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NATIONAL POPULATION PROGRAMS AND POLICY: SOCIAL AND LEGAL IMPLICATIONS*

I. AFTERNOON PANEL DISCUSSION

PROFESSOR GIANNELLA: Dr. Tien, I know you have to leave early, so I will ask you if there are any final comments you would like to make after listening to the other panelists' presentations?

DR. TIEN: There are a few things which I would like to add to what I said earlier. Concerning the question whether the United States is a new-comer in the science or art of population policy or not all depends on how far back you want to go in history. If you were to go back in history far enough I suppose the United States is a new-comer. What I mean is that in terms of concrete decisions which involved some kind of public awareness, public debate and public participation and also specific legislation, the United States is a new-comer. Now, of course, it depends on how you define the term population policy. You can make it refer to all types of legislation affecting distribution of the population and immigration from without. If you take that view, I would agree with the people here. Perhaps I have just not used the word correctly. I would change that to fertility policy rather than population policy.

It has been stressed here that the individual is to be given some kind of freedom in terms of national family programs. I'll go along with that but, on the other hand, I would also like to stress the fact that whenever any type of freedom is mentioned we should also mention the problem of responsibility. As we all know, there are limits to freedoms of any kind. Therefore, we should be more specific when we talk about a kind of demographic freedom. For example, the inter-relationship between family planning and health is a tricky question. I am sure it can be shown that those who have smaller families enjoy better health. On the other hand, can we really isolate the effect of family size on health? Little is really known about the relative nutrition that people enjoy. Perhaps it is much more important for us to have smaller families and enjoy better nutrition, have better diet, better housing conditions and so forth. Now those things are probably

* This Symposium is presented in two parts. The afternoon session is in the nature of a workshop. The panelists present their papers and then discuss the positions adopted among themselves and with the members of the *Law Review* and distinguished invited guests. During the evening session, which is open to the public, the panelists restate their basic positions and explore the various issues in a general manner. William and Mary Law School, Williamsburg, Virginia, 1970. Produced here.

much more important in terms of individual health than having one or two children.

Dr. Driver mentioned some of the very interesting studies he is making; specifically, state regulations affecting marriage and the effect that the waiting period might have as a deterrent to marriage. Most authorities feel that there is a need for a waiting period so that people won't rush into marriage without thinking of the consequences. But few sociologists have done any study of it. People can infer some of the consequences from the provisions of the law but we have very little concrete empirical evidence.

The assumption here is that people do not participate in sexual activities outside of marriage. Unless we make that assumption any kind of legislation will have very little meaning in terms of population control or fertility control.

I should like to make one more point about the United States and population policy. The United States is clearly a new party on the scene if you look at what has happened in some of the other countries of the world in the last 20 years. Take China for instance. About 15 years ago, China went through the same kind of arguments that we are now going through. They argued about whether or not there should be a policy, and if so, what means should be used to realize the goal that is desirable in the interest of Chinese society. They argued about abortion, they argued about sterilization, and they argued about oral contraception. All the arguments were resolved in favor of some kind of national program. That happened not very long ago in the late 1950's. We in the United States are going through the same kind of arguments now in the late 1960's and early 1970's. In that sense, the United States is a new-comer. Thank you.

PROFESSOR GIANNELLA: We will now entertain questions from the floor.

QUESTION: Dr. Shultz, it was mentioned earlier that there was a possibility of the development of an injection to induce sterility in humans. You referred to several programs that were being developed. Can you tell us about them?

DR. SHULTZ: Some of you may be aware that at the moment there is under test, both in this country and abroad, an injectable hormone which works on the same basis as the oral contraceptive but its effectiveness is prolonged. The preparation that is used most commonly has a three month duration, but there are certain side effects. There is also under experimentation the implantation under the skin

of a silastic capsule which would, over a longer period of time — a year and a half to two years — discharge at a relatively steady rate and lead to the absorption at a relatively steady rate of a hormonal preparation — a progestational agent which would behave in the same way. Now these particular methods are obviously aimed primarily at the female population. There was experimentation with two male injectables but they have been rejected due to side effects. The program of experimentation is being under-written by the Center for Population Research, which is supporting investigation of items which look promising for the future. They are testing to see whether an injectable item can be applied and developed. The Agency for International Development, due to the gravity of population problems abroad, is moving forward much more swiftly to support research and development of immediately applicable items. Therefore we have this sort of double thrust in relation to federal support for research in the improvement of contraceptive methods.

QUESTION: Dr. Shultz, recently Dr. Ehrlich has received notoriety for his views. He seems to suggest that the population problem requires immediate steps. Would you comment on the urgency of the situation.

DR. SHULTZ: I know Dr. Ehrlich's point of view; obviously I've been exposed to it. I think that we have made astonishing progress in a very rapid fashion. In fact, Dr. Driver seems to feel that we may have moved administratively too fast in this area. Dr. Driver seems to feel that we should wait for a public mandate to proceed while Dr. Ehrlich believes the situation is extremely imminent. I personally feel astonished by the rapidity with which we have moved administratively, but I do think, just in passing, that I should reassure Dr. Driver about one element.

There was one area of state law that you didn't mention that has to do with the provision of contraceptive services to unmarried women in certain states. The Congress of the United States, when it passed the child health provisions of the "Social Security Amendments of 1967,"¹ stated that contraceptives should be made available to women regardless of their marital status. I believe that this would supersede the state law. Legal reform was immediately proposed in Massachusetts and Wisconsin and pressure was brought to bear. But then Congress, in the Appropriations Committee's report reviewing the appropriation, indicated a feeling that state law should supersede

1. Social Security Amendments of 1967, 42 U.S.C. §§ 701-29 (Supp. III, BB. 1967).
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and that this requirement of the federal law should not be enforced. This was a very interesting development in which there was a grass roots mandate not to do something which had been a legislative mandate rather than an administrative solution. So, there is still operative in this area, in a few instances, the voice of the people. So do be a bit reassured.

DR. WISHIK: My comment, in addition to what Dr. Shultz has said, is that there has been tremendous progress in the last ten years, but chiefly because there was such a vacuum before. The only direction it could go was up. I say that we have made very poor progress in the sense that family planning is discriminated against in comparison to other medical services. Women cannot receive these services under Medicaid in all the states; why does one extract this particular kind of service and say it may not be funded under public programs while other kinds of services can? So I think we have a long way to go to put family planning in its proper place with other services.

QUESTION: Dr. Driver, earlier in your presentation you asked the question "What is the social philosophy behind what we are doing?" Then you stated that "we don't have a specific goal or outlook." Then you further stated that "health and welfare terms and answers are not sufficiently satisfactory." To whom do you refer and what better goals could you propose?

DR. DRIVER: I think some of the important goals would be related to various decisions concerning the style of living, the quality of the entire community and the kinds of recreational activities and interests. I think what we need here is some notion of the kinds of things that the body politic seeks. Now, it may be that what they are seeking would include health and economic well being; it may also be that they live by more than bread alone. You may know, for example, the studies of dying. There are research institutes now dealing with death. It's very interesting that as you begin to examine this phenomenon, you discover that the most crucial thing to most people is a sense of community, even to the very end. Now I could see where in some sort of a survey of the body politic that it might be more concerned with something called community — the creation or the re-creation of social bonds — a reduction in uncertainties, of psychological insecurity and things of this sort; a feeling of being at ease in the presence of one's fellow man, be it in Villanova or New York City.

It may be that there is something of this sort which even takes precedence over health and economic well-being. In fact, there are studies that clearly show that societies are concerned about regulating their numbers when regulation is a matter of prestige or status. However poor they may be, they do find ways of regulating their numbers anyway, and these are what are called primitive societies. Mary Douglas, writing in the *BRITISH JOURNAL OF SOCIOLOGY* in 1967² makes this point very very clear. The point is, I don't think that we know the goals and we have not enunciated a social philosophy. It may very well be that the programs which are intended to realize some goals of health and economic well-being, may, in fact, generate frictions and create other kinds of health problems which are more mental than physical.

My simple point is that we don't know the relationship of programs to a variety of goals. There are many values from which people can choose and we need to know what they are, what the hierarchy is, which ones are immediate and which are long-range. The best approach therefore, of pursuing this sort of thing, is to take a look at the whole complex rather than an isolated view. Let me illustrate this just one other way. We have approached economics, I think, in a very simplistic manner; for, after all, there is throughout the world a fairly good correlation between increasing economic well-being and increasing psychological insecurity and social friction. Why is this so? It is so because of the concept that the sociologists call "relative deprivation." The fact is, with more prosperity you begin to see just how much more you could have and how much more others are obtaining. So my point here is that one may prefer egalitarianism rather than simply an increase in economic well-being. This is the kind of thing we need to look into before making decisions on the kinds of programming that will provide us with these objectives.

QUESTION: Dr. Driver, I would like to question you about the goal concept. You said that Sweden had a goal of egalitarianism and has achieved it. It seems to me that if we do set any kind of social philosophy it would have to be very flexible and bend through intermittent steps and if we do that I don't see the distinction between that concept of the goal and what we are doing now. If our national condition dictates that we have to slow down the population because of resources then we slow it down by taking certain steps. If the goal is to be flexible, I don't see the distinction that you are trying to make between setting a philosophy and what we are doing now.

DR. DRIVER: Well, if you take the approach of Sweden, which is more than just a kind of social egalitarianism — its much more than that — then this will condition what you then do in the way of programming, assuming that there are limited resources of money, natural resources, or what have you. You will make various kinds of allocations that you would otherwise not make. This is my point in terms of seeing initially what these goals are, long-range and short-range, and then deciding on how to pursue this whole matter. It may very well be that you would decide to put more resources into, let us say, housing. This might give us more of the kind of thing we are looking for than we would get by putting resources into family planning or into more jobs. I'm not quite sure how we would actually make the allocations. I think the opposite side of this is that once you commit resources to some things it gives a shape to society and there is not much undoing of that shape unless you do develop policies to modify it. However, it becomes more difficult in the absence of some overall planning. Planning is what I'm really pushing for.

QUESTION: Dr. Wishik spoke of coercion on one end and of communication of the truth of the matter on the other end. Is the only way to get this knowledge to the poor community by knocking on the door and saying "this is what we have and you have nine children and if you want this why don't you come down?" Do you feel that there will be something struck in the middle between the two and, if so, how can this be accomplished.

DR. WISHIK: I certainly didn't try to convey a formula on what the exact content of the program would be in all circumstances and in all places. I just felt that we needed a little word of reservation about our own enthusiasm; that we were taking over to a certain extent things that I felt belong within their purview. I'll give you another example of that which will sound even stranger than those I gave previously. When people set up family planning clinics and find poor women coming very often, these women may have no other medical contact. They may never see a doctor or any other healing practitioner and so the tendency is to say, "Let's have them as a kind of captive group, let's do some good for them. Let's examine their heart, take an X-ray of their chest and let's give them all the health care that they deserve." In other words, surround the family planning service with comprehensive health care. On the face of it that sounds very nice, it sounds very good. But, I think people have the right — for instance a man and his wife just want to find out how not to have a baby — not to have to subject themselves to a complete medical

examination even if it would be good for them. In other words, there are many ways in which we make administrative decisions about what we think is good for people when they should have the right to make that choice themselves.

II. EVENING PANEL DISCUSSION

PROFESSOR GIANNELLA: Ladies and gentlemen, I would like to welcome you to the evening session of the Sixth Annual Villanova Law Review Symposium. This year the topic is *National Population Programs and Policies, Social and Legal Implications*. We at the Law School realize with great pain at times the difficulties that can result from the population explosion. We have had our own, the result of the new construction going on, and this has caused perhaps the most serious ecological dislocation a modern metropolitan university can suffer — that of its parking lot. But we are looking forward to planning for the future.

The discussion this afternoon dwelt on three or four key issues. One of the questions which recurred concerned the extent to which we have a serious population problem, particularly in the United States. Another issue that was discussed from various points of view was whether or not a population control policy should be directed at the entire society or only at certain groups within the society. If the aim of a policy would be to improve the economic well-being of certain groups, perhaps the policy would be directed to the poorer economic segments of the society. On the other hand, if the policy is directed at controlling overall population, then it would be directed at society as a whole. A third issue that was raised dealt with the means that should be used to implement a policy once it has been decided upon.

This afternoon there was a question from the floor that made reference to the views of Dr. Ehrlich of California who feels that the population time-bomb is ticking very ominously. This point of view would suggest that rather drastic steps should be taken. There was some mention in passing of doing things like dropping sterilizing agents along with fluorides in the water supply so that the population would taper off in time. The question was asked of the panel whether the problem was that drastic and if I understood the answers of Dr. Shultz and Dr. Wishik, they both thought that it was not quite that bad and that the problem could be dealt with through voluntary, non-coercive programs of family planning. I would now like to ask Dr. Wishik and Dr. Shultz how they react to the other point of view from Dr. Driver who is not so sure that there is a population problem to begin with.

DR. SHULTZ: As Dr. Driver indicated earlier, the population problems that we have today in the United States may be related more to migration than to fertility. However, if recent fertility patterns persist we will probably have a fertility based population problem by the end of the century. I think we do have a social philosophy which has engendered a type of population policy. The very fact that all of these indices you developed, Dr. Driver, based on the various requirements for marriage and its dissolution in the several states reflects the importance of marriage in our society. One of the things which indicates that we have a population problem is that our consumption of resources and our method of dealing with the excretion of these resources, once consumed, has created problems that are very difficult and uneconomic in many respects for us to deal with. As a result of the social philosophy that leads to more of the same, we're "hoist on our own petard." I personally feel that we would be very well off if we were able to turn around some of our social pressures so that it would be possible for one not to marry without being ostracized, or to marry and not have children or to have large families if this is what is desired. We need in some means or other to make this acceptable so there can be some exchange of these tickets which are passed out, if that's the stage that we eventually end up in, so that those who want five children may have five, and those that want none need not have two.

DR. WISHIK: Dr. Driver, the question is whether there is a population problem in the United States. Professor Means first answered this in a sense by saying that "we in the United States are a greater problem to the rest of the world than we are to ourselves," because we are consuming the products of the rest of the world at a rate estimated between 20 and 50 times that of people in other parts of the world, and we are disposing of our waste products at a rate much greater than that of less affluent peoples. So I don't think we can, in 1970, sit back and worry about whether we have a problem within the confines of our own shores, but recognize that we are part of the world and that we have a responsibility to the rest of the world. Secondly, however, I think that we do have a problem within our own shores although it is so easy for me or anyone else to mix together a good many things and come out and say this is *because* of the population growth. Obviously, all the concerns of urbanization of the ghettos, of pollution and ecology are not purely a matter of numbers of people. They aren't even simply a matter of density of people. But in some way I have the feeling that people have something to do

with it and I think that we can't get away from the fact that these problems are related to numbers of people and the way they live.

We have the paradox in the United States of having bigger and bigger cities with greater and greater concentration and larger and larger wide open spaces with nobody living there. We actually have more open spaces today than we had a good many years ago because people are moving to the cities. We have become a society that likes to be crowded together into cities. It may be that the nostalgia for the open spaces may hit our population before retirement age one of these days, but by and large it doesn't. People go to the cities and when they get old they start thinking about a place on the lake. So we have bigger cities and I think the curse is partly bigness, with the attendant difficulty in administering places that are so big. When we worry about what this does to people, we can easily measure smog and air pollution, but we find it much more difficult to measure the intangibles on noise and contacts. I worked for a while in Asia, specifically in Pakistan, which is a very crowded country. When you go to the bazaar to shop, you are constantly buffeted by people, you are just knocking shoulders against people and nobody stops to say excuse me because you would be saying it a thousand times a day. After a while you just learn to live with it. One day I got the notion of feeling as if I was one of those particles of dust in a ray of sunshine and I thought we ought to establish a contact index to see how many times a day you hit somebody else and to see if there is some cumulative psychological impact from it.

Another thing in our life is the deadlines. How many times a day from morning to night do you have to make a deadline? How many times do you look at a watch? Now, I grant that I can't blame all this on numbers of people, but somehow I think that this is a result of the fact that there are so many of us and that we've put ourselves into a certain way of life. I think we can talk about recreation and the need for respite to get away. We can't get away anymore without somebody being there before us.

I am seeking for something that we can call the dignity of life. I would like to have something that is more than sheer materialism and I don't know that we will necessarily get it back by killing off half the world. But it is inevitable that someday there are going to be too many people. Maybe it will be in the year 10,000 rather than the year 2,000, but one would have to say that some day population growth has to slow down. The question is: do you wait for that someday when there is no doubt about the need, or do we try to establish an objective short of that? This brings me back to my final

comment and in full agreement with Dr. Driver that unless we define our goals, unless we are able to say what kind of a nation, what kind of a society, and what kind of a life we want to live, it is very hard to answer the question, "are there too many of us?" I think there are.

DR. DRIVER: I find that my colleagues are now very much on the side of Ehrlich, Hardin and Tien. They note that resources are being consumed much too quickly by the United States and that the United States therefore has a responsibility to the rest of the world to cut down on this consumption. The point of Dr. Tien earlier, that these programs ought to be directed toward the affluent, is very much the point of Ehrlich and Hardin — to direct these programs at the major consumers. These are the people who have 30 percent of the world's resources coming in to them on a per diem. This is the point that Harrison Brown of the National Academy frequently makes too. As far as the waste is concerned, this is an industrial problem, one that faced me from my earliest days in Philadelphia — drinking water from the Schuylkill. There was no mention in the 30's, during the depression, of too many people. The problem was here and nothing was ever done with it and nothing has been done with it yet. I still smell the chlorine. This is an industrial problem and the people that you are talking about do not contribute to it. This whole matter of cities and their growth is largely a matter of migration and not fertility within the city. What this would suggest then, is some sort of problem connected with industrial and commercial centralization. The way out of this is to decentralize New York City and you can very easily do this through various kinds of governmental policy. We have over one hundred billion dollars being spent by the federal government and if it is decided that the aircraft industry will be located in, say, California, some 70 percent of it, then you are going to get a tremendous influx of people into Burbank and the whole Los Angeles area. The point is, if cities are a problem, the appropriate attack is not so much upon fertility as it is upon policies governing migration.

I do not see that the growth of population makes very much difference yet. I don't see why we have to worry about it slowing down. Just a few years ago, the underdeveloped countries were being told that their problem was too many people and too little food. And then suddenly in the last two years, the "green revolution" took place all through Asia and, as a consequence of this, countries which had been importing are now exporting food. And now the argument has to shift. It is no longer a question of food, it is something else. This is what bothers me about the whole argument of those who would

want to control population; that their arguments are not rooted in very solid fact.

Dr. Wishik has made much of spatial relationships and this is certainly a cultural thing. I enjoyed the bazaars of Asia and I'd love to get back, I'm itching to go now. I love to "rub against people." I live in a small town. I don't like the impersonality of social relationships, nor do Latin Americans. The point is that people can rub shoulders with one another without there being great friction. We do not yet know — except for some of the ants and termites — just what the limits of spatial density are and whether or not they do have the psychological consequences which are suggested. I am still seeking to find the basis of this problem in some very concrete way rather than in expressions of vague feelings that there is a problem.

PROFESSOR GIANNELLA: Professor Means, I was wondering whether or not it is a fact that we face a population problem. It has certainly become part of at least a "pop" sociology that we do, and face a serious one. I was wondering whether you think this has influenced the courts, particularly in the abortion area, in arriving at the position of the constitutional right of the woman to abort or do you think it is primarily concerned with individual freedom.

PROFESSOR MEANS: In my reading of the briefs that have been submitted to the courts in these cases, there is some reference to a population problem. There is usually a paragraph in which the brief writer says something about population being *the* problem of man in the latter half of the twentieth century. There has not been much effort to document this assertion, or to build up this aspect of the cases in the Brandeis briefing of them that has been done. There is much more emphasis on matters more directly germane to the abortion issue itself: the great and continuing danger to women's health through abortions in substandard conditions that are now illegal. It used to be fashionable to mourn the great number of women who died from such abortions, but, since the advent of antibiotics in the 1940's few died from illegal abortions any more, but a great deal of morbidity does ensue from such operations. Both the Lucas thesis and my own, which are the two mainstays of the constitutional arguments that have been put before, and adopted by, the courts, have tended to play down the population argument either as a reason for the original enactment of the antiabortion laws or as a reason for now declaring them unconstitutional. Perhaps this is myopic on the part of counsel and the courts, but that is the way it has been.

QUESTION: Gentlemen, assuming that we do have a population problem, the present programs pursued by the federal government have been characterized as timid, or not likely to succeed. What is your reaction to such statements?

DR. SHULTZ: My personal view is that a policy to provide family planning services to those who cannot afford them is not a solution to the problem of population growth in the United States. I am in complete agreement with the Davises that this is no direct solution. It may assist in a very small way in providing some reduction, but this will not make a significant contribution. As long as you find a desire for three or more children among all segments of society regardless of socioeconomic status, color, or anything else, you are not going to find a large reduction. We will arrive at our 300 million people in the year 2000. Therefore, I don't think this particular policy is "timid," since it was not designed for the purpose of solving the problem of population growth.

I think, as we indicated earlier today, there is an established belief that there are direct health benefits, as well as probable economic ones from family planning. For example, a program analysis was carried out by the Department's Office of Planning and Evaluation and it was found that of all the programs that were at the disposal of the Department of Health, Education and Welfare, the one which appeared most likely to contribute to economic improvement for the smallest expenditure and have the greatest impact on health improvement was the family planning program.

Dr. Driver alluded to the fact that in certain census tracts in Chicago there was an infant mortality rate of 100 per thousand live births. This is an intolerable infant mortality rate — that was about what the rate was in the general population in 1910 or around the turn of the century — an infant mortality rate of 10 percent. Now the federal government has done something specifically about that by establishing the maternity and infant care programs. In Chicago, for example, since the institution of these programs along with the increased availability of family planning services, the general level of the infant mortality rate has fallen significantly. This is true in most of the metropolitan areas. It is an absolute scandal in this country that the infant mortality rates in our urban areas were and are as high as they are. That the infant mortality rates among the Indians and Alaskan natives were fifty per thousand live births or higher is just unendurable when other segments of the population have infant mortality rates down around 14 per thousand live births. This

is a kind of discrimination that we in the health profession feel we have an obligation to deal with. Though I have gotten off the question a bit, this illustrates why the federal government is so concerned. The population aspects are relatively a small portion of why there is such a concern for getting family planning services out to all those who cannot afford them.

DR. WISHIK: This is, of course, the answer to the question. This afternoon we made a very clear distinction between the family planning program and a population control program. The polemic in the several issues of "Science Magazine" refers to the article by Kingsley Davis and Judith Blake Davis³ in which they attacked family planning enthusiasts on this score — that this is no way to control population. Well, of course we were never trying to control population, but trying to give services to women who need it and who do not get it at the present time. In our response to the Davises we made this point — that nobody in the United States government had made any statement on population. The statements were all on family planning. Shortly after this was printed, President Nixon came out with his population speech⁴ and of course this is an indication of how fast things are changing. At present the United States is, for the first time, moving into an attempt to think about the possibility of developing a population policy. It certainly doesn't have any population policy yet. There is no real issue. We believe in family planning because it's good for people themselves, because they would themselves benefit. The discussion about population control is another issue.

QUESTION: I would like to address a question to the panel in general and to Professor Means in particular. You mentioned three possible methods of fertility control: contraception, sterilization, and abortion. I see a problem involved in abortion that is not involved in the other two. That is the presence of a possible third being, the embryo or the fetus. Now the *Belous*⁵ court glossed over this problem. The District of Columbia court relied on *Belous*'s reasoning, not dealing with the problem either. I would like to know if you gentlemen are prepared to write off any possible right to life, either full or somehow diminished, vesting sometime during pregnancy before live birth.

3. K. & J. (Blake) Davis, *Birth Control and Public Policy*, 29 COMMENTARY 115 (Feb. 1960).

4. *Message from the President of the United States Relative to Problems of Population Growth*, July 18, 1969, 5 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1000 (No. 29) (1969).

PROFESSOR MEANS: Counsel who have been arguing these cases have conceded that the legislature does have constitutional power to prohibit a destructive operation on the fetus late in pregnancy. A distinction has long been drawn at common law between the fetus before quickening and the fetus after quickening. For example, in New York we have by statute preserved the common-law rule that if a pregnant woman is condemned to die she is reprieved until after delivery only if the fetus has quickened. If the fetus has not quickened, she is executed forthwith and her womb becomes its tomb. Now this indicates that neither the common law, which existed on this subject for centuries, nor the New York legislature for more than 140 years, has ever exhibited the slightest interest in any alleged right of an unquickened fetus to survive.⁶

Contrary to your statement, the Supreme Court of California in *People v. Belous*⁷ did not gloss over this question. It considered it in two places. First, it held that "the law has always recognized that the pregnant woman's right to life takes precedence over any interest the state may have in the unborn,"⁸ and second, it remarked, by way of dictum, "There is nothing to indicate that in adopting the [1967] Therapeutic Abortion Act the Legislature was asserting an interest in the embryo."⁹

If ever a legislature should pass an antiabortion statute which was aimed at protecting the fetus, then I think there would be something to discuss along the lines of your question. The entire argument then would have to be conducted at a different level. The premise of your question is, however, reflected in the bland assumption made by the Attorney General of California in the *Belous* case, by the United States Attorney in the *Vuitch*¹⁰ case, by the Wisconsin district attorney in the *Babbitz*¹¹ case, and by the Attorney General of New York in the four cases pending there, namely, that the motive of Congress and the state legislatures in enacting the antiabortion laws was to protect the early fetus. The courts have correctly treated that assumption as erroneous.

Historically it is erroneous. We have the evidence as to the real reason for which these laws were passed. It was not to protect the

6. Means, *The Law of New York Concerning Abortion and the Status of the Foetus: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411, 421, text and n.18, 441-43, text and nn.65-68 (1968). See this article, *passim*, for the medical background of the early statutory enactments against abortion before quickening.

7. 71 A. Cal. 2d 996, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

8. *Id.* at 1011, 458 P.2d at 203, 80 Cal. Rptr. at 363.

9. *Id.* at 1014, 458 P.2d at 205, 80 Cal. Rptr. at 365.

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

11. *Babbitz v. McGehee*, 301 F. Supp. 293 (E.D. Wis. 1970).

fetus. It was to protect the pregnant woman herself at a time when not merely abortifacient surgery, but every type of deep cavity surgery, was extremely dangerous to the patient's life. Surgeons did not wash their hands, sterilize their instruments, wear surgical masks, or take any of the precautions that were adopted after Lister's discovery of antiseptic surgery. Unwittingly they were constantly infecting their patients. In *Lyons v. Lefkowitz*¹² I introduced in evidence statistics culled from the surgical register of the New York Hospital for the period 1808 to 1833, when our earliest antiabortion law was passed. A pathologist reviewed this register for me, and also the lying-in ward register of the same hospital for approximately the same period. He discovered that the death rate from all types of surgery was 37.5 per cent, whereas the death rate from childbirth was between 2 and 3 per cent. Thus, at that time, abortion, even when performed under the best medical conditions then available, was about 15 times as dangerous to the patient's life as was childbirth at term.

In modern times these figures are reversed. Abortion early in pregnancy, in hospital, is about 6 to 8 times as safe as childbirth at term in the same hospital, so far as death rates from the two procedures are concerned. In addition, of course, both death rates are minuscule compared to what they were early in the nineteenth century. Thus the reason for which these laws were passed has disappeared. *Cessante ratione legis, cessat et ipsa lex.*

The contention that the early fetus has a right to survive is a modern argument. It did not figure in the history of the passage of these laws. It conceivably might be a factor in the passage of some new law, but has no bearing on any that are on the books.

DR. WISHIK: I think there are at least three possible approaches to the question, which is a very difficult question. One is legal, which was the way you asked it and Mr. Means responded; the second is what we might call philosophical; and the third is physiological. If I have any competence, it would be only in the third, so I wouldn't presume to touch on the first two. Mr. Means used the word "quickening" which some people in the audience might not know is the point at which the mother first feels movement of the baby. This occurs just about halfway through pregnancy. It is interesting that quickening has been something that has been recognized legally in the United States. That point in pregnancy is the point in the Holy Koran of the Mohammedan faith until which time an abortion was permissible. So, in the Mohammedan religion abortion was permitted, according

¹² 305 F. Supp. 1030 (S.D.N.Y. 1969).

to the Koran, much later than we doctors would have liked it, because we prefer it to be within the first three months. What I mean by physiological approach is to attempt, as a physician, to ask the question that I think you're asking: "When does life begin?" Of course it never begins; because life goes on forever from one generation to the next. Certainly life can't be said to have begun for the first time at the moment of fertilization, when the sperm and the egg unite, because both of them were alive before they got together. Otherwise there wouldn't have been any result from it. We know that about one-third of fertilized ova get into the uterus and never implant, but just pass on; it's just nature's way. We know that about one-third or more of those that implant and begin to grow separate spontaneously and leave. We do know that nature has always been extravagant about reproduction. Nature has always tried to overproduce in order to end up having the numbers that seem appropriate and this is true in mankind as it is in other forms of life. And so, I found it very difficult to have a sharp point of demarcation before which life didn't exist and after which it does exist to the point where you have to ask different kinds of questions about its management. I can't speak beyond that as a physiologist.

QUESTION: How much comfort can we take from your position, Doctor? You say that life does not begin, it goes on. Does that mean we can say it doesn't end?

DR. WISHIK: Life never ends. It never begins and never ends.

QUESTION: Dr. Shultz, do you want to respond to that.

DR. SHULTZ: No, but I think it's a happy thought.

QUESTION: I wanted Professor Means to comment if he thought this was a scientific distinction — quickening — and whether there really was a difference in the embryo three days before quickening or three day after.

PROFESSOR MEANS: I do not consider the quickening distinction itself any more scientific than the different and shorter periods which ancient rabbis and medieval philosophers and theologians derived by exegesis of Leviticus xii. 1-5. Westermarck thought their technique eisegesis rather than exegesis, but it was universally accepted Biblical interpretation in its day. From this text, at any rate, the medievals derived a period of 40 days in the case of a male fetus, 80 in the case of a female, as the time after conception when a human person became present upon the uterine scene.

I think the fundamental insight that the medievals had concerning this matter was sound. It was based upon a morphological view — what my friend Father Donceel calls a hylomorphic view¹³ — of the fetus, as a being that undergoes change in the course of its uterine development. Difficult though the choice of a moment in gestation as the point of ensoulment may be, I think it can be said with confidence that no human person is present in the fetus until the start of the last trimester of pregnancy. I arrive at that point in this way. First, I accept the definition of man as a rational animal, which is common to philosophers and theologians. Second, I bear in mind that, in biology, form precedes function. When, then, does the fetus become rational? If the function of reason be required, one would have to wait until a born child is about three years old (when, according to Father Donceel, he first uses the word “true”). More reasonably, it is the form of reason, not the function, whose presence marks the fetus as a human person. In the case of man, the form of reason is the human cerebral cortex, in which distinctively human mental activity later on takes place. The fetal cerebral cortex does not acquire its distinctively human gigantic ratio to the remainder of the brain until the start of the third trimester of pregnancy. I think that point, therefore, on morphological grounds, to be preferable either to quickening or to the Levitical periods.

Nevertheless, for entirely non-morphological and non-metaphysical reasons, I bow to Dr. Wishik and all the other doctors who say that they certainly do not want to perform abortions that late in pregnancy. It is simply that late abortions are much more dangerous, even now, to the lives of patients. On prudential grounds, except in rare cases, abortions should be performed much earlier than the beginning of the third trimester.

I agree entirely with what Dr. Wishik said in regard to the continuity of life. I think that the statement of the problem as, “When does life begin?”, is a misstatement of it. What the person who says that is trying to say is: When does a human person begin? Just as human life is present in the fetus prior to the presence therein of a human person, so, at the other end of the life-span, the heart transplant cases show us instances where human life is still present in the body after the human person has ceased to be present in it. In order for a human body to be eligible as donor of a heart for transplant, physicians and moralists universally agree that there must have been such massive brain damage that it is certain that human mental activity can never be resumed. A flat electroencephalogram for a prescribed period of

13. Donceel, *A Liberal Catholic's View*, in *ABORTION IN A CHANGING WORLD* 39-45 (R. Hall ed. 1970).

hours is insisted upon. Nevertheless, there must still be a living heart because, if that heart were already dead, it would be useless for the purpose of transplant. The reason why we permit the invasion of this human body at this point is because there is no longer a human person present, not because there is no longer human life present. Human life must still be there for the heart to be of any use. The relevant questions therefore are: (1) when does a human person begin? and (2) when does a human person end? Human life exists before the human person is present, and it can exist after the human person is no longer present. Human life, without the presence of a human person, is not sacred. It is the human person that is sacred, and that imparts its own sacredness to the human life in which it is present.

QUESTION: I'd like to ask the panel whether government or private organizations should administer national population programs, and to Dr. Shultz, whether your department has considered doing something in the order of what the Labor Department has done — fostering black economic development by turning over federal money to private organizations engaged in that field?

DR. SHULTZ: Well, yes I can give you an example very close to home. Better Family Planning here in Philadelphia is an entirely black organization. It originally was supported by the Population Council during its period of early development but it is now basically supported by the Department of Health, Education and Welfare under a categorical family planning project grant. There are other cases. Some of the applications that have come in have not been funded. There was one from Watts, in Los Angeles County, it would have been supported had the application been satisfactory but the proposal didn't measure up. But that same group, as part of a larger project, has received some support through the Office of Economic Opportunity. So definitely the answer is yes, this is an ongoing process.

QUESTION: I have one question to the entire panel. I get the impression that there's general agreement that non-coercive methods should be used, if they are used at all, to control population and that generally these non-coercive methods would create a new way of thinking in society, not favoring birth as it is now, but controlled birth and reduced population. How is it possible to create such a change of thinking when many of the religious institutions in the country today stand diametrically opposed to many of the suggestions the panelists have proposed today?

DR. SHULTZ: I would like to respond to a part of the question rather than the whole question and perhaps the side issue here.

I think one of the things that we need is to create an awareness that even if we began with a two child family right now, in the sense of two children per reproductive couple, that it would not be until the middle of the next century that the population would actually level off. Even if everybody entering the reproductive years right now began with this two child average concept, it would still take that long given current mortality and with everything else remaining relatively constant. It isn't something that can be accomplished overnight. This is one of the reasons that so much of the President's message contained this sort of "given" that we were probably going to end up with close to three hundred million. With a two child family we would have by the turn of the century, around 245 million rather than 300 million.

Now as to the other part of the question about social change and institutional change, I think that there is a tendency to overestimate the monolithic quality of our institutions and their impact, whether they be the federal government or, if it is large enough, a private organization. I don't think that you necessarily discover quite the consensus, particularly in individual behavior, within any institution. Therefore all of these institutions are constantly undergoing change and development just as Dr. Wishik illustrated by saying that no statement had emerged from the federal government in relation to population. Then such a statement did appear in July. This shows that there is, even in a bureaucracy of that horrendous size, change. Perhaps I'm sanguine about this, but the message we seem to get from many young people is that they are in the process of developing their views and their views are not necessarily consistent with those of the older generations.

DR. WISHIK: I think you understand the statistics that Dr. Shultz presented. It's because of the age distribution of our population. So many already born children are going to grow up and become parents that even if we got down to this two-child family, which we won't, we still will add some 30-35-40 million people to our population. That's another argument answering Dr. Driver about whether or not we have a population problem.

I think the answer to the question about religious opposition is first the fact that even the Catholic Church is not that monolithic and secondly, that the Catholic Church from what little I know of it, is probably the most flexible organization that's ever existed in the history of man — flexibility that you may not see within years or decades but you certainly see within centuries. I think the Catholic Church is going to change.

DR. DRIVER: Just one comment on this concept of coercion versus freedom, or voluntary versus non-voluntary. You know many things get argued in terms of a value framework and never are these concepts made explicit in terms of their meaning. It reminds me a bit of separate but equal. And you know the transition through which one went from 1896 up to the present. I find it difficult to imagine state policy which is other than coercive. I think it's almost a contradiction in terms to expect to have laws which are otherwise.

QUESTION: Dr. Driver, I somehow can't quite understand your statement that population is not a problem because, if you say that our ecological problem is industrial, isn't it easier to clean up an industry that's geared to 200 million people than one that's geared to 300 million people?

DR. DRIVER: First, I'm not quite sure what the ecological problem is. If you are thinking of ecology you are thinking of how people are distributed, over space, with regard to certain resources.

QUESTION: Waste disposal, the water in the Schuylkill River that you mentioned before and various other things are the result of what other people feel are a crowded planet. It might not be a crowded planet. You said before that it was an industrial problem.

DR. DRIVER: I'm thinking of the pollution. I don't see where the people are creating pollution. This is a matter of industrial production which can be regulated and, in fact, it has been proposed at the federal level that subsidies be paid to industry in order that they carry out a task which industrial and chemical engineers have indicated is quite easy to do. So the question is one of providing industry with some incentive or motivation. Let's carry that just a bit farther. In many of the arguments it is sort of assumed that the productivity is due to some sort of demand on the part of this population, be it 200 or 300 million. I think its pretty obvious that industries produce today, almost irrespective of the number of people in the community, a good bit of waste which is non-consumable. In fact this is one of the major problems facing industry: What to do with it? So I think there is a point here of regulation and it can be regulated without very much difficulty through industrial and chemical engineering.

QUESTION: Dr. Driver, two questions: Don't you think 300 million people are going to drive more automobiles and 300 million people are going to have more sewage to dispose of than 200 million

DR. DRIVER: Maybe they will. But if you are concerned about emission systems, for example, which pollute, there is no technical problem involved in controlling the emissions. It is just a matter of getting industrial producers to do it. The same is true with automobile safety. It usually costs only a few pennies more to make the brakes better. There is no technological reason for not doing this. We have the knowledge for all of these things and the question of who is going to do this, I think, resides with the producers or the industrial organization. It is their task to carry out these matters, which are quite simple to do. In effect, I would not argue that the consumers determine what things get produced. I don't think that consumers are determining fashions. Where we are going this year from mini to maxi is not because of any demand on the part of the public. Now the question is what to do with all of the minis. The public did not decide this shift. And so it is with many other things which are produced today. On the question of water pollution, this is again, a very simple industrial-chemical problem.

QUESTION: It still strikes me that if you are dealing with a 50 percent increase in the number of people, that we are going to have a 50 percent greater problem, regardless of the fact that it is an industrial problem.

DR. DRIVER: All right, if that were so, it would be true only if the economic product is more equitably distributed. This is the point of Harrison, Brown, Ehrlich and Hardin. But if you are concerned about the numbers and if you want to keep the same structure of distribution of economic resources then the point of approach are those who have the resources and who are the major consumers.

DR. WISHIK: I agree with Dr. Driver that 300 million people need not necessarily drive more cars than 200 million people. All we have to do is do something as a society to see that this one man in each car isn't driving down the road every morning and every afternoon. We have it within our capacity to make this a better life at the present time. We just don't know how to do it in a social sense, in a sociological sense, let alone the technology of it. It's ridiculous that we do the things that we do at the present time.

QUESTION: I read an article not too long ago which suggests that stress alone might be an answer to the population problem. I wonder if you could react to that.

DR. WISHIK: That came out of animal ecology. Animals seem to be more responsive to stress and seem to do more sensible

things about it. Mankind hasn't yet learned how to be homeostatic in the same way. Just a word about what detriments are involved in population density. For example, we have a notion that crowding people together means there's more disease while actually there is less disease. People in cities are healthier than they are on the farm. There's more access to medical care and so on. But in the transition from the farm to the city, before they have made their adjustment, before they have been stabilized, there seem to be some stressful factors which produce disease. So we have reasons to believe that stress hurts us as much as it does other species. We're not quite sure what to do with it.

QUESTION: Dr. Wishik, if you thought that we have to focus on individuals because that actually is the basic problem and if we look at the family unit and the children, you seem to disagree that we should limit the number of children to those whom the family can properly care for. There are tremendous constitutional problems, definitional problems of the phrase "properly cared for," and also the effect this is going to have on how high the standard of proper care will be. But it seems to me if we are concerned with the welfare of children and if we say that we are going to set up some kind of system such as this, we are going to get to the root of this problem. I'd like your comments.

DR. WISHIK: I disagreed with the statement that people should have only as many children as they can afford to bring up because I think that this says the poor may not have children and the rich may. It says just that in very simple terms. It also says that the poor will always be poor and the rich have never been poor. If a young couple is starting out and the husband is on his first job, they are too poor at that point and have to wait until 20 years later when it's too late for them to have their children at the time when he's an executive. So when you use the phrase, which I think is an appropriate one, get at the root of the problem, the root of the problem is economic; if we find families that have children that aren't properly cared for, it's up to us to correct it and not to prevent them from having children.

QUESTION: I fail to hear from this panel a statement of the problem. The breadbox of the east is the people on the plateau. It had four feet of topsoil on an average when we came, it probably has less than six inches today. One million acres of farm land from Pennsylvania have been lost in the last ten years. The best farm land is Lancaster County and thousands of farms have been lost in Lancaster

County. Dr. Ehrlich says "The causal chain of deterioration is easily followed to its source. Too many cars, too many factories, too much detergent, too much pesticide," and incidentally when your topsoil gets down to six inches you have to use a lot of herbicides and a lot of pesticides, "inadequate sewage treatment plants, too little water, too much carbon dioxide, all can be traced to *too many people*." I have quoted from the *Population Bomb* by Ehrlich.¹⁴

Some members of the panel I can forgive, but Dr. Shultz, I'd like to know from you, how many people are in your office, what your budget is, and why you cannot produce a statement as to the population problem?

DR. SHULTZ: Unfortunately, the last time I was asked that question it was also by a lawyer. It was during the hearings before the Health subcommittee of the Labor and Public Welfare Committee of the Senate and the reason that it was being asked was because, as good lawyers generally know, they know the answers before they ask the question and they had been provided with the answer. The answer was that actually in the office from which we operate within HEW there is a very limited number of professional personnel because of our staff function to the assistant secretary. Actually, we have three professionals and at the moment one of the three positions is vacant and the budget is similarly small.

QUESTION: Can you tell us how many personnel you have and what your budget is?

DR. SHULTZ: The overall budget is around \$100,000 per annum, I would say. It is not the operating program. The two major operating programs are in the Center for Population Research and the Center for Family Planning Services. The operating budgets of those programs for this fiscal year for the Center for Population Research, which has about 60 on its staff, is 15.5 million dollars. The Center for Family Planning Services by the end of this fiscal year will have around 30 on its staff and a total budget for supporting Family Planning Services of around 23 million dollars.

QUESTION: I would like to address my question to Dr. Shultz. Dr. Shultz, you mentioned that ideally there would be created some kind of balance where couples who wanted to have large families could and those who didn't want to have any could do that. This is obviously not going to happen overnight. What do you think, in light of that, about the talk now about the moral responsibility of couples to limit their families to two children?

DR. SHULTZ: Well, I'm pleased to hear this talk because I think it indicates that there is an overall concern in this area, and that there is a growing public awareness of the fact that this may be a desirable goal for the general population. I think people will recognize that there has to be some variation in society, that everybody can't be the same. This is one of the problems with egalitarianism when it is carried too far. It would be very boring if everybody had exactly the same thing and everybody was exactly the same.

QUESTION: What do you do with the acuteness of the problem now? Is it that acute now?

DR. SHULTZ: Not in my opinion.