolina, Washington, and the Virgin Islands.[12] Twelve of the 47 states having this requirement will not accept out-of-state examinations.

---

9. The minimum age may be set aside by the court under unusual circumstances. In Oklahoma, for example, where males under the age of 18 years and females under the age of 15 years are expressly forbidden to marry, the law says:

> Provided, that this Section shall not be construed to prevent the courts from authorizing the marriage of persons under the ages herein mentioned, in settlement of suits for seduction or bastardy; and the courts may also authorize the marriage of persons under the ages herein mentioned, when the unmarried female is pregnant, or has given birth to an illegitimate child, whether or not any suits for seduction or bastardy have been brought; but no marriage may be authorized when such marriage would be incestuous under this chapter.

OKLA. STAT. tit. 43, § 3 (1965). Approximately one-quarter of the states which set the minimum at fifteen or sixteen years of age for the female automatically grant exceptions when pregnancy exists. Those states are: Florida; Georgia; Kentucky; Maryland; South Dakota; and Virginia. CALLAHAN, *supra* note 6, at 10-15.

10. The minimum age at common-law was the age of puberty, 12 years for the female and 14 years for the male. By raising the required minima, legislatures have created a gap between the ages at which persons are deemed capable of reproduction and the ages at which statutes sanction marriage and reproduction. Some legal problems associated with this gap are discussed in 16 WASH. & LEE L. REV. 87 (1959).

11. Marital age without parental consent and majority age in a given state are not always the same. The Oklahoma statutes provide that the marital age is twenty-one for the male and eighteen for the female. OKLA. STAT. tit. 43, § 3 (1965). The majority age may be different according to whether one is talking about voting, crime or some other matter. The Oklahoma Constitution provides that the voting age is twenty-one for both sexes. OKLA. CONST. art. III, § 1. In criminal law, a male over eighteen years of age may be charged with rape, even though the woman consents to sexual intercourse, if she is below the age of consent — sixteen, unless she is under eighteen and of previous chaste and virtuous character. OKLA. STAT. tit. 21, § 1111.

12. The legal basis of the pre-marital physical examination and blood test and the effectiveness of such legislation are treated in J. O'BRIEN, THE RIGHT OF THE STATE TO MAKE DISEASE AN IMPEDIMENT TO MARRIAGE, CATHOLIC UNIV. OF AM., STUDIES IN SACRED THEOLOGY X (2d series, No. 73, 1952); and Trythall, *The Pre-marital Law*, 187 J. AM. MED. ASS'N 900 (Mar. 21, 1964).

TABLE I*

DISTRIBUTION OF STATES BY MINIMUM AGE AT MARRIAGE FOR MALES AND FEMALES, WITH AND WITHOUT PARENTAL CONSENT

	Age (in years)									Total States
	13	*14*	*15*	*16*	*17*	*18*	*19*	*20*	*21*	
With parental consent:										
Males	—	1	1	11	3	37	—	—	—	53
Females	1	7	5	38	1	1	—	—	—	53
Without parental consent:										
Males	—	—	—	—	—	4	3	2	44	53
Females	—	—	—	—	—	36	2	1	14	53

4. *Waiting Periods*

The number of days which must intervene between the filing of an application, or in some cases the taking of the blood test, and the issuance of the marriage license ranges from none in 20 states to eight in one state—the Virgin Islands. The number of states having various other waiting periods are as follows: one, 1 day; two, 2 days; twenty, 3 days; two, 4 days; six, 5 days; and one, 7 days. Some states automatically grant exceptions to the waiting period and others will do so on petition. There is no waiting in Idaho and Oklahoma if both parties are over 21 years of age. Upon petition, the waiting period may be waived in the District of Columbia (4 days), Mississippi (3 days), Montana (5 days), New Hampshire (5 days), Oregon (7 days), and Wisconsin (5 days). Georgia, on the other hand, does not have a waiting period but may institute one by virtue of special laws applicable for persons under 21 years of age.

There are only four states which require a waiting period between the issuance of a license and the formal marriage ceremony. In Delaware the period is one day if one or both parties are non-residents. It is 6 days in Louisiana, 3 days in New York, and 5 days in Vermont.

No state has a waiting period before *and* after the issuance of the marriage license.

5. *Kinship*

The eligibility of two parties to legally enter into the marriage relationship is also related to their biological and social characteristics. Until their abrogation by the Supreme Court in *Loving v. Virginia,*[13]

* Table I is compiled from information found in the WORLD ALMANAC AND BOOK OF FACTS 74 (1970).

13. 388 U.S. 1 (1967).

TABLE II*

POLICIES OF THE STATES GOVERNING MARRIAGE

STATES	Common-Law Marriage Not Recognized	HIGH MINIMUM AGE FOR MARRIAGE — With Consent (18 yrs.)		HIGH MINIMUM AGE FOR MARRIAGE — Without Consent (21 yrs.)		Blood Test Required	WAITING PERIOD — For License (Over 24 Hrs.)	WAITING PERIOD — After License (Any Time)	First Cousin Marriage Prohibited	Index of Difficulty of Marriage
		M.	F.	M.	F.					
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)
Alabama	—	—	—	X	—	X	—	—	—	2
Alaska	X	X	—	X	—	X	X	—	X	6
Arizona	X	X	—	X	—	X	X	—	X	6
Arkansas	X	X	—	X	—	X	X	—	X	6
California	X	X	—	X	—	X	—	—	X	5
Colorado	—	—	—	X	—	X	—	—	X	3
Connecticut	X	—	—	X	X	X	X	—	—	5
Delaware	X	X	—	—	—	X	—	X	X	5
Dis. of Colum.	—	X	—	X	—	X	X	—	—	4
Florida	—	X	—	X	X	X	X	—	X	6
Georgia	—	X	—	—	—	X	—	—	—	2
Hawaii	X	X	—	—	—	X	X	—	X	5
Idaho	—	X	—	X	—	X	X	—	X	5
Illinois	X	X	—	X	—	X	—	—	X	5
Indiana	X	X	—	X	—	X	X	—	X	6
Iowa	—	X	—	X	—	X	X	—	X	5
Kansas	—	X	—	X	—	X	X	—	X	5
Kentucky	X	X	—	—	—	X	X	—	X	5
Louisiana	X	X	—	X	X	X	—	X	X	7
Maine	—	—	—	X	—	X	X	—	—	3
Maryland	X	X	—	X	—	—	X	—	—	4
Massachusetts	X	X	—	X	—	X	X	—	—	5
Michigan	X	X	—	—	—	X	X	—	X	5
Minnesota	—	X	—	X	—	—	X	—	X	4
Mississippi	X	—	—	X	X	X	X	—	X	6
Missouri	X	—	—	X	—	X	X	—	X	5
Montana	—	X	—	X	—	X	X	—	X	5
Nebraska	X	X	—	X	X	X	—	—	X	6
Nevada	—	X	—	X	—	—	—	—	X	3
New Hampshire	X	—	—	—	—	X	X	—	X	4
New Jersey	X	X	—	X	—	X	X	—	X	6
New Mexico	X	X	—	X	—	X	X	—	X	6
New York	X	—	—	X	—	X	—	X	X	5
North Carolina	X	—	—	—	—	X	—	—	X	3
North Dakota	X	X	—	X	—	X	—	—	X	5
Ohio	—	X	—	X	X	X	X	—	X	6
Oklahoma	—	X	—	X	—	X	X	—	X	5
Oregon	X	X	—	X	—	X	X	—	X	6
Pennsylvania	—	—	—	X	X	X	X	—	X	5
Rhode Island	—	X	—	X	X	X	—	—	—	4
South Carolina	—	—	—	—	—	—	—	—	—	0
South Dakota	X	X	—	X	X	X	—	—	X	6
Tennessee	X	—	—	X	X	X	X	—	—	5
Texas	—	—	—	—	—	X	—	—	—	1
Utah	X	—	—	X	—	X	—	—	X	4
Vermont	X	X	—	X	—	X	—	X	—	5
Virginia	X	X	—	X	X	X	—	—	—	5
Washington	X	—	—	X	—	—	X	—	X	4
West Virginia	X	X	—	X	X	X	X	—	X	7
Wisconsin	X	X	—	X	—	X	X	—	X	6
Wyoming	X	X	—	X	X	X	—	—	X	6
Puerto Rico	X	X	—	X	X	X	—	—	X	6
Virgin Islands	X	—	—	X	—	—	X	—	X	4

* Table II is compiled from information found in Parnell J.T. Callahan, THE LAW OF SEPARATION AND DIVORCE 2–3 (1967) and WORLD ALMANAC AND BOOK OF FACTS 74–75 (1970).

statutes in several states prohibited marriages between persons of different races. Now kinship is the main social characteristic upon which eligibility is based. Every state prohibits marriage between a person and his or her father, mother, son, daughter, brother or sister, grandmother or grandfather, granddaughter or grandson, aunt or uncle, and niece or nephew. The prohibition in some states extends to in-laws, step-relatives, and to various other lineals, collaterals, and affines. An interesting rule is that pertaining to marriage between first cousins (collaterals) — the preferred form in some societies outside the United States. Forty of the 53 jurisdictions prohibit it.

6. *Index of Difficulty of Marriage*

Each of the policies, or legal rules, governing eligibility for marriage may be formulated so as to make it easy or difficult to marry. It is, for example, most difficult to marry in those states which do not recognize common-law arrangements, set high minima ages for males and females, require blood tests and long waiting periods before the formal ceremony, and prohibit marriage between the most distant kinsmen. The prohibition against kinsmen marrying can be quite effective in lowering the marriage rate in states with sparse population, isolated communities, and little migration.

I have attempted to construct an index of the difficulty of marrying in each of the 53 states. In doing so I have acted as if each kind of policy is of equal importance in facilitating or obstructing marriage. I have proceeded on this basis here and elsewhere because, although intuitively I feel the policies to be of unequal weight, I do not now have an empirical basis for scaling the policies according to effectiveness. By the procedure used a state might have a score ranging from 0 (minimal difficulty of marrying) to 9 (maximal difficulty of marrying). Table II shows the score for each state.

B. *Policies Governing Conception Control and Birth Control**

The direct role of the states in conception control and birth control is a dual one. By legislative enactments they may permit or prohibit persons from mechanically, chemically or surgically interfering with conception (contraception or sterilization) or birth (abortion or infanticide). Secondly, they may or may not act through their health, welfare, education or other departments to provide information, mate-

* Much of the information in this section was obtained from R. Weinberg, LAWS GOVERNING FAMILY PLANNING 4-38 (1968).

rials or facilities for conception and birth control. This second role will be referred to as family planning activities.

1. *Contraception*

The legal attitude of the Federal government and the states to contraception has gone through an almost complete cycle during the last 100 years: moving from non-regulation to total and universal regulation and, now, to partial and non-universal regulation. The last vestiges of regulation will probably disappear in the next decade.

The first Federal legislation was embodied in the famous Comstock Act of 1873.[14] This literally forbade the importation, mailing and interstate transportation of articles and literature on contraception and abortion. Following this Act every state except New Mexico passed laws prohibiting contraception. Beginning in 1915, a series of cases were won in the appellate courts which had the effect of abrogating most of the provisions of the Comstock Act. Physicians were exempted from many of the anti-abortion provisions of the Act by two landmark cases: *Bours v. United States*[15] and *United States v. One Package.*[16] Furthermore, in *Consumer's Union v. Walker*[17] the mailing of reports evaluating certain contraceptive materials was declared legal and in *United States v. H. L. Blake Co.*[18] the practice of mailing vending machines containing prophylactics was made permissible.

The successful challenge to the Comstock Act had the effect of nullifying provisions of several state statutes. The most significant challenge to these statutes came, however, in *Griswold v. Connecticut*[19] which held that the prosecution of persons for using contraception was an invasion of the "right to privacy." Although this right is not explicitly mentioned in the Constitution, it is established by the 14th Amendment (Justice Harlan),[20] the 9th Amendment (Justices Warren, Goldberg, and Brennan),[21] and the "totality of the constitutional scheme under which we live."[22] Following *Griswold,* progressive measures were enacted in 16 states in 1965 and 1966. Most notable were the changes in Massachusetts and Ohio. Massachusetts repealed an 87-year-old ban on the manufacture and dissemination of contra-

14. 17 Stat. 598 (1875), *as amended* 19 U.S.C. § 1305 (1964).
15. 229 F. 950 (7th Cir. 1915).
16. 85 F.2d 737 (2d Cir. 1935).
17. 145 F.2d 33 (D.C. Cir. 1944).
18. 189 F. Supp. 930 (D. Ark. 1960).
19. 381 U.S. 479 (1965).
20. *Id.* at 499.
21. *Id.* at 486.
22. *Id.* at 494, *citing* Poe v. Ullman, 367 U.S. 497, 521 (1960).

ceptive devices and birth control information and it simultaneously passed legislation authorizing members of the health profession to give professional advice on contraception. (Contrary to popular belief, Massachusetts had never forbade the *use* of contraception.) The revised Ohio code removed all references to the prevention of conception from the criminal code and it permits the unconditional advertisement and sale of contraceptive drugs and devices by anyone, not simply the medical profession.

The result of this legal reform is that in 1966 few states were left with laws prohibiting or restricting the sale or manufacture of abortifacients and ten states had removed all statutory obstacles to contraception. The ten states include: Alabama, Georgia, New Hampshire, New Mexico, Rhode Island, South Carolina, Tennessee, Vermont, West Virginia, and the Virgin Islands. But even in these states persons may be subject to local ordinances. After surveying the reforms of 1965 and 1966, Weinberg was led to comment that:

> There remain, nevertheless, numerous statutes — to say nothing of hundreds of local ordinances — regulating the sale, distribution, and advertisement of contraceptives or prophylactic materials, as well as the dissemination of information. Such statutes vary widely, both in scope and severity . . .
>
> It is important to bear in mind . . . that the literal terms of legislation of this character are not invariably accurate indications of the practical status of law. This is frequently reflected by liberal judicial construction and administrative deviation from the law's technical requirements, as, for example, in states which include birth control services in their public health programs, notwithstanding ostensibly unqualified statutory prohibitions. Conversely, even states having no specific statutes respecting contraception nevertheless regulate such activity in varying degrees in connection with statutes bearing on comparable activities.[23]

2. *Sterilization*

Sterlization — or the surgical inducement of sterility — may be eugenical, therapeutic, or contraceptive in its intent. The eugenical type which is intended to prevent the propagation of mental defectives and criminals is sanctioned in 28 states. The therapeutic type is intended to prevent further aggravation of serious illness or disease which would result if pregnancy were to occur. The contraceptive type serves solely to prevent conceptions for purposes of family limitation. The legal status of both the therapeutic and contraceptive types is

23. R. WEINBERG, LAWS GOVERNING FAMILY PLANNING 20 (1968).

vague in most states.[24] Only Virginia in 1962 and North Carolina in 1963 have passed statutes which expressly authorize voluntary[25] contraceptive sterilization. The Virginia law sanctions free surgery for needy mothers to prevent further childbirth if they request it.[26] At the Federal level, administrative rulings permit the use of HEW and the Department of Defense funds for meeting the costs of such sterilization for persons within their programs.

3. *Abortion*

Changes in the legal attitudes to abortion resemble closely those pertaining to contraception. At common-law, abortion before "quickening" was not criminal. The first U.S. statutes on abortion were passed in Connecticut[27] in 1821 and in Illinois[28] in 1827. The Connecticut law prescribed life imprisonment for any attempt to abort by drugs after quickening. By 1860 the law was modified so as to include pre-quickening attempts, reduce the penalty from life imprisonment to imprisonment for 1-5 years, and exempt from penalty abortion for the purpose of saving the life of the mother. New York's first abortion statute,[29] the earliest American statute dealing with surgical sterilization, was enacted in 1829. After Connecticut, Illinois, and New York, the other states adopted anti-abortion statutes but most of them permitted abortion if the life of the mother was in jeopardy.

The 1960's were the period when state laws went through considerable liberalization. Provisions for a Therapeutic Abortion Law contained in the Model Penal Code, which was approved by the American Law Institute in 1962, have been closely paralled by similar new state provisions introduced in several state legislatures.[30] Under this

---

24. Many hospitals have established a Therapeutic Abortion-Sterilization Committee to adjudicate problems arising out of "the absence of a clearly defined legal code and the inadequacies of medical custom in the perplexity of therapeutic abortion and sterilization." Savel and Perlmutter, *Therapeutic Abortion and Sterilization Committee,* 80 AM. J. OBSTET. & GYNEC. 1192 (Dec. 1960).

25. Punitive, noneugenic sterilization proposals have recently been suggested in at least ten states. Unmarried and highly fertile, welfare mothers would be punished by sterilization, the loss of welfare benefits, imprisonment and/or fines, and the loss of custody of children. For a discussion of specific bills and judicial rulings in California, Delaware, Georgia, Illinois, Iowa, Louisiana, Maryland, Mississippi, North Carolina, and Virginia, *see* Paul, *The Return of Punitive Sterilization Proposals,* 3 LAW & SOC'Y 77 (1968).

26. Reed, *New Voluntary Sterilization Law,* 9 EUGENICS QUARTERLY 166 (Sept. 1962); *Sterilization: New Argument,* U.S. NEWS & WORLD REPORT, Vol. 53, Sept. 24, 1962, at 55.

27. *Id.* at 52.

28. Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A case of Cessation of Constitutionality,* 14 N.Y.L.F. 411, 450 (1968).

29. N.Y. REV. STAT. Pt. IV, Ch. 1, tit. 2, § 1 (1829), *as amended,* N.Y. PENAL LAW § 125.05 (McKinney 1970).

30. WEINBERG, *supra* note 23, at 66.

Code, the termination of pregnancy at the request of a woman would be permissible if the continuation of pregnancy was: (1) a threat to her life or health; (2) might result in the birth of a deformed offspring; or (3) if the pregnancy was due to rape or incest.[31] Several of these provisions or modifications of them were included in the acts passed in Colorado, Georgia, New Mexico, Alabama, Oregon, the District of Columbia, Maryland, California, and North Carolina.

More recently the effort has been to obtain laws giving women the right to decide whether to terminate a pregnancy solely for purposes of family limitation. As of April, 1970, New York, Hawaii and Maryland had approved this type of legislation.

4. *Family Planning Programs*

It is unclear just when local units and state units of government decided to take positive action to promote family limitation. But a part of this history can be sketched.

It would appear that the early efforts were based on administrative rulings rather than legislative enactments. As early as 1937 the State Board of Health in North Carolina permitted its county units to establish birth control centers in connection with their regular activities. The objectives of these centers were to: 1) reduce infant and maternal mortality, 2) reduce the birth rate and increase child spacing among dependents, and 3) "increase the birth rate among the physically fit, and the financially and intellectually competent".[32] Other states which early had programs were Georgia,[33] beginning in 1939, and Virginia,[34] beginning in 1940. Their programs likewise had the State Board of Health authorizing local units to provide contraceptive materials to their clientele. In Virginia these materials were provided by private sources until 1956 when the State Board of Health assumed the financial responsibility for their costs. It was not until 1966 that the Virginia Assembly appropriated funds specifically earmarked for family planning services through the Health Department.[35]

Following North Carolina, Georgia, and Virginia, many other states developed similar programs.[36] But, until 1960, except for the

31. MODEL PENAL CODE § 230.3(2) (Proposed Official Draft, 1962).

32. Pratt, *Program for Public Health Nurses in Birth Control Work,* 30 AM. J. PUB. HEALTH 1096, 1097 (1940).

33. Brackett, *Role of the State Health Department in Family Planning,* 29 OBSTET. & GYNEC. 590 (1967).

34. Jessee, *Family Planning Services in Virginia,* 82 PUB. HEALTH REP. 292 (1967).

35. *Id.* at 293.

36. WEINBERG, *supra* note 23, at 16-17.

seven southeastern states, the services were negligible.[37] In 1966, a survey by a U.S. Senate subcommittee showed that local or state projects in family planning existed in all but nine states.[38] Twenty-one had *state*-sponsored programs. By July 1967 there were 29 states providing fairly adequate contraceptive services through their public welfare departments.[39] The greatest development is in California.[40]

At the federal level, the Department of Health, Education and Welfare and the Office of Economic Opportunity have approved use of their funds to meet the costs of family planning in the programs which they sponsor.[41]

5. *The Index of Birth Control Liberality*

The states vary somewhat in the degree to which their policies permit and support measures to limit births. The policies may be said to be liberal — directed to birth limitation — when a state does not prohibit contraception, does not restrict the sale or manufacture of abortifacients, has a therapeutic abortion statute, permits contraceptive sterilization, and has a program of family planning. If we were to take into account events of 1970 we would add the legal right of a woman to choose to have her pregnancy terminated for whatever reasons are agreeable to her and a physician.

By the items on our list, the index of birth control liberality can range from 0 to 5, 5 being the most liberal. As indicated by Table III, the index grouping is as follows: 6 states have an index of 0; 18 states have an index of 1; 18 states have an index of 2; 7 states have an index of 3; 3 states have an index of 4; and 1 state (North Carolina) has an index of 5.

C. *Policies Governing Taxation of Personal Income*

The states differ widely in their policies on taxation of personal income. Virtually every state has a progressive tax[42] — one which

37. Corsa, *supra* note 1, at 3.

38. Those nine states are Connecticut, Indiana, Louisiana, Massachusetts, New Hampshire, New Jersey, Oklahoma, Rhode Island and South Dakota. Corsa, *supra* note 1, at 2–4.

39. Harting, *et al., Family Planning Policies and Activities of State Health and Welfare Department,* 84 PUB. HEALTH REP. 127, 131 (Table I) (1969). *See* Corsa, *supra* note 1, at 1, for a map showing those states which have programs based on welfare policy, health policy, welfare legislation, or health legislation or a combination of two of these approaches.

40. CALIFORNIA POPULATION STUDY COMMISSION, REPORT TO THE GOVERNOR (Dec. 20, 1966).

41. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, FAMILY PLANNING: NATIONWIDE OPPORTUNITIES FOR ACTION 27 (1968) (H.E.W. pamphlet).

42. There are some states without any tax on personal income. They are: Connecticut, Florida, Nevada, Ohio, Pennsylvania, South Dakota, Texas, Washington, and Wyoming. WORLD ALMANAC AND BOOK OF FACTS 945–46 (1970) [hereinafter cited as WORLD ALMANAC].

Driver: Population Policies of State Governments in the United States: So

TABLE III*

POLICIES OF STATES ON CONCEPTION CONTROL AND BIRTH CONTROL

STATES	*Absence of Statute on Contraception*	*No Prohibition or Restriction on Sale or Manufacture of Abortifacients*	*Liberal or Therapeutic Abortion Statute*	*Legal Approval of Voluntary Contraceptive Sterilization*	*State Program of Family Planning*	*Index of Birth Control Liberality*
(1)	(2)	(3)	(4)	(5)	(6)	(7)
Alabama	X	X	X	—	X	4
Alaska	—	X	—	—	X	2
Arizona	—	X	—	—	X	2
Arkansas	—	X	—	—	X	2
California	—	X	X	—	X	3
Colorado	—	—	X	—	X	2
Connecticut	—	X	—	—	—	1
Delaware	—	X	—	—	—	1
Dis. of Colum.	—	—	X	—	X	2
Florida	—	X	—	—	X	2
Georgia	X	X	X	—	X	4
Hawaii	—	X	—	—	X	2
Idaho	—	X	—	—	X	2
Illinois	—	—	—	—	—	0
Indiana	X	X	—	—	—	2
Iowa	—	X	—	—	—	1
Kansas	—	X	—	—	X	2
Kentucky	—	X	—	—	X	2
Louisiana	—	X	—	—	—	1
Maine	—	X	—	—	—	1
Maryland	—	—	X	—	X	2
Massachusetts	—	—	—	—	—	0
Michigan	—	X	—	—	X	2
Minnesota	—	—	—	—	—	0
Mississippi	—	—	—	—	X	1
Missouri	—	—	—	—	—	0
Montana	—	X	—	—	—	1
Nebraska	—	X	—	—	—	1
Nevada	—	—	—	—	—	0
New Hampshire	X	X	—	—	—	2
New Jersey	—	X	—	—	—	1
New Mexico	X	X	X	—	X	4
New York	—	—	—	—	—	0
North Carolina	X	X	X	X	X	5
North Dakota	—	X	—	—	—	1
Ohio	—	X	—	—	X	2
Oklahoma	—	X	—	—	X	2
Oregon	—	X	X	—	X	3
Pennsylvania	—	X	—	—	—	1
Rhode Island	X	—	—	—	—	1
South Carolina	X	X	—	—	X	3
South Dakota	—	X	—	—	—	1
Tennessee	X	X	—	—	X	3
Texas	—	X	—	—	X	2
Utah	—	X	—	—	—	1
Vermont	X	—	—	—	—	1
Virginia	—	X	—	X	X	3
Washington	—	—	—	—	X	1
West Virginia	X	X	—	—	X	3
Wisconsin	—	X	—	—	—	1
Wyoming	—	X	—	—	—	1
Puerto Rico	—	X	—	—	X	2
Virgin Islands	X	X	—	—	X	3

* Columns 2–5 were compiled from information found in R. Weinberg, LAWS GOVERNING FAMILY PLANNING (1968). Column 6 has an X next to those states which are average or better in financing contraceptive services through their public health departments. Harting, Stableford, Eliot & Corsa, *Family Planning Policies and Activities of State Health and Welfare Departments*, 84 PUB. HEALTH REP. 131 (1969).

rises as income increases — but the states differ in their rates of taxing various categories of income. The initial category ranges from a low of the first $500.00 of income to a high of the first $10,000. The tendency is for taxation to be more severe the smaller the initial category of income which gets taxed. There are at the same time variations among the states which have the same initial category. For example, the first $500 is taxed at 1.5% in Minnesota but at 3% in Oregon; and the first $3000 is taxed at 1% in Arkansas, Georgia, and North Dakota but at 3% in Colorado. The rate of taxation on the first $10,000 of income is only 1.5% in New Mexico and 2% in Louisiana.[43]

The states also differ considerably in their allowances for personal exemptions. The extreme variations according to marital status are as follows: if single, $370 in Wisconsin[44] and $4000 in Mississippi[45]; if married or the head of a family, $600 in W. Virginia[46] and $6000 in Mississippi[47]; and, for each dependent, nothing in Mississippi and $1200 in Michigan.[48]

On the surface it would seem that the policies of the states with regard to taxing personal income would vary in their influence on decisions of residents to marry and to have offspring. One would expect the pressure against marriage and family formation to be greatest where there are extremely high rates of taxation on all income levels, and where personal exemptions are so low as to have virtually no effect on one's net income. Several criteria have been used — *e.g.*, a tax rate of 5% + on an income under $10,000 — to compute for each state an *index of income tax pressure against marriage and family formation.* This index could vary from 0 (no pressure) to 6 (extreme pressure). In actuality, as Table IV shows, it ranges from 0 in 15 states to 5 for 9 states.

*D. Policies Governing Inheritance**

A recurrent theme in the popular literature and drama is the threat of the elders to disinherit the recalcitrant youth who would marry contrary to their wishes. Nothing is said, however, about the share of property to which such youth is entitled despite an elder's wishes.

* The main sources of information for this section include: E. Wypyski, THE LAW OF INHERITANCE IN ALL 50 STATES 1-98 (1961); VETERANS AD., DEP'T OF VETERANS BENEFITS, DIGEST OF INHERITANCE LAWS: STATES AND TERRITORIES OF THE UNITED STATES 1-118 (1966).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

Driver: Population Policies of State Governments in the United States: So

TABLE IV*

POLICIES GOVERNING TAXATION OF PERSONAL INCOME

STATES	HIGH RATE OF TAXATION ON NET INCOME AFTER PERSONAL EXEMPTIONS			PERSONAL EXEMPTIONS			*Index of Income Tax Pressure Against Marriage and Family Formation*
	5%+ on Less Than $10,000	*7%+ on $10,000–$24,999*	*9%+ on $25,000 or More*	*$1000 or Less for Single Person*	*$1500 or Less for Married, Family Head*	*Less Than $600 per Dependent*	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Alabama	—	—	—	—	—	X	1
Alaska	—	—	—	X	X	—	2
Arizona	X	—	—	X	—	—	2
Arkansas	—	—	—	—	—	X	1
California	—	X	X	—	—	X	3
Colorado	X	X	—	—	—	—	2
Connecticut	—	—	—	—	—	—	0
Delaware	X	X	X	X	X	—	5
Dis. of Colum.	—	—	—	X	—	X	2
Florida	—	—	—	—	—	—	0
Georgia	—	—	—	—	—	—	0
Hawaii	X	X	X	X	X	—	5
Idaho	X	X	X	X	X	—	5
Illinois	—	—	—	X	—	—	1
Indiana	—	—	—	X	X	X	3
Iowa	—	—	—	—	—	X	1
Kansas	—	—	—	X	X	—	2
Kentucky	X	—	—	X	—	—	2
Louisiana	—	—	—	—	—	X	1
Maine	—	—	—	X	—	—	1
Maryland	—	—	—	X	—	—	1
Massachusetts	—	—	—	—	—	X	1
Michigan	—	—	—	—	—	—	0
Minnesota	X	X	X	—	—	X	4
Mississippi	—	—	—	—	—	X	1
Missouri	—	—	—	—	—	X	1
Montana	X	X	X	X	X	—	5
Nebraska	—	—	—	X	X	—	2
Nevada	—	—	—	—	—	—	0
New Hampshire	—	—	—	X	X	X	3
New Jersey	X	X	X	X	X	—	5
New Mexico	—	X	—	X	X	—	3
New York	X	X	X	X	X	—	5
North Carolina	X	X	—	—	—	—	2
North Dakota	X	X	X	X	—	—	4
Ohio	—	—	—	—	—	—	0
Oklahoma	—	—	—	X	—	X	2
Oregon	X	X	X	X	X	—	5
Pennsylvania	—	—	—	—	—	—	0
Rhode Island	—	—	—	—	—	—	0
South Carolina	—	X	—	X	—	—	2
South Dakota	—	—	—	—	—	—	0
Tennessee	—	—	—	—	—	—	0
Texas	—	—	—	—	—	—	0
Utah	X	—	—	X	X	—	3
Vermont	X	X	X	X	X	—	5
Virginia	—	—	—	X	—	X	2
Washington	—	—	—	—	—	—	0
West Virginia	—	—	—	X	X	—	2
Wisconsin	—	X	X	X	X	X	5
Wyoming	—	—	—	—	—	—	0
Puerto Rico	—	—	—	—	—	—	0
Virgin Islands	—	—	—	—	—	—	0

* Table IV was compiled from information found in WORLD ALMANAC AND BOOK OF FACTS 945–46 (1970) (Tax Division, U.S. Treasury Dep't as of July 1, 1969).

Published by Villanova University Charles Widger School of Law Digital Repository, 1970

The minimum share of property of the elder which the state guarantees to his spouse or his offspring could conceivably influence reproductive behavior in two ways. For the offspring his decision to marry (and later to remarry) and to assume the financial responsibilities of parenthood might be related to the share of land, money, stocks, or a business which he is sure of receiving at some point in his lifetime. The spouse might decide to have few or many children, depending on how the inheritance laws (and other laws) provide for her financial security in the event of the husband's death.[49] In order to somewhat simplify a comparison of state policies on inheritance only the minimal guarantees to the spouse are discussed.

Most states base the spouse's share of each type of property — real or personal — upon whether she is left childless or with one or more children. The usual pattern is for her minimal share of each type of property to decrease as the number of children increases. Except in the states which have both abolished the right of dower and have established a "child's share" for the widow, the widow can be certain of at least 33% of each type of property irrespective of the number of children. Where she has a "child's share" the law usually operates to guarantee her 20% of each type of property irrespective of the number of children. An exceptional pattern is found in Louisiana where the widow's share of real property increases from 50% to 100% as the number of children increases.

The minimum benefit to the widow without children varies from 100% of the real property and 100% of the personal property in Alaska, Colorado, Delaware, and several other states to only 33% of the real property in Kentucky and Tennessee and 33% of the personal property in states such as Arkansas. Other inter-state differences are found for widows having one or more children. If there is one child, the share of each type of property is 33% in several states but 50% in the others. If there are four children, the share of each type of property is 20% in a few states, 33% in several states, and 50% in a few other states. The exceptions to these patterns are Louisiana, as

49. Historically, English Law has always sought to issue widows suitable support and maintenance after their spouse's death by assigning them a certain share in their husband's property. The "weotuma" and the "morning-gift" served this purpose until dower became the general practice. A provision in the Magna Carta of 1217 extended the dower interest to a one-third part of all his land and not merely that of which he was seised at the time of marriage. English, *Married Women and their Property Rights: A Comparative View,* 10 CATH. U. AM. L. REV. 75 (1961).

English Law and American Law have also tried to protect the widow from schemes to defeat her right of inheritance. Comment, *Disinheritance of the Widow in New England,* 44 BOSTON U.L. REV. 534 (1964).

noted above, and Iowa which provides the widow with 100% of the personal property irrespective of the number of children.

The differences among the states in their minimal guarantees of shares of property and the decrease in these guarantees as the number of children increases suggest that inheritance laws could very much influence the fertility decisions of a woman who gives thought to her financial security. In some states the decision not to have a child or an additional child would result in her obtaining a much larger estate upon the husband's death. The value of fertility control to a widow inheriting her minimal share of property in various states is shown in Table V. Here is computed the difference in inheritance which would result by the woman having had one less child — two rather than three, one rather than two, and none rather than one. In some states such as Florida, Georgia, and Mississippi, each alternate pattern of fertility provides an appreciable increase in inheritance. In several other states none of the patterns provides much of an increase. In more than half of the states the decision to not have a child at all rather than one child would mean a gain to the widow of $10,000 or more on a net estate of real property of $20,000.

The intention of Table V is to point out that inheritance laws are structured to influence fertility decisions. Whether they, in fact, do so in the United States can only be determined by empirical investigation. The *index of impact of inheritance laws on fertility,* (column 5 of Table V) measures, then, the relative *potential* of such laws in the United States on marital and fertility patterns.

*E. Policies Governing the Dissolution of Marriage**

A marriage may be broken by annulment, separation, divorce, or death. Annulment creates the legal fiction that the marriage did not in fact occur because one of the legal requisites, whether explicitly stated or not in legislative enactments, did not exist. For example, annulment might be granted because the act of marriage was based on coercion — hence involuntary — or falsification of age. It might also be granted because of sexual impotency[50] which by law or judicial interpretation is a disqualification for marriage. Generally the policies of the states

* The sources for this section include: WORLD ALMANAC AND BOOK OF FACTS 75 (1970); Callahan, *supra* note 8, at 33–122.

50. Impotency usually means the physical incapacity to copulate rather than to conceive or to impregnate. But occasionally the latter are included in the definition. Impotency may be a cause of annulment or divorce in several states. They include: Arkansas, California, Delaware, District of Columbia, Hawaii, Idaho, Iowa, Kansas, Mississippi, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Pennsylvania, South Dakota, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Callahan, *supra* note 8, at 34–40.

TABLE V*

IMPACT OF STATE INHERITANCE LAWS ON DIRECT, PERSONAL BENEFIT OF A NET ESTATE (REAL PROPERTY) OF $20,000 TO A WIDOW, GIVEN THREE PATTERNS OF FERTILITY

	DIFFERENCE IN INHERITANCE EQUALS			
STATES (1)	*$2,000+ if two children rather than three* (2)	*$3,400+ if one child rather than two* (3)	*$10,000+ if no child rather than one* (4)	*Index of Impact of Inheritance Laws* (5)
Alabama	—	—	—	0
Alaska	—	—	X	1
Arizona	—	—	X	1
Arkansas	—	—	—	0
California	—	—	—	0
Colorado	—	—	X	1
Connecticut	—	—	X	1
Delaware	—	—	X	1
Dis. of Colum.	—	—	—	0
Florida	X	X	X	3
Georgia	X	X	X	3
Hawaii	—	—	X	1
Idaho	—	X	—	1
Illinois	—	—	—	0
Indiana	—	X	—	1
Iowa	—	—	X	1
Kansas	—	—	X	1
Kentucky	—	—	—	0
Louisiana	—	—	—	0
Maine	—	—	X	1
Maryland	—	—	—	0
Massachusetts	—	—	—	0
Michigan	—	—	—	0
Minnesota	—	X	X	2
Mississippi	X	X	X	3
Missouri	—	—	—	0
Montana	—	—	—	0
Nebraska	—	X	—	1
Nevada	—	—	—	0
New Hampshire	—	—	X	1
New Jersey	—	—	—	0
New Mexico	—	—	—	0
New York	—	X	X	2
North Carolina	—	X	X	2
North Dakota	—	X	X	2
Ohio	—	X	—	1
Oklahoma	—	X	—	1
Oregon	—	—	X	1
Pennsylvania	—	X	X	2
Rhode Island	—	—	X	1
South Carolina	—	—	X	1
South Dakota	—	X	X	2
Tennessee	—	—	—	0
Texas	—	—	X	1
Utah	—	—	X	1
Vermont	—	—	X	1
Virginia	—	—	X	1
Washington	—	—	—	0
West Virginia	—	—	X	1
Wisconsin	—	—	X	1
Wyoming	—	—	X	1
Puerto Rico	NA	NA	NA	
Virgin Islands	NA	NA	NA	

* Table V is compiled from information found in E. WYPYSKI, THE LAW OF INHERITANCE IN ALL 50 STATES 1-98 (1961); VETERANS AD., DEP'T OF VETERANS BENEFITS, DIGEST OF INHERITANCE LAWS: STATES AND TERRITORIES OF THE UNITED STATES 1-118 (1966).

on annulment are a mirror-image of their policies on marriage and it is for this reason that we shall not compare the states with regard to annulment rules. Rather, the comparisons are of their rules or policies pertaining to divorce and separation.

1. Divorce

The states and territories differ somewhat on their policies governing divorce. The policies govern legal reasons for divorce, the in-state residence which is required, and the time which must elapse between the interlocutory and final decrees.

The more common legal reasons for divorce are: adultery (49 states), desertion (50 states), cruelty (44 states), felony (44 states), alcoholism (39 states), impotency (32 states), insanity (30 states), and non-support (25 states). Less frequent reasons include: pregnancy at the time of marriage, drug addiction, violence, indignities, unchaste behavior after marriage, vagrancy, prostitution, gross misbehavior or wickedness, membership in religious order disbelieving in marriage, attempted homicide, lack of cohabitation for one year or more, neglect of duty, bigamy, and treatment which injures health. The number of reasons recognized by the several states ranges from 2 in California and 3 in New Jersey to 13 in Alabama and Kentucky and 12 in Oklahoma.

California has taken the lead in legal change by removing the concept of "guilty party" from its laws and proceedings and substituting the concept of dissolution for divorce. Either spouse may petition the court for dissolution of the marriage because of irreconcilable differences.[51] The marriage can be dissolved in two minutes by the petitioner answering four questions:[52]

> 1. In your petition you have asked that the court dissolve your marriage. Do you still desire to have your marriage dissolved?
>
> 2. At this time do there exist irreconcilable differences between you and your spouse?

53. *Id.*

> 3. Do you believe that those differences have caused an irremediable breakdown of your marriage?
>
> 4. Do you believe that marriage counseling, or the assistance of the conciliation court, or a waiting period before proceeding further could restore your marriage?[53]

---

51. CAL. CIV. CODE §§ 4500-21 (West 1970).
52. N.Y. Times, Jan. 4, 1970, at 1, col. 5.
53. *Id.*

There are now nine states which permit divorce because of incompatibility. It differs from irreconcilable differences by requiring more legal proof and the designation of a "guilty party."[54]

The states also differ in their residence requirements before action for divorce may be instituted. It ranges from six weeks in Idaho and Nevada to three years in Connecticut. But Connecticut and some other states allow the courts to waive the requirement in exceptional cases. For example, in West Virginia, which has a two year rule, the residence requirement is waived in cases of adultery. The modal waiting period is one year (28 states).

Only a few states require that time must elapse between the interlocutory and final decrees. It is usually two or three months. The longest period is one year which is required in Wisconsin.

2. Separation

Most states permit a marriage to be dissolved by legal separation. It differs from divorce in not allowing the parties to remarry.[55] Like divorce, it frees the parties from some of the obligations and duties which inhere in the marital status and it prohibits their cohabitation.[56] The kinds of reasons for legal separation are virtually the same as those for divorce but the tendency is for each state to allow fewer of them for separation than it does for divorce. Five states (Illinois, Louisiana, Maine, Tennessee and Utah) have reached the point of permitting legal separation simply because the parties are "living separate and apart."

3. Index of Ease of Dissolution of Marriage

Each of the policies governing divorce and separation may be formulated so as to make the dissolution of marriage relatively easy or difficult in the several states. It would, for example, be easy to dissolve a marriage in a state which grants a divorce for numerous reasons such as incompatibility or irreconcilable differences, with only a short period of residence required, and without there being a waiting period between the decrees.

In constructing an index of the ease of marital dissolution, we have, as in other instances, acted as if each of the items is of equal weight. There is no doubt that our procedures for formulating this and other indexes can be improved upon. Our effort is certainly only a pioneering one and, we hope, not the final one.

54. *Id.*
55. CALLAHAN, *supra* note 8, at 41.
56. *Id.*

Driver: Population Policies of State Governments in the United States: So

The system applied in Table VI can provide a range of scores from 0 to 6 (easiest dissolution). The actual range is from 0 in five states (Massachusetts, Nebraska, New York, Oregon and Wisconsin) to 5 in Oklahoma. As Table VI indicates, there are 19 states with a score of 1, 13 with a score of 2, 13 with a score of 3, and 2 with a score of 4.

*F. Policies Governing Remarriage**

There is no barrier to remarriage when the marriage is dissolved by the death of the spouse for causes which are not attributable to the surviving partner. When it is dissolved because of divorce, the parties may ordinarily marry after the final decree, notwithstanding those states which set a waiting period between the granting of the decree and the eligibility of divorcees for remarriage.[57] The waiting period is 30 days in Kansas, 60 days in Alabama, 6 months in Minnesota and Texas, one year in Iowa, and two years in Alabama.[58] In Hawaii it is also one year if there is a minor child to the marriage; otherwise there is no waiting period.[59] There is no waiting period for the man but up to 301 days for the woman in Puerto Rico.[60]

Some other states fix the length according to whether the person is the plaintiff or defendant and according to the reason for the divorce.[61] In Vermont the plaintiff must wait six months and the defendant two years to remarry.[62] If adultery is the offense then the defendant can remarry only with the approval of the court in Georgia, Mississippi, North Dakota, and Virginia.[63] West Virginia has a waiting period of 60 days except in cases of adultery where the length of time is determined by the court.[64] Statutes in Louisiana, Pennsylvania and Tennessee prohibit marriage by a divorced person to his paramour if the basis of dissolution of the marriage was adultery.[65]

---

* Much of the information in this section is found in Callahan, *supra* note 8, at 87-90; WORLD ALMANAC AND BOOK OF FACTS 75 (1970).

57. WORLD ALMANAC 75 & nn.R, S & T (1970).

58. *Id.*

59. *Id.*

60. *Id.* The long waiting for the woman is sometimes justified on the grounds that pregnancy by the former husband would show up if it exists. The ISRAELI DRAFT FAMILY CODE, § 41 (1956), is most explicit about this:

> No marriage shall be celebrated of a woman whose former marriage was dissolved within the preceding six months, unless she has given birth during that period or presents a physician's certificate that she is not pregnant.
>
> . . . We consider a period of six months as adequate. Since a waiting period is required to distinguish between the issue of the first husband and that of the second and only for that purpose, there is no need to wait further. . . .

GOLDSTEIN & KATZ, *supra* note 5, at 653.

61. WORLD ALMANAC, *supra* note 42.

62. *Id.* at n.O.

63. *Id.* at n.V.

64. *Id.* at nn.R & V.

65. Tainter, *Marriage to a Paramour After Divorce: The Conflict of Laws,* 43 MINN. L. REV. 389 (1959).

Published by Villanova University Charles Widger School of Law Digital Repository, 1970

Villanova Law Review, Vol. 15, Iss. 4 [1970], Art. 4

TABLE VI*

EASE OF DISSOLUTION OF MARRIAGE

	LEGAL CAUSES OF DIVORCE			LEGAL CAUSES OF SEPARATION			
STATES (1)	*Incompatibility or Irreconcilable Differences* (2)	*Ten or More Other Causes* (3)	*Residence Time of Less Than 1 Year* (4)	*No Wait Between Interlocutory & Final Decrees* (5)	*Living Separate and Apart* (6)	*Ten or More Other Causes* (7)	*Index of Ease of Divorce or Separation* (8)
Alabama	—	X	—	X	—	X	3
Alaska	X	X	—	X	—	—	3
Arizona	—	—	—	X	—	—	1
Arkansas	—	X	X	X	—	—	3
California	X	—	X	—	—	—	2
Colorado	—	—	—	X	—	—	1
Connecticut	X	—	—	X	—	—	2
Delaware	X	X	—	—	—	—	2
Dis. of Colum.	—	—	—	X	—	—	1
Florida	—	X	X	X	—	X	4
Georgia	—	X	X	X	—	—	3
Hawaii	—	X	—	X	—	X	3
Idaho	—	—	—	X	—	—	1
Illinois	—	X	—	X	X	—	3
Indiana	—	—	—	X	—	—	1
Iowa	—	—	—	X	—	—	1
Kansas	X	—	X	X	—	—	3
Kentucky	—	X	—	X	—	X	3
Louisiana	—	—	—	X	X	—	2
Maine	—	—	X	X	X	—	3
Maryland	—	—	—	X	—	—	1
Massachusetts	—	—	—	—	—	—	0
Michigan	—	—	—	X	—	—	1
Minnesota	—	—	—	X	—	—	1
Mississippi	—	X	—	X	—	X	3
Missouri	—	X	—	X	—	—	2
Montana	—	—	—	X	—	—	1
Nebraska	—	—	—	—	—	—	0
Nevada	X	—	X	X	—	—	3
New Hampshire	—	X	—	X	—	X	3
New Jersey	—	—	—	X	—	—	1
New Mexico	X	—	—	X	—	—	2
New York	—	—	—	—	—	—	0
North Carolina	—	—	X	X	—	—	2
North Dakota	—	—	—	X	—	—	1
Ohio	—	X	—	X	—	—	2
Oklahoma	X	X	X	X	—	X	5
Oregon	—	—	—	—	—	—	0
Pennsylvania	—	—	—	X	—	—	1
Rhode Island	—	X	—	—	—	X	2
South Carolina	—	—	—	X	—	—	1
South Dakota	—	—	—	X	—	—	1
Tennessee	—	X	—	X	X	—	3
Texas	X	—	—	X	—	—	2
Utah	—	—	X	—	X	—	2
Vermont	—	—	X	—	—	—	1
Virginia	—	—	—	X	—	—	1
Washington	—	X	—	X	—	—	2
West Virginia	—	—	—	X	—	—	1
Wisconsin	—	—	—	—	—	—	0
Wyoming	—	X	X	X	—	X	4
Puerto Rico	—	X	—	—	—	—	1
Virgin Islands	X	—	X	—	—	—	2

* Table VI was compiled from information found in Parnell J.T. Callahan, THE LAW OF SEPARATION AND DIVORCE 50–74 (1967); WORLD ALMANAC AND BOOK OF FACTS 75 (1970).

And, finally, in Montana, New York, Vermont and Virginia the court may, at the time of divorce, grant exceptions to its rule on remarriage, and delay one's eligibility.[66]

The index of the difficulty of remarriage, as shown in Table VII, is based simply on whether a state has any barrier or not. Thus, other things being equal, it is more difficult to remarry in states having a score of 1 than in those having a score of 0.

G. A Composite View of the Several Policies

We have considered the potential pressures which six types of policies of the states might exert against reproductive behavior. These are policies pertaining to marriage, birth control, the taxation of personal income, inheritance, divorce and separation or the dissolution of marriage, and remarriage. The states were scored with regard to the probable effectiveness of their policies on each of these matters. The different scores or indexes are brought together in Table VIII to provide a composite view of how the states stand on the several indexes. The indexes are cumulated for each state to give a total score or index (column 8).

The total index could range from 0 to 30 (extreme pressure against reproductive behavior). As a matter of fact, the total index ranges from 6 for Nevada and 7 for Massachusetts, South Carolina, Texas, and Washington to 16 for Hawaii, Oklahoma, and Oregon. The modal index is 13 and the second mode is 12.

III. Fragmentary Evidence of the Effectiveness of the Policies

This paper is intended to be suggestive rather than final as a research enterprise. It does not, therefore, pretend to demonstrate all the ramifications of the policies discussed here. A complete evaluation of these policies would necessitate, at the least, consideration of the whole range of policies which conceivably have some bearing on human fertility. Furthermore, because of the newness of the type of research which this paper considers, there is but fragmentary evidence of the marital and fertility outcomes of even some of the policies that we've talked about.

A. Policies Governing Marriage

1. Waiting Period

A long waiting period between the application for a marriage license and the receipt of that license is assumed to lessen the prob-

66. World Almanac, *supra* note 57.

Published by Villanova University Charles Widger School of Law Digital Repository, 1970

TABLE VII*

DIFFICULTY OF REMARRIAGE

STATES (1)	*Legal Barriers to Remarriage* (2)	*Index of Difficulty of Remarriage* (3)
Alabama	X	1
Alaska	—	0
Arizona	X	1
Arkansas	—	0
California	—	0
Colorado	—	0
Connecticut	—	0
Delaware	—	0
Dis. of Colum.	—	0
Florida	—	0
Georgia	X	1
Hawaii	—	0
Idaho	—	0
Illinois	—	0
Indiana	X	1
Iowa	X	1
Kansas	X	1
Kentucky	—	0
Louisiana	X	1
Maine	—	0
Maryland	—	0
Massachusetts	X	1
Michigan	X	1
Minnesota	X	1
Mississippi	X	1
Missouri	—	0
Montana	—	0
Nebraska	—	0
Nevada	—	0
New Hampshire	—	0
New Jersey	—	0
New Mexico	—	0
New York	X	1
North Carolina	—	0
North Dakota	X	1
Ohio	—	0
Oklahoma	X	1
Oregon	X	1
Pennsylvania	X	1
Rhode Island	—	0
South Carolina	—	0
South Dakota	X	1
Tennessee	X	1
Texas	X	1
Utah	X	1
Vermont	X	1
Virginia	X	1
Washington	—	0
West Virginia	X	1
Wisconsin	X	1
Wyoming	—	0
Puerto Rico	X	1
Virgin Islands	X	1

* Table VII is compiled from information found in Parnell J.T. Callahan, THE LAW OF SEPARATION AND DIVORCE 87–90 (1967); WORLD ALMANAC AND BOOK OF FACTS 75 (1970).

TABLE VIII*

SCORES FOR EACH STATE ON THE SEVERAL INDEXES OF POLICIES EXERTING PRESSURE AGAINST MARRIAGE AND FERTILITY

STATES (1)	*Difficulty of Marriage* (2)	*Birth Control Liberality* (3)	*Income Tax Pressure* (4)	*Impact of Inheritance Law* (5)	*Ease of Divorce or Separation* (6)	*Difficulty of Remarriage* (7)	TOTAL (8)
Alabama	2	4	1	0	3	1	11
Alaska	6	2	2	1	3	0	14
Arizona	6	2	2	1	1	1	13
Arkansas	6	2	1	0	3	0	12
California	5	3	3	0	2	0	13
Colorado	3	2	2	1	1	0	9
Connecticut	5	1	0	1	2	0	9
Delaware	5	1	5	1	2	0	14
Dis. of Colum.	4	2	2	0	1	0	9
Florida	6	2	0	3	4	0	15
Georgia	2	4	0	3	3	1	13
Hawaii	5	2	5	1	3	0	16
Idaho	5	2	5	1	1	0	14
Illinois	5	0	1	0	3	0	9
Indiana	6	2	3	1	1	1	13
Iowa	5	1	1	1	1	1	10
Kansas	5	2	2	1	3	1	14
Kentucky	5	2	2	0	3	0	12
Louisiana	7	1	1	0	2	1	12
Maine	3	1	1	1	3	0	9
Maryland	4	2	1	0	1	0	8
Massachusetts	5	0	1	0	0	1	7
Michigan	5	2	0	0	1	1	9
Minnesota	4	0	4	2	1	1	12
Mississippi	6	1	1	3	3	1	15
Missouri	5	0	1	0	2	0	8
Montana	5	1	5	0	1	0	12
Nebraska	6	1	2	1	0	0	10
Nevada	3	0	0	0	3	0	6
New Hampshire	4	2	3	1	3	0	13
New Jersey	6	1	5	0	1	0	13
New Mexico	6	4	3	0	2	0	15
New York	5	0	5	2	0	1	13
North Carolina	3	5	2	2	2	0	13
North Dakota	5	1	4	2	1	1	14
Ohio	6	2	0	1	2	0	11
Oklahoma	5	2	2	1	5	1	16
Oregon	6	3	5	1	0	1	16
Pennsylvania	5	1	0	2	1	1	10
Rhode Island	4	1	0	1	2	0	8
South Carolina	0	3	2	1	1	0	7
South Dakota	6	1	0	2	1	1	11
Tennessee	5	3	0	0	3	1	12
Texas	1	2	0	1	2	1	7
Utah	4	1	3	1	2	1	12
Vermont	5	1	5	1	1	1	14
Virginia	5	3	2	1	1	1	13
Washington	4	1	0	0	2	0	7
West Virginia	7	3	2	1	1	1	15
Wisconsin	5	1	5	1	0	1	13
Wyoming	6	1	0	1	4	0	12
Puerto Rico	6	2	0	—	1	1	10
Virgin Islands	4	3	0	—	2	1	10

* To determine how any of the indexes in Table VIII were computed, see Tables II–VII *supra.*

ability of a marriage actually occuring and, consequently, the level of fertility. This assumption is based on the belief that a couple, after making application, continues to assess the marital state and becomes more aware of its negative features. For example, "in Los Angeles County alone . . . more than a thousand couples each year go to the courthouse and apply for a license to wed, and then do not take the trouble to come back three days later and get it."[67] Probably few of the 1000 persons would have changed their minds had there been no waiting period. Regrettably, this point cannot be proved because the data are not available.

The data from Los Angeles and Milwaukee suggest that a moderate waiting period deters a small percent, but still a significant number, of persons from carrying out their wedding plans.[68] Between 1954 and 1962, some 235 couples in Milwaukee County applied for marriage licenses but did not return to get them.[69] The ratio of non-returnees to applicants was 1:130 in 1962.[70]

2. *Blood Test*

Mississippi is a good example of how changes in requirements for a marriage license and their administration can influence the rate of marriage.[71] Until 1957, this state did not require a blood test. The clerks of circuit courts which granted licenses often failed to obtain satisfactory proof of the ages of the parties and tended to ignore legal provisions on the waiting period. Beginning in 1957 there were several changes in the law, in particular, the addition of the requirement of a blood test. This new requirement had a dramatic impact on the marriage rate in Mississippi. In 1956, Mississippi ranked 26th among the states in population but 6th in the granting of marriage licenses.[72] Only New York, Pennsylvania, Illinois, Texas and California — the heavily populated states — granted more licenses.[73] Of the total licenses issued in Mississippi, 65.6 *percent* (about 43,000) were issued to non-resident couples and 47.1 *percent* were issued to teenagers.[74] Most of the licenses were issued by courts in counties which border other states and are accessible by major highways. The two leading counties, for example, border Memphis, Tennessee and

67. Shipman & Yuan Tien, *Non-Marriage and the Waiting Period*, 27 J. MARR. & FAM. 277 (1965).
68. *Id.* at 280.
69. *Id.* at 277.
70. *Id.* at 278.
71. Kennedy, *Mississippi Marriages and Legislation*, 4 PUB. ADM. SURVEY 2 (1957).
72. *Id.*
73. *Id.*
74. *Id.*

Driver: Population Policies of State Governments in the United States: So

other points north. These two issued 23.3 *percent* of the state's total licenses and 96 *percent* of the women obtaining licenses were from out-of-state.[75] Because of the new requirement of a blood test in 1957, the number and rate of marriages in 1958 were reduced about 50 *percent*.[76] When the full force of the law was felt in 1959, the marriage rate in Mississippi fell to its normal position and the rates for neighbouring states in the region rose slightly higher (see Table IX). The neighbouring states — Arkansas, Alabama, Tennessee, and Louisiana (males only) had earlier instituted a blood test requirement.[77]

Whereas previously, 65.6 *percent* of the licenses in Mississippi were issued to non-resident couples,[78] now less than 25 *percent* of the licenses are issued to such couples.[79]

3. *Age at Marriage*

Earlier it was assumed that a high minimum age at marriage, with or without parental consent, acts to lower the marriage rate and fertility level. Some data which supports this assumption is provided by Rosenwaike's comparison of marriage data for Maryland, Pennsylvania, and Virginia.[80] Marriage, without parental consent, is permissible at 18 years of age for a girl in Maryland but only at 21 years of age in the other two states. The ratio of marriages at ages 18–20 years to marriages at age 21 years is used to measure the effect of parental consent on the frequency of marriage. Rosenwaike found that Pennsylavnia and Virginia — states adjacent to Maryland — have quite similar ratios. But, Maryland's ratio is double that of each of the other two states.

Persons from other states who migrated into Maryland for marriage account partly for the large number and high ratio of youthful brides. The ratio for migrants is 605.5, as compared with the overall ratio of 439.1 for Maryland. When the migrant women are eliminated the overall ratio drops from 439.1 to 356.7, which is still about 70 *percent* greater than the ratio for Pennsylvania and about 90 *percent* greater than the ratio for Virginia.

The fertility implications of these patterns are important to consider. In this regard, an important question is: How many years of exposure to the possibility of conception (during marriage) would have been eliminated had Maryland had the same total number of

75. *Id.*
76. *Statistical Abstract of the United States* 69 (1960).
77. Kennedy, *supra* note 71, at 5.
78. *Id.* at 2.
79. U.S. NAT'L CENTER FOR HEALTH STATISTICS, MARRIAGE STATISTICS ANALYSIS — UNITED STATES 1962 8 (Series 21, No. 10, 1967).
80. Rosenwaike, *Parental Consent Ages as a Factor in State Variation in Bride's Age at Marriage*, 29 J. MARR. & FAM. 452–55 (1967).

Published by Villanova University Charles Widger School of Law Digital Repository, 1970

TABLE IX*

MARRIAGES IN MISSISSIPPI AND ADJACENT STATES BEFORE AND AFTER THE INTRODUCTION OF A BLOOD TEST LAW

STATES	NUMBER OF MARRIAGES (IN THOUSANDS)				
	Before		*After*		
	1955	*1956*	*1958*	*1959*	*1960*
Mississippi	66	66	36	20	21
Tennessee	23	24	28	30	31
Alabama	20	21	25	31	32
Arkansas	15	15	15	18	18
Louisiana	21	23	21	23	24
	RATE OF MARRIAGE (PER 1000 POPULATION)				
Mississippi	31.1	31.0	16.9	9.3	9.7
Tennessee	6.8	6.9	8.0	8.5	8.6
Alabama	6.4	6.7	7.7	9.6	9.8
Arkansas	8.3	8.2	8.8	10.6	10.3
Louisiana	7.3	7.5	6.8	7.2	7.2

TABLE X**

RATIOS OF BRIDES AGED 18 TO 20 YEARS TO BRIDES AGED 21 YEARS FOR 1964 MARRIAGES IN THREE ADJACENT STATES

AGE OF BRIDE	PENNSYLVANIA	VIRGINIA	MARYLAND
18–20 years	211.9	190.2	439.1
18 years	58.9	74.8	171.3
19 years	70.7	61.1	145.2
20 years	82.3	54.3	122.6
21 years	100.0	100.0	100.0
NUMBER OF BRIDES			
18–20 years	21,799	11,612	16,860
21 years	10,291	6,107	3,840

TABLE XI***

RATIOS OF BRIDES AGED 18 TO 20 YEARS TO BRIDES AGED 21 YEARS FOR 1964 MARRIAGES IN MARYLAND BY RESIDENCE

AGE OF BRIDE		NON-RESIDENT BRIDES		
	Resident Brides	*Resident Groom*	*Non-Resident Groom*	*Total*
18–20 years	356.7	363.6	638.0	605.5
18 years	130.7	117.9	271.4	253.2
19 years	121.1	123.2	203.4	193.9
20 years	104.9	122.5	163.2	158.4
21 years	100.0	100.0	100.0	100.0
NUMBER OF BRIDES				
18–20 years	9,165	549	7,146	7,695
21 years	2,569	151	1,120	1,271

* Table IX was compiled from information found in the STATISTICAL ABSTRACT OF THE UNITED STATES 73 (1959) & 69 (1960); U.S. NAT'L CENTER FOR HEALTH STATISTICS, MARRIAGE STATISTICS ANALYSIS — UNITED STATES 1967 5–6 (1967) (Series 21, No. 10).

** Table X was compiled from information found in Rosenwaike, *Parental Consent Ages as a Factor in State Variation in Bride's Age at Marriage,* 29 J. MARR. FAM. 452–55 (1967).

*** Table XI was compiled from information found in Rosenwaike, *Parental Consent Ages as a Factor in State Variation in Bride's Age at Marriage,* 29 J. MARR. FAM. 452–55 (1967).

marriages but the age at marriage ratios found in Pennsylvania and Virginia? The ratio of 18–20 year old to 21 year old brides in Pennsylvania and Virginia combined is 203.7 (21,799 + 11,612/10,291 + 6,107).[81] A ratio of 203.7 rather than 439.1 would have given Maryland 13,884 brides aged 18–20 years and 6,816 brides aged 21 years. In effect, 2,976 (16,860–13,884) of the brides who married between 18–20 years of age would not have married until age 21. If we take 19 years as the average for this 18–20 year old group, then a total of 5,952 (2,976 × 2) years of marital exposure to the possibility of conception would have been eliminated before age 21 years. This means a reduction of roughly 17.6 *percent* (5,952/2 × 16,860) in the years of exposure for the entire group of 18–20 year old brides in Maryland.

B. *Policies Governing Inheritance*

In the absence of U.S. data, some evidence from abroad will be used. Ireland, for at least 100 years, was the classic case of how the inheritance system can affect the rates of marriage and fertility in society.[82] In Ireland the approved and virtually universal form of marriage was "matchmaking." A match (Gaelic, cleamhnas-marriage and spre — a dowry) was a contractual marriage made by the parents or families of the marrying parties and involving the disposal of properties. The father began the matchmaking by looking for a suitable girl for one of his sons who is to inherit his farm or shop. The choice of the heir from among the sons rested in the father's hands. When the girl was found, the boy's parents and the girl's parents might contract for the marriage if the boy's inheritance (land or shop) and the girl's "fortune" or dowry (money) were sufficient and of nearly equal value. The "fortune" was paid to the boy's parents as partial compensation for their loss of land.[83]

Under this system, ordinarily only one son inherited. Even for him the inheritance came somewhat late in his life because fathers usually disposed of their property at age 70. Because property was a requisite to marriage, the other sons were barred from marriage and reproduction (premarital and extramarital sexual intercourse seems to have been almost nil).

The result of this complex of property, inheritance, and marriage is vividly shown in the population statistics. The birth rate remained at roughly the level of replacement during a period of rapid population

81. See Table X for the figures used in this and succeeding calculations.

82. C. ARENSBERG & S. KIMBALL, *Family and Community in Ireland* 94–117 (2d ed. 1968).

83. *Id.*

growth elsewhere in Europe.[84] Although marital fertility in Ireland was extremely high, the general fertility rate was low because of the small proportion of men and women who found it possible to marry and cohabitate. Fairly typical of the period from 1846 to 1936 are the figures provided by Arensberg and Kimball for 1926. At age 55, 26 *percent* of the males and females in Ireland had never married as compared with 10 *percent* of the males and 7 *percent* of the females in the United States.

TABLE XII*

PERCENT OF MALES AND FEMALES IN SEVERAL COUNTRIES IN 1926 WHO AT VARIOUS AGES HAD NEVER MARRIED

AGE	IRELAND	DENMARK	ENGLAND	U.S.A.
MALES:				
25–29 years	80	49	45	39
30–34 years	62	25	25	24
35–39 years	50	15	16	18
55–64 years	26	8	10	10
FEMALES:				
25–29 years	62	39	41	20
30–34 years	42	25	26	15
35–39 years	32	19	20	10
55–64 years	24	14	15	7

C. *Dissolution of Marriage*

Earlier it was assumed that the ease of dissolving a marriage and the difficulty of remarrying would lower fertility below the level which it would have reached had the first marriage continued. Evidence to prove or disprove this assumption is difficult to obtain. One would have to know the fertility outcomes both for marriages of incompatible couples which do not result in dissolution and for those which do result in dissolution. The very pointed kinds of comparisons needed for proof will have to await further research. But, in their absence, there are some data which lend general support to the above assumption.

Lauriat[85] employs U.S. Census data on marital status for the period 1891 to 1960 to demonstrate that marital dissolution results in an overall loss in fertility. In 1960, women 35 to 44 years of age, having a continuous marriage, averaged 2,690 children per 1,000 women. Those in discontinuous marriages (broken by death, separation, or divorce and whether remarried or not) average 2,380. The

* Table XII was compiled from information found in C. Arensberg & S. Kimball, FAMILY AND COMMUNITY IN IRELAND 100 (2d ed. 1968) (Figure 11).

84. W. THOMPSON, *Population Problems* 160–61 (1942).

85. Lauriat, *The Effect of Marital Dissolution on Fertility,* 31 J. MARR. & FAM. 484 (1969).

method of estimation employed in this study finds that the women in discontinuous marriages would have averaged 3,019 children ever born if they had experienced the same fertility rates, specific for age at marriage, as women in continuous marriages. Thus women in discontinuous marriages may be said to have had only 79 percent of the children they would have had, had they remained continuously married.

There is, then, about a 21 percent loss in fertility for all women in discontinuous marriages. The amount of loss varies, however, with subgroups. The loss was 19 percent for white women and 30 percent for black women. It was greatest for divorced women who did not remarry — 32 percent for white women and 42 percent for black women. Widowed women sustained less of a loss in fertility because of marital dissolution than did remarried women — 15 percent as compared with 19 percent.

That divorces may increase with liberalization of the law is shown by New York State. Its divorce rate, for years the lowest in the nation, tripled in the first two years of the new matrimonial law. From an annual average of fewer than 4,000 divorces granted because of adultery — the only ground under the old law — the courts are now granting more than 18,000 a year on this and five additional grounds: cruel and inhuman treatment, desertion, the imprisonment of a spouse for three or more consecutive years, and two types of legal separation each for a minimum of two years.[86] Some of the increase may, of course, be the result of New Yorkers migrating less to other states for obtaining a divorce. The Canadian experience is similar to that of New York. Now, between 50 and 60 legal aid certificates for divorce actions are issued each week in Metropolitan Toronto alone, which is roughly double the rate that existed when adultery was the only ground for divorce.

IV. TRENDS AND IMPLICATIONS

Several trends with regard to the policies discussed in this paper are fairly evident.

A. Policies Governing Marriages

The policies in the several states have become quite uniform over the years and there is every reason to expect this trend to continue. A comparison of the 1969 data with that appearing in a 1966 publication[87] shows that the minimum age at marriage for the female, with consent, has recently been raised from less than 15 years or 16

86. N.Y. Times, Jan. 4, 1970, at 1, col. 5.
87. F. KUCHLER, *The Law of Engagement and Marriage* 11-16 (1966).

Villanova Law Review, Vol. 15, Iss. 4 [1970], Art. 4

years in Georgia, Idaho, Iowa, Kentucky, Massachusetts, Mississippi, and Washington. The minimum is now set at 16 years or higher in virtually every state. Three states — Arizona, New Mexico, and the District of Columbia — which did not require the pre-marital physical examination now do.[88] As we noted earlier,[89] there are only a few states that are still without this requirement. The pre-marital examination and the necessity of verifying age and other data on the marriage license (as exemplified by Mississippi in 1957) have increased the number of states having a waiting period between the application and granting of a marriage license. Common-law marriage has declined rapidly in legal recognition and only a minority of states now permit it.[90] With the abolition of miscegenation statutes, there are no longer legal obstacles to one's freedom to choose a partner across racial lines. Except for this freedom, then, the trend is toward imposing greater restrictions on the eligibility of persons for marriage.

B. Policies Governing Conception Control and Birth Control

Policies governing conception control and birth control are undergoing rapid change. Since *Griswold v. Connecticut*[91] in 1965, several states have rescinded laws prohibiting contraception and have passed laws or administrative regulations which ease the obtaining of pills, condoms, diaphrams, IUCDs, and other devices.[92] There has been little change in the written law on sterilization; it remains as vague as before. But the number of sterilizations is increasing and there is reason to believe that the demand will become greater as the method becomes more publicized and as ignorance about it is overcome.[93] The prevailing sentiment points to a future removal of the remaining legal obstacles to contraception — or physical, chemical, and surgical means of preventing conception.

The most rapid and significant changes are occurring with regard to abortion — preventing birth once conception has occurred. New York State exemplifies this change. In 1967 the Blumenthal bill to liberalize the abortion law could obtain only about a dozen supporting votes.[94] Support for liberalization increased each year and in 1970 the legislature was able to pass a law which placed the decision on

88. *Id.* at 17–20.
89. *See* p. 821 *supra.*
90. *See* note 8 *supra.*
91. 381 U.S. 479 (1965).
92. WEINBERG, *supra* note 23, at 13–21.
93. A recent survey of Cornell University students points to a large percent of biology and non-biology majors who are ignorant of the reproductive system and the consequences of sterilization. *See* Eisner, *et al., Population Control, Sterilization and Ignorance,* 167 SCIENCE, Vol. 167, No. 3917, 1970, at 337.
94. N.Y. PENAL LAW § 125.05(3) (McKinney Supp. 1970).

https://digitalcommons.law.villanova.edu/vlr/vol15/iss4/4

abortion solely in the hands of the woman and her doctor.[95] This total nullification of the old statute has had the effect of voiding the suit initiated in 1969 which questioned the constitutionality of the old New York law.[96] Elsewhere, dramatic change is also occurring. In reversing the conviction of an obstetrician–gynecologist for referring a patient to an unlicensed physician for an abortion, the California Supreme Court in 1969 held that the abortion law was so vague as to be unconstitutional.[97] In the same year, Judge Gerhard A. Gesell of the United States District Court in dismissing the indictments for abortion brought against Milan Vuitch — a physician licensed in the District of Columbia — urged the government attorneys to promptly appeal to the United States Supreme Court so that the constitutionality of the law might be decided.[98] The Supreme Court has since agreed to hear the arguments at its October 1970 sessions.[99] Some of the arguments put forth by legal scholars against prohibiting abortion, include:

1. *The laws no longer serve their intended purpose.* The objective of the early laws and their successors to the present day was not the protection of the life of the fetus, but the preservation of the life and health of the pregnant woman under the surgical conditions 140 years ago. (In fact some of the early bills initially sought to prohibit *any* surgery for whatever purpose.) The laws against abortion became unconstitutional at that point when the risks to life and health associated with legal abortion became smaller than the corresponding risk of pregnancy and childbirth.[100]

2. *The law is so vague that physicians grant legal abortions at their peril, thus denying the physician and the woman due process of law.* The Court has stated that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[101]

3. *The law violates various provisions of the Bill of Rights which create a right of marital and sexual privacy.* It is similar to the right that overturned Connecticut's ban on the use of contraceptives—which the state cannot invade by regulating abortions.[102]

95. *Id.*
96. N.Y. Times, Jan. 25, 1970, § 6, at 30, col. 1.
97. N.Y. Times, Sept. 14, 1969, § 1, at 66, col. 1.
98. United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969).
99. Petition for Certiorari filed, 39 U.S.L.W. 3006 (U.S. July 14, 1970) (No. 1155).
100. Means, *supra* note 28. *See also* N.Y. Times, April 12, 1970, § 4, at 10, col. 2.
101. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). *See* Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes*, 146 N.C.L. REV. 730, 768 (1968).
102. N.Y. Times, Nov. 16, 1969, § 4, at 9, col. 3.

> 4. *The law is discriminatory against poor women.* It denies them the equal protection of the laws by prohibiting them from obtaining the costly, medically safe abortions.[103]

If the Supreme Court upholds the District Court ruling in the case of Milan Vuitch, then the laws against abortion in virtually every state will be nullified. Such nullification would have a significant effect on the birth rate if the experience of Hungary and other Eastern European nations, Japan, and the state of Hawaii are adequate indicators.[104] During the first week of Hawaii's new law, which leaves the decision of abortion to a woman and her doctor, the number of abortions in a week is nearly equal to those which occurred in a year under the old Therapeutic Abortion Law.[105]

C. *Policies Governing Personal Income Taxation*

Policies governing personal income taxation are increasingly being evaluated in terms of their effects on marriage and reproductive behavior. Schobell, in a very thoughtful article, points to the tax advantage of remaining unmarried if one is in a relatively high income tax bracket in Canada.[106] In the United States, on the other hand, the single person is at a considerable disadvantage when it comes to income taxation. In addition, the single person, especially the woman, is at a disadvantage when it comes to qualifying for a maximum real estate mortgage, obtaining home-owner's insurance, giving away or inheriting property, and benefiting under provisions of the Social Security Act.[107]

Congressional efforts to use the personal income tax provisions to reduce fertility among married persons is exemplified by Senate Bill, S. 3502, which was introduced by Senator Robert Packwood (R.–Oregon). This proposal would allow a family a $1000 deduction for the first child in the family, $750 for the second child, and nothing for children after that. The change would apply to children born after January 1, 1973.

D. *Policies Governing the Dissolution of Marriage*

Two tendencies with regard to the dissolution of marriage are slowly developing. First, the states are becoming more uniform in the

103. United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969).

104. For information concerning Hungary and other Eastern European countries, *see* Klinger, *Demographic Effects of Abortion Legislation in Some European Socialist Countries,* 2 PROCEEDINGS OF THE WORLD POPULATION CONFERENCE (Aug. 30–Sept. 10, 1965, Belgrad, Yugoslavia) (United Nations Dep't Economics and Social Affairs 1967).

105. HAWAII REV. LAWS § 768–7 (Supp. 1970). *See* N.Y. Times, Mar. 23, 1970, at 19, col. 1.

106. Schobell, *Income Taxes Discourage Wedlock,* CANADIAN BUSINESS, Dec. 1965, at 38–40.

107. *See* McVeety, *Law and the Single Woman,* 53 WOMEN L.J. 10 (1967).

number and variety of reasons which are legally valid grounds for separation or divorce. Generally there has been an increase in the total reasons which are acceptable today as compared with a few years ago. Secondly, dissolution is made easier as states come to accept incompatibility or irreconcilable differences as valid grounds. As we noted earlier, California has gone farther than any other state in easing the process by eliminating the notion of a "guilty party" and substituting the term dissolution for divorce.

V. FINAL REMARKS

This paper merely scratches the surface of the area which embraces population policies at the state level. Omitted from the discussion are policies pertaining to housing, compulsory and higher education, employment, welfare, social security, military service, political candidacy, and maternity leave. It would be immensely valuable to have data in order to describe and compare the states on these and several other policies. In addition, indicators are needed to assess their impact on marital and fertility behavior.

In this regard, several questions immediately come to mind. What are the fertility consequences, if any, of the policy in New Haven, Connecticut, of providing housing subsidies to low-income parents who already have several children?[108] To what extent do policies which encourage home ownership have the unexpected consequence of accelerating the tempo of childbirth? Does the policy in public housing projects of retaining families with a small number of children depress reproductive behavior? How is the timing of marriage affected by an emphasis on and facilities for the higher education of all youth? How much do laws on compulsory school attendance delay one's entrance into the labor force and into marriage? Are marital and reproductive behaviors of military personnel influenced by the policy of providing family allowances? What kinds of jobs include family status as a condition of eligibility? Do women tend to postpone marriage, or, if married, reproduction, where their conditions of paid employment are favorable? How do policies providing maternity leave and benefits (as found in four states) offset the depressant effect of attractive employment on fertility behavior? Such questions try to suggest a great need to research existing policies in terms of their social and demographic implications.

There is need, too, to give much more intensive treatment to the policies on marriage, birth control, income taxation, inheritance, and

108. Cogen & Feidelson, *Rental Assistance for Large Families: An Interim Report: New Haven's Low-Income Housing Demonstration,* 3 PRATT PLANNING PAS. 9-20 (1964).

separation and divorce which have been briefly considered in this paper. There is also need to show how each of these policies meshes with the other ones. Policies governing separation and divorce, for example, converge at various points with policies governing inheritance and income taxation,[109] as well as those governing marriage.

Lastly, it is impossible to resist responding to repeated objection to research which purports to demonstrate the ways by which laws may affect human conduct. It is argued that laws, especially those governing sexual behavior, are widely violated and, thus, do not have their intended effect. For example, pre-marital and extramarital relations, in this view, are proof of the ineffectiveness of policies governing marriage.[110] A response to the objection and its supporting proof is twofold. First, the effectiveness of any legal policy is exceedingly difficult to measure because of the levels of human consciousness at which law operates.[111] It may be so deeply ingrained for all or a segment of the population that compliance with its dictates is automatic — without conscious effort or thought. For instance, if premarital sexuality is employed as an indicator of the effectiveness of policies governing marriage, one may use either of two methods of measurement: (1) the traditional approach which is to compute the *percent* of *women* who have sex relations (and offspring) before marriage; or (2) the new approach which somehow relates the *number of acts* of sexual relations to the *number of opportunities* for such relations prior to marriage. This latter approach appears to be the more sound procedure. One of its important merits is that it enables us to determine whether the woman who is a violator according to the first procedure has not, in fact, spent most of her life complying with the law.

A second comment is that the effectiveness of any legal policy cannot be determined by isolating it from the many other legal policies to which persons in a given society are subject. Policies may be inconsistent in their objectives and varied in their importance, and compliance with some may foster deviance from others. Imperfect coordination among the multiple policies in a pluralistic, democratic society is a normal expectation.

109. *See, e.g.*, Comment, *Divorce, Separation and the Federal Income Tax: The ABC's of Alimony, Child Support and Attorney's Fees*, 39 U. COLO. L. REV. 544 (1967); Sander, *Dependency Exemptions for Children of Divorced or Separated Spouses: The New Amendment to the Internal Revenue Code*, 45 TAXES 710 (1967).

110. *See, e.g.*, Weyrauch, *The Kinsey Reports and the Legal Mind*, 11 U. FLA. L. REV. 277 (1958); Hartley, *Illegitimacy Among Married Women in England and Wales*, 31 J. MARR. & FAM. 793 (1969).

111. This point is well developed in J. HALL, LIVING LAW OF DEMOCRATIC SOCIETY (1949).