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## Legal Implications of Population Control: A Practical Reevaluation of Some Human Rights Considerations

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# Legal Implications of Population Control: A Practical Reevaluation of Some Human Rights Considerations

Susan C. Eisenhauer

## **Abstract**

In recent years, much attention has been devoted to the problems of overpopulation and attempts at slowing population growth. The number of people is expanding at an alarming rate, thereby threatening the physical environment as well as the quality of human life. The United Nations has not adequately dealt with the population problems. This paper outlines the existing problem and its ramifications, and discusses the UN position regarding human rights in the area of family planning. Questions are raised, as to what the rights consist of, if they are absolute, and if protection of the quality of life should limit population growth. In light of the shortcomings of the UN position, a more realistic approach is offered, focusing on the particular problems facing the world today. The role of law in the population area is considered. Possible population policies are discussed and evaluated in light of the aforementioned human rights and population realities.

## COMMENT

### LEGAL IMPLICATIONS OF POPULATION CONTROL: A PRACTICAL REEVALUATION OF SOME HUMAN RIGHTS CONSIDERATIONS

#### I. INTRODUCTION

In recent years, much attention has been devoted to the problems of overpopulation and attempts made at slowing population growth. The number of people is expanding at an alarming rate, thereby threatening the physical environment as well as the quality of human life.

The United Nations has not adequately dealt with population problems. It was not until the late 1960's that the UN adopted a broad human rights approach to the population field.<sup>1</sup> From this two clear principles have emerged. The family has the right to make a free and responsible choice respecting the number and spacing of its children<sup>2</sup> and the right to adequate information and means with which to make the choice.<sup>3</sup> The UN firmly advocates these rights as inalienable and essential both for the exercise of human freedom and control of the population problem.

This paper outlines the existing problem and its ramifications, and discusses the UN position regarding human rights in the area of family planning. The UN position then is evaluated in light of the present situation. Questions are raised, as to what the rights consist of, if they are absolute, and if protection of the quality of life should limit population growth. In light of the shortcomings of the UN position, a more realistic approach is offered, focusing on the

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1. Tabbarah, Population Policy Issues in International Instruments: With Special Reference to the World Population Plan of Action, 9 J. Int'l L. & Econ. 419, 424 (1974).
  2. Id. at 434-35.
  3. Id. at 437

particular problems facing the world today. The role of law in the population area is considered. Possible population policies are discussed and evaluated in light of the aforementioned human rights and population realities.

## II. THE PHYSICAL REALITIES

Problems related to the procreation of the human race have always existed. However, "[i]t has only been since World War II that the desirability of growth has been questioned and that human rights and other considerations have entered the population picture."<sup>4</sup> Recently, population has grown at an unsurpassed rate. In the less developed countries (LDC), the numbers are rising at an alarming rate of approximately three percent per annum, resulting in a doubling time of twenty-five to thirty years.<sup>5</sup> Even in the United States the population is growing, despite the fact the fertility rate of 1.8 children per woman in 1977 fell below the "replacement level" of 2.1.<sup>6</sup> If the United States maintained replacement level fertility, its population would grow from 213 million in 1975 to 262 million in 2,000 and then take over twenty years to stabilize.<sup>7</sup> Even with stringent world-wide birth control measures starting immediately, the population will greatly increase as these children become adults and have families,

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4. Lee, Legal Implications of the World Population Plan of Action, 9 J. Int'l L. & Econ. 375, 379 (1974) [hereinafter cited as Legal Implications].
  5. W. Ophuls, Ecology and the Politics of Scarcity 49 (1977).
  6. Barnett, The Constitutionality of Selected Fertility Control Policies, 55 N.C.L. Rev. 357, 358 (1977). The concept of replacement level refers to parents having only enough children to replace them at death, on an average. Eventually this would lead to stabilization of the population, referred to as zero population growth.
  7. National Commission for the Observance of World Population Year, Report to the President 3, (1975) [hereinafter cited as Report to the President]. Because the number of adults in their child-bearing years is disproportionately high, the population continues to grow, even at or below the replacement level, until the population attains a relatively equal age distribution.

delaying the world population stabilization date thirty-five years with equilibrium reached in forty years at twice the present level.<sup>8</sup>

Compounding the seriousness of the problem is the failure to understand the mechanics of exponential growth.<sup>9</sup> Doubling time can be calculated by dividing seventy years by the rate of growth. If population levels grow at one percent per annum, the doubling time is seventy years; if at two percent, thirty-five years; 3.5%, twenty years. By examining the evolution of the population problem, its catastrophic consequences become self-evident. "We may be through with the past, but the past is not done with us."<sup>10</sup>

<u>Population in Billions</u>	<u>Years Required to Add One Billion People</u>	<u>Year Reached</u> <sup>11</sup>
1	2,000,000	1830
2	100	1930
3	30	1960
4	15	1975
5	11	1986
6	9	1995

Therefore, not only the rate at which the population grows is important, but its size also is a vital consideration.

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8. This projection was based on population controls starting in 1975. M. Mesarovic & E. Pestel, Mankind at the Turning Point: The Second Report to the Club of Rome 70-82 (1974).
9. D. H. Meadows, D. L. Meadows, J. Randers & W. Behrens, The Limits to Growth (1972), the first study for the Club of Rome describes a pond with one lily pad. The number of leaves doubles each day so that there are two leaves on the second day, four leaves on the third, and so on. By the twenty-ninth day, the pond is only half full, but on the thirtieth it is filled completely. Recounted in L. Brown, In the Human Interest 22 (1974).
10. Commission on Population Growth and the American Future, Population and the American Future 75 (1972) [hereinafter cited as Population and the American Future].
11. L. Brown, supra note 9, at 23; accord, Report to the President, supra note 7, at 4 (only giving date through 1975).

Unfortunately, the above information is the mere skeleton of the problem. Because the issue deals with people, it is compounded by all aspects of life. For the developed nations, especially the United States, the problem is one of over-production and over-consumption. The impact of each individual American on the world environment is estimated at about twice that of a European and twenty to 100 times that of an Asian.<sup>12</sup> With the present per capita growth rate at approximately five percent per annum, even with zero population growth, world industrial output would double every fourteen years.<sup>13</sup> Increasing industrial development places an unsupportable strain on natural resources and creates an unbearable amount of pollution. Therefore, accompanying the increase in overall population and standard of living as measured by GNP is a decline in the quality of life.<sup>14</sup>

Thus far, the American people have responded to the situation by reducing fertility levels. However, this occurs more among whites and non-poor segments of the population. The poor and non-white elements still have higher than replacement level fertility rates.<sup>15</sup>

The problems of the LDC's are much more severe. It is questionable whether they will have sufficient food to keep their people alive. Almost all progress that is made in terms of socio-economic development is set back by the increasing number of people, resulting in less per person.<sup>16</sup>

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12. Ehrlich & Ehrlich, Introduction, 23 Hastings L.J. 1345, 1346 (1972).
  13. Note, Economic and Population Growth: Critical Choices in a Crowded World, 14 Washburn L.J. 507, 508 (1975) [hereinafter cited as Economic and Population Growth].
  14. Ehrlich & Ehrlich, supra note 12, at 1346.
  15. P. Ehrlich & A. Ehrlich, Population, Resources, Environment: Issues in Human Ecology 246 (1970).
  16. Report of the Secretary-General, Population, Resources and the Environment, 1 The Population Debate: Dimensions and Perspectives 77, 98 (1974) [hereinafter cited as Population, Resources and the Environment].

There are problems of quality of life in the less developed countries also. First, intense efforts to increase food production lead to harmful effects on the land.<sup>17</sup> Even the food that is available does not supply the needed nutrition. Next, due to religious and cultural barriers, most people are unwilling to accept family planning services.<sup>18</sup> Even if such desire existed, the masses in the rural areas are illiterate and thus often unable to take advantage of the programs.<sup>19</sup> The urban areas, where the people are more willing to accept modern methods, are tremendously overcrowded, with high levels of unemployment and low standards of living.<sup>20</sup> Then, there are also inadequate water supplies for irrigation in the farming areas and domestic uses in both rural and urban areas. The existing systems of disposal cannot handle the increasing waste, which compounds the problem of common water supplies by creating a breeding ground for water-borne diseases.<sup>21</sup>

Although each country tends to view the situation from its own vantage point, most would agree there is a world-wide population problem. "This country [USA], or any country, always has a 'population problem', in the sense of achieving a proper balance between size,

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17. Id. at 97. For example, there is cultivation of marginal lands, destruction of forests, salt accumulation due to irrigation problems and overgrazing of pastures. Id.
  18. Singh, India, Population and Law 99, 100 (1971).
  19. Percy, Implementation of the World Population Plan of Action, 10 J. Int'l L. & Econ. 37, 46 (1975). In particular, India's level of illiteracy is approximately 70%. Id. at 45.
  20. Falk, World Population and International Law, 63 Am. J. Int'l L. 514, 516 (1969) (Editorial Comment). In 1968, two-thirds of the world's population was living on an income of about \$300.00 or less a year per family. Id.
  21. Population, Resources, and the Environment, supra note 16, at 98.

growth, and distribution on the one hand, and on the other, the quality of life to which every person in this country aspires."<sup>22</sup> Most of the LDC's are mainly concerned with raising their level of socio-economic development, along with slowing population growth. The affluence of the developed states creates an environmental crisis for the entire world. Therefore, a real need for concerted action exists.

### III. THE UNITED NATIONS' POSITION

Since 1948 the United Nations has adopted the position that the family is the basic unit of society and therefore entitled to protection.<sup>23</sup> This statement has been reaffirmed in ten UN documents between 1965 and 1972.<sup>24</sup> From 1948 to 1968, the UN maintained a statistical and demographic approach to the study of population. In the late sixties, in response to its acceptance by many governments, the Population Commission entered the field of family planning and changed the emphasis to the economic, social and health aspects of population.<sup>25</sup> At the International Conference on Human Rights at Teheran in 1968, the UN adopted a human rights approach. It was then proclaimed that "parents have a basic human right to determine freely and responsibly the number and the spacing of their children."<sup>26</sup> "The decision that human rights considerations should override demographic considerations has certain implications for the formulation and implementation of family planning programs."<sup>27</sup>

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22. Population and the American Future, supra note 10, at 13.
23. Universal Declaration of Human Rights, G.A. Res. 217A, art. 163, U.N. Doc. A/810 (1948).  
Article 16  
3. The family is the natural and fundamental group unit of society and entitled to protection by society and the state. Id.
24. Dobson, Objectives and Principles of the World Population Plan of Action, 2 The Population Debate: Dimensions and Perspectives 625, 628-29 (1974).
25. Tabbarah, supra note 1, at 422-24.
26. Final Act of the International Conference on Human Rights, 23 U.N. GAOR (1748th plen, mtg.) \_\_, U.N. Doc. A/ Conf. 32/41 (1968).
27. Tabbarah, supra note 1, at 435.

This human rights approach implies obligations on both the couple and the state. The couple must make a free and responsible choice.<sup>28</sup>

"Free" has been interpreted to mean without being subjected to any direct or indirect constraint upon choice and subsequent actions.<sup>29</sup>

Thereby, the state may inform its people and encourage a particular policy, but it may not penalize people for not conforming.<sup>30</sup>

"Responsible" refers to the duty of the couple towards the family, community, and society in general.<sup>31</sup> The state has the obligation to develop population policies to inform people of the situation on all levels, to aid them in making responsible decisions.<sup>32</sup>

Some member States sought to include a "right to information and available services," but this was not incorporated into the final text of the Teheran proclamation.<sup>33</sup> A year later, however, in the Declaration on Social Progress and Development, the General Assembly recognized the right of families to "the knowledge and means necessary to enable them to exercise their right...."<sup>34</sup> But the general position of this Declaration was very conditional, only asking member States to establish "necessary" population policies. Finally, at the

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28. Id. at 436.

29. UNESCO, Population and Human Rights: Education and Information, ? The Population Debate: Dimensions and Perspectives 429, 430 (1974).

30. Murphy, The Impact of Fertility on Human Rights, 2 Population Debate: Dimensions and Perspectives 365, 368 (1974).

31. UNESCO, supra note 29, at 430.

32. Tabbarah, supra note 1, at 436.

33. Id. at 437.

34. G.A. Res. 2542, Art. 22 (b), 24 U.N. GAOR, Supp. (No. 30) 49, 52, U.N. Doc. A/ 7630 (1969).

World Population Conference at Bucharest in 1974, the World Population Plan of Action made these duties unconditional.<sup>35</sup> All countries must make appropriate education available as well as the means of exercising the couple's right to determine family size.<sup>36</sup>

The primary aim of the Plan of Action is to enable countries to deal with their population problems, and to coordinate these efforts with those taken in the areas of social and economic development.<sup>37</sup> The Principles of the Plan recognize that the purpose of social, economic, and cultural development is to improve the quality of life. Population and development are interrelated; policies in each area must supplement, but not supersede the other. "The message of Bucharest is not that development policy is a substitute for population policy but that the latter is a component of the former."<sup>38</sup> Population policies must be consistent with recognized human rights. National sovereignty is essential for development, and each government shall have control over the setting of population policies which should reflect the particular conditions and needs of that state. "How states desiring to implement the Plan of Action will seek to proceed depends entirely upon the motivation of the sovereign States, because neither priorities nor criteria for implementation are provided."<sup>39</sup>

The Plan was designed to allow for flexibility to meet the needs of each country. Before the Conference, regional meetings were planned to follow shortly after, to aid in the selection of appropriate

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35. World Population Plan of Action, 57 U.N. ESCOR (1926th plen. mtg.) \_\_, para. 14(f), U.N. Doc. E/ Conf. 60/ 19 (1974) [hereinafter cited as Plan of Action]. "All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children and to have the information, education and means to do so;..." *Id.*
36. Tabbarah, *supra* note 1, at 438-39.
37. Plan of Action, *supra* note 35, at paras. 1, 15.
38. Tabbarah, *supra* note 1, at 432.
39. Percy, *supra* note 19, at 42.

population policies and programs.<sup>40</sup> It appears the openness of the Plan enabled it to be adapted by a consensus because the member states knew the final decisions would be adapted to their needs.<sup>41</sup> At the same time, the "Plan of Action is comprehensive enough to allow nations to pursue economic, social, and population policy and program development to meet their national objectives."<sup>42</sup>

The general objectives of the Plan are to advance understanding of population and its interrelationship with factors of development at all levels, and to promote socio-economic measures which are aimed at affecting population growth.<sup>43</sup> The Plan seeks to develop a unified analytical approach to the problem, with adequate educational and research programs to help countries develop and implement population policies consistent with national goals and international principles.<sup>44</sup>

The effects of the Bucharest Conference are yet to be clearly defined. Reactions in different countries will depend both on their respective levels of development and population problem. For example, India, Egypt, Mexico, and Rumania take a very broad view and are desirous of implementing all policies having any effect on population.<sup>45</sup> However, India has such a low level of socio-economic development and literacy, that most of its efforts are aimed at social welfare.<sup>46</sup> There are countries, such as Chile, Peru, and Uruguay, which perceive the problem as one of development alone, and believe the population problem will solve itself as the economy advances.<sup>47</sup> In contrast,

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40. Id. at 38

41. Id. at 42-43.

42. Id. at 45.

43. Dobson, supra note 24, at 625-26.

44. Plan of Action, supra note 35, at para. 15(a)-(b).

45. Percy, supra note 19, at 49.

46. Id. at 48.

47. Id.

Tunisia feels it must first decrease its population size in order to improve the social and economic conditions.<sup>48</sup> Turkey, Denmark, and France, to name a few states, deal with their population problems solely through such direct measures as contraception and abortion.<sup>49</sup> There are even some states with pro-natalist policies, such as Gabon and Rumania.<sup>50</sup>

There was much controversy at the Conference over setting actual global targets. Many members argued this would violate the principles of national sovereignty and diversity of national conditions.<sup>51</sup> Generally it was felt that the purpose was not to impose growth targets, but to assist governments in achieving their own national plans.<sup>52</sup> The most populous countries wanted to curtail growth, but the majority of the states present were not necessarily in agreement.<sup>53</sup> The achievement of the targets would have resulted in an overall decline in fertility levels, even with each country adopting its own plan.<sup>54</sup> However, "[t]he consensus at Bucharest cannot be presumed to assure widespread or substantial decreases in population growth rates."<sup>55</sup>

The Plan of Action recommended continuous monitoring of population policies, with a biennial review by the United Nations beginning in 1977. It also suggested a comprehensive review of progress towards achieving the goals and recommendations of the Plan to be conducted every five years by the UN system, starting in 1979.<sup>56</sup> At this time

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48. Id.

49. Id. at 49.

50. Id.

51. Tabbarah, supra note 1, at 440.

52. Id. at 442.

53. Id. at 441.

54. Id. at 443.

55. Percy, supra note 19, at 50.

56. Plan of Action, supra note 35, at paras. 107-08.

it is too early to assess the effectiveness of the UN and its member States. The role of the international organization here is basically supportive<sup>57</sup> and provides a channel for comparison and cooperation. The main responsibility and the key to the Plan's success lie with the countries themselves. "The intention of member States to implement the Plan is, however, balanced delicately by reality."<sup>58</sup>

One observer commented, "[t]he World Population Plan of Action was the first comprehensive international instrument and strategy in the field of population on which all the members of the United Nations and its specialized agencies present at the Conference agreed...."<sup>59</sup> However, this view may be somewhat limited.

The Plan of Action which emerged from these deliberations was not as specific or precise as the draft documents submitted to the Conference by the Secretariat. The original focus on population was blurred by continual references to economic development.... The final version had the advantage of incorporating the views of many countries and was adopted by consensus.<sup>60</sup>

Throughout these UN documents two principles are juxtaposed: the individual's right to freedom of choice and the responsibility and sovereignty of the state. The UN instruments prior to the Plan of Action failed to "fully come to grips with the underlying issue of individual freedom and the rights of the State to consider larger social objectives."<sup>61</sup> Under the Plan, the right of sovereignty appears unequivocal except for being subject to the right of the individual to determine family size.<sup>62</sup> The position of the UN seems to be that

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57. Tabbarah, supra note 1, at 450.

58. Percy. supra note 19, at 58.

59. Tabbarah, supra note 1, at 421 (footnote omitted).

60. Burke, The World Population Conference: An Overview, 9 J. Int'l L. & Econ. 367, 372 (1974).

61. Dobson, supra note 24, at 630.

62. Tabbarah, supra note 1, at 446.

the right of family planning should be "respected and promoted irrespective of its demographic consequences."<sup>63</sup> This position appears to leave many questions with legal consequences unanswered.

#### IV. THE CONFLICT BETWEEN POPULATION AND HUMAN RIGHTS

##### A. What Does the Right Consist Of?

What actually does this right to freely and responsibly choose the number and spacing of children consist of? It might appear at first glance that the right is linked with procreation. "However, none of the instruments that have been studied explicitly states that procreation is the purpose or necessary consequence of family union."<sup>64</sup> Neither the UN Charter nor the US Constitution expressly mentions a right to reproduce.<sup>65</sup> There may very well be no right to procreation itself. But, there does appear to be a recognized right to information and education in all areas affecting family life and to the means with which to exercise family planning.<sup>66</sup> It may be presumptuous to automatically include within these limits the right to procreate.

##### B. Is the Right Absolute?

Whether the right is merely one of education and implementation or includes procreation, one might ask if the right is absolute. "From the standpoint of legal theory that so-called 'right' is really no more than a privilege, and there is therefore no reason why we cannot regulate its exercise."<sup>67</sup> Even if there is such a right implicit in the US Constitution, it is not absolute. The test applied by the Supreme Court to determine whether a fundamental right has been violated is one of strict scrutiny. The state must show a compelling governmental

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63. Id. at 449.

64. United Nations Secretariat, United Nations Standards Concerning the Relationship Between Human Rights and Various Population Questions, 2 The Population Debate: Dimensions and Perspectives 349, 350 (1974)

65. P. Ehrlich & A. Ehrlich, supra note 15, at 273.

66. See notes 28-36, supra and accompanying text.

67. P. Ehrlich & A. Ehrlich, supra note 15, at 273 (emphasis in original)

interest to override a fundamental right.<sup>68</sup> This means that classifying something as a compelling state interest would justify reasonable regulation of the right. "Certain legislative limitations of individual rights are necessary for the common welfare."<sup>69</sup> Such overriding interests will be discussed later in this paper.

For an interesting twist on the right to education and information, it is mentioned that the result of such education might be to alter people's attitudes towards having a family. "Such factors might lead to a significant popular willingness to consider freedom of choice and privacy in reproductive behavior as a privilege to be regulated by the government rather than as an unimpeachable right."<sup>70</sup> In fact, the success of the World Population Plan of Action rests on this very premise; that the natural result of family planning services is to lessen the desire for large families. "The implication is made that freedom is promoted when the individual has knowledge and means of exercising alternatives, as well as knowledge of the probable consequences of these actions."<sup>71</sup>

Neither of these assumptions may be justified. If the inevitable result of such knowledge is to decrease the fertility rate, one might ask whether this education is really a form of propaganda. If so,

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68. Legal Analysis and Population Control: The Problem of Coercion, 84 Harv. L. Rev. 1856, 1880 (1971) [hereinafter cited as Legal Analysis]. (Generally discussing the development of standards of review under the Due Process Clauses). See, e.g., Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).
69. Shaw, Procreation and the Population Problem, 55 N.C.L. Rev. 1165, 1167, (1977) (citing Smith v. Wayne, 231 Mich. 409, 415, 204 N.W. 140, 142 (1925)).
70. Legal Analysis, *supra* note 68, 1863.
71. Dobson, *supra* note 24, 628.

there is no reason why people's freedom would be any greater than before. The only difference would be in the values upon which the decisions were being based. Imposing these values on people through education may be more humane than doing so by coercive methods, but the result is the same. However, the ends do not always justify the means, and more subtle methods of behavior control may be desirable. It is the nature of society to develop values through social mores and laws. Changing people's attitudes towards family planning fulfills a natural function of government and evidences its responsiveness to the practicalities of the population problem. The problem remains that even given such information and family planning services, attitudes may not change due to factors such as cultural and religious traditions. More realistically, the change will occur, but slowly, especially in the less developed world, where it is needed the most.

The assumption that the result of such knowledge is freedom, and that the free person will choose a smaller family is analogous to the premise of Liberal economics that each enlightened individual attempting to maximize his own self-interest will promote the common good. Both presume an "invisible-hand" will guide the decision of the individual so the aggregate effect will benefit society. This theory has been proven in practice to be entirely wrong. It has been referred to as the Tragedy of the Commons.<sup>72</sup> The example given is one of a pasture open to all. Each herdsman tries to keep as many cattle as possible on the commons. A point is reached when the carrying capacity of the pasture is met. From then on, the attempt of each herdsman to maximize his gain leads to tragedy. Each asks himself what his gain will be by adding one more cow. The gain to the herdsman will be having another animal to sell, while the detrimental effects of overutilization of the pasture caused by the animal will be shared by all. Thus, the herdsman decides his gain exceeds his loss and adds

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72. Hardin, The Tragedy of the Commons, 162 Science 1243 (1968).

another cow. The tragedy is that every herdsman individually will come to the same conclusion. The commons is ruined for all since the resources become exhausted. Herein lies the fault of the assumption behind each individual pursuing his self-interest.<sup>73</sup>

Applied to the population problem, assuming that having children is considered desirable and that each family makes a free choice as to its size, the world will become populated beyond any reasonable level. The invisible hand theory lacks any inherent limiting factors. Rather, it encourages people to maximize the satisfaction of their desires regardless of social consequences.<sup>74</sup>

C. Should Protection of the Quality of  
Life Limit Population Growth?

At this point it is appropriate to ask whether there are any overriding considerations, which promote the general interest of all mankind, which should be limiting factors on population growth. It is felt by many that the quality of life is much more important than the quantity. If the population continues to grow, governments will be less capable to provide basic services for the people. The overcrowding in the cities will increase and possibly along with it, crime, poverty, disease and pollution. Fewer people will be satisfied with their positions in life, thus riots, violence, and political upheaval may become more commonplace.<sup>75</sup> It appears the population levels will soon exceed the carrying capacity of the earth. Given a planet of finite land, water, and resources, continual population

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73. Id. at 1244.

74. In Legal Analysis, supra note 68, the issues are stated: "[w]hether, a policy which aimed to ensure complete freedom of choice for the individual couple deciding whether to have a child would result in an average fertility equaling the replacement goal" and "[w]hether, and to what degree, we should be willing to sacrifice some individual freedom of choice by instituting manipulative or overtly coercive regulation of reproductive behavior." Id. at 1869-70.

75. Falk, supra note 20, at 517.

growth will decrease the per capita share. Increasing economic development will create more pollution and compound existing environmental problems. These trends are interrelated, as emphasized by the UN position, and limits must be placed on both population and economic expansion if the quality of life is not to deteriorate. "Even if, as must soon happen, our American per capita consumption is reduced, the aggregate benefits to the rest of the world from our consumer restraint will be wholly or partially cancelled out by our own population increases."<sup>76</sup> The unwillingness of underdeveloped countries to accept the view of a finite world can largely be explained by their remoteness from environmental problems of the developed world. The realization of the developed world that growth must be curtailed is in the interests of the entire world community. Of course, problems exist as to the actual acceptance of a reduction of consumption.

The very fact of over-population will threaten the existence of human freedoms. "Population projections, and even present levels of population, are bound to imperil, if not negate, the attainment of almost every human right set forth in the Declaration of Human Rights ...."<sup>77</sup> It is believed over-population could jeopardize the exercise of Constitutional rights. First Amendment rights in particular are deemed essential for effective self-government but the need for regulation may become greater with overpopulation.<sup>78</sup> "As more and more people require space and resources on this planet, more and more rules and regulations are required to supervise individual use of the earth's resources for the common good."<sup>79</sup>

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76. Hollingsworth, A "Contingency Plan" of Economic Incentive to Limit U.S. Reproduction, 6 Env't'l Aff. 301, 304 (1978).
77. Falk, supra note 20, 517.
78. Legal Analysis, supra note 68, at 1907-09.
79. L. Brown, P. McGrath & B. Stokes, Twenty-Two Dimensions of the Population Problem, 5 Worldwatch Paper 76 (1976) [hereinafter cited as L. Brown, et al.].

There is a real need to distinguish the optimum from the maximum. The desire of individuals to maximize their own self-interests is not consistent with the search for optimal world levels of population and economic growth. Family planning alone is an insufficient means of curtailing world population growth because it does not consider the optimal size of society.<sup>80</sup>

In sum, population-induced scarcity makes 'muddling through' in a basically laissez-faire socio-economic system no longer tolerable or even possible. In a crowded world menaced by ecological stresses and resource scarcities, the only alternative to self-discipline in consumption and procreation may be a situation in which the grip of planning and social control will of necessity become more and more complete.<sup>81</sup>

#### D. What Other Positions Are There?

In light of the inadequacy of the UN position in dealing with the realities of our time, one must inquire what other positions there are which would be more receptive to the needs of the world's people.

In the Report of The Commission on Population Growth and the American Future,<sup>82</sup> three possible perspectives are outlined. First, the population problem is seen as the result of individuals being unable to control the number of children they have.<sup>83</sup> Thus education and access to birth control are needed to enable the individual to make an enlightened free choice.<sup>84</sup> This is basically the UN position and suffers from all the fallacies discussed earlier.<sup>85</sup> Second, the problem is viewed as a manifestation of the inequalities in our society.<sup>86</sup> Full legal equality and access to opportunities must be

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80. P. Ehrlich & A. Ehrlich, supra note 15, at 251.

81. L. Brown, et al., supra note 79, at 78.

82. Population and the American Future, supra note 10.

83. Id. at 13.

84. Id.

85. See notes 70-74, supra and accompanying text.

86. Population and the American Future, supra note 10, at 14.

made available to all groups. With a more equal socio-economic base, these people would have fewer children.<sup>87</sup> Many of the less developed countries hold this view. Under such a policy, however, a stable population level would not be reached within a reasonable length of time. In reaching the necessary state of development, the world's valuable resources will be exploited and the earth polluted. All in all, this solution by itself, is too slow and too dangerous. Social and economic equality must be complemented by other, carefully devised policies.

Lastly, the population problem is considered within the ecological framework.<sup>88</sup> This framework proposes the functional interdependence of man the environment. Human beings are only one part of the environment and must realize their place in it. Thus people can no longer act as conquerors of nature but must exercise husbandry towards the environment. The present and past reliance on technology has damaged the environment; the answer must be found elsewhere. To solve the population problem, a total recasting of the existing value system and its replacement with a non-growth ethic is needed. Only when a broader view of mankind is commonly held, and the relationships among all aspects of human and non-human existence are understood, will population growth subside.<sup>89</sup> This view is the only realistic one because it is based on the practical necessity of limiting population growth (hereinafter referred to as the Realist position). Although the implications of this position may seem very threatening to some people, the obstinance of its proponents is due to the belief that there is no other choice. Given the realities of the modern world, society must restructure itself to survive. By reevaluating the underlying premises of the existing society and restructuring them to fit the modern situation, the quality of life can be preserved. But all this must be qualified by the warning: "time is of the essence."

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87. Id.

88. Id. at 14.

89. Id.

There is no "convincing economic argument for continued national population growth. The health of our economy does not depend on it. The vitality of business does not depend on it. The welfare of the average person certainly does not depend on it."<sup>90</sup> On the other hand there are many arguments against it.<sup>91</sup> It is time to stop "upholding the myth that we can have full employment, continued population growth, a low rate of inflation, a continual rise in GNP and an incessantly increasing standard of living, all of this with ample resources and adequate protection for our environment."<sup>92</sup> In fact, "[t]he search for an ever-increasing standard of living is thus doomed by a finite world system."<sup>93</sup>

Merely to cope with the growing population is very risky, because eventually emergency measures will have to be employed. In the meantime, the population measures will have expanded and there will be little time and no margin for error. It is dangerous to adopt new technologies and procedures without adequate testing and evaluation.<sup>94</sup> Because most of the existing problems are in large part due to the world's blind faith in technology, any further total reliance would be an invitation to catastrophe. "What is clearly needed is less selfishness and a greater social conscience and awareness, for there most assuredly will be no technological miracle cure for the problems herein enunciated."<sup>95</sup>

"The overriding goal would seem to involve the search for balance between man and the finite resources and capacities of the global environment."<sup>96</sup> By acting now, the quality of life can be

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90. Id. at 41.

91. See notes 75-79, supra and accompanying text.

92. Economic and Population Growth, supra note 13, at 538.

93. Id. at 510.

94. Population and the American Future, supra note 10, at 50.

95. Economic and Population Growth, supra note 13, at 537-38.

96. Falk, supra note 20, at 520.

protected for future generations. "How we respond to the population threat may do more to shape the world in which they [our children and grandchildren] will live than anything else we do."<sup>97</sup> By transcending the present way of life, de-emphasizing the material aspects and rediscovering man's place in the world, the quality of life, in humanistic terms, may even be enhanced. "A new vision is needed - a vision that recognizes man's unity with nature, that transcends a simple economic definition of man's identity, and that seeks to promote the realization of the highest potential of our individual humanity."<sup>98</sup>

#### E. What Is The Role of Law?

After investigating possible views of the population question, one should consider the role of law in the population field and how law can help actualize the goals enunciated above. Luke Lee has defined population law as the "body of law which relates directly or indirectly to ... population growth and distribution and those aspects of well-being affecting, as well as affected by, population size and distribution."<sup>99</sup> The ultimate concern of population law is human rights. Family planning is not an end in itself, but only a means of achieving basic human rights for people.<sup>100</sup> "As a basic human right, family planning derives its strength and authority from the United Nations as a forum for the proclamation of what might be called modern natural law."<sup>101</sup> The dominant theme of natural law is

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97. L. Brown, et al., supra note 79, at 80.

98. Population and the American Future, supra note 10, at 14.

99. Legal Implications, supra note 4, at 337.

100. Id. at 383.

101. Gross, Family Planning As a Human Right: Some Juris-prudential Reflections on Natural Rights and Positive Law, Human Rights and Population 25, 26 (Proceedings of the Second Annual Meeting of the Int'l Advisory Committee on Population and Law), 5 Law & Population Book Series (1973).

that it is derived from human nature and is valid for all people, at all times, in all places.<sup>102</sup>

Natural law has been seen as an ideal with a changing content,<sup>103</sup> or as a universal proposition manifesting itself in different forms according to the specific conditions and needs of society. Natural law affects positive law in three interrelated ways. First, it is a source of positive law by comprising the precepts to be incorporated into the positive law.<sup>104</sup> Second, it is a censor by challenging positive law which conflicts with it, thereby testing the social justice of the positive law.<sup>105</sup> Third and most important, natural law is a principle of action by encouraging the modification of positive law to conform with natural law ideals.<sup>106</sup> Natural law itself has no objective existence; it is only a guide by which laws can be assessed as fair and just. The UN attempts to follow a natural law approach by upholding certain principles and continually appealing to member states to strike down laws not in conformance with these principles and adopt new ones befitting the natural law concepts. In fact, Lee feels that most important feature of the Bucharest Conference was its calling for each participating country to review its laws bearing directly and indirectly on population and to reform its laws to better actualize population-related human rights.<sup>107</sup>

In addition to the UN charter and documents encompassing natural law, many national constitutions are framed in natural law. Thus it is proper for each country to reevaluate its laws in light of these general principles according to its specific needs and circumstances.

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102. Id.  
 103. Id. at 28.  
 104. Id. at 29.  
 105. Id. at 30.  
 106. Id. at 31.  
 107. Legal Implications, supra note 4, at 375.

"[I]n view of the limited amount of available resources, each country must construct its own lists of priorities from the competing demands of ... rights in the light of each country's own socio-economic conditions and needs."<sup>108</sup>

It is crucial that natural law be viewed as vehicle for change. Natural law does not uphold any particular formulation as being absolutely right, rather it requires the positive law to change with the times in order to best serve mankind. "When one considers the relationship between law and demographic evolution, the first thing that strikes him is the inconsistency between the law and present day conditions and, at the same time, the failure to adopt present laws to the existing situations as a means of positive action in the field of demographic evolution."<sup>109</sup> Understood this way, the Realist view of the population problem does not appear threatening or alarmist. It is merely serving the requirements of the natural law in seeking coordination of positive law with the practical realities. The UN position, on the other hand, does not fully comply with natural law by encouraging the adoption of methods which no longer serve the needs of mankind and are therefore dangerous. "The time may well have come when the United Nations should review its methods in the pursuit of the ideal of human rights generally and the right to family planning in particular."<sup>110</sup>

It is often asked whether the human rights espoused in UN documents have legal or simply moral import.<sup>111</sup> Although most people declare, in accordance with the UN charter, that these are not

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108. Id. at 388-89.

109. Paraiso, Legislation and Demographic Changes, 7 Colum. Human Rights L. Rev. 56, 59 (1975).

110. Gross, supra note 101, at 32.

111. UNFPA, Law and Population, 2 Population Profiles 10 (1976); Legal Implications, supra note 4, at 383.

legally binding until in treaty form and properly ratified or properly enacted by the state itself, some legal scholars would consider this elevating form over substance, especially in the human rights area, where legal concepts evolve from natural law, customary international law and other widely recognized general principles of law.<sup>112</sup> Since human rights often provide the foundation for a law, the rights gain legal import by a type of estoppel.<sup>113</sup> "Since 'right' and 'duty' are two sides of the same coin, acceptance of human rights entails a corresponding duty not only to refrain from activities which would impede the exercise of the right but to undertake positive measures to aid in the attainment of such rights."<sup>114</sup> Thus, by adopting human rights as the basis for its laws, a country undertakes a legal duty to uphold those rights.

Positive law is an indispensable element of a meaningful population policy as it reflects, refines, and coordinates the policy, as well as enforces it.<sup>115</sup> The law is one of the most effective means of implementing a policy.<sup>116</sup>

A law can be classified by form, purpose, and effect.<sup>117</sup> There are laws in positive form, such as one permitting voluntary sterilization, and those negative form, for example an anti-abortion statute.<sup>118</sup> The purpose of population laws are either to provide incentives, which tend to encourage population growth, or to prevent population growth through disincentives. Most commonly, laws are classified

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112. Legal Implications, supra note 4, at 384-85. This comment will not consider the effect of customary or conventional international law on human rights.

113. UNFPA, supra note 111, at 11.

114. Legal Implications, supra note 4, at 386.

115. Id. at 383.

116. Paraiso, supra note 109, at 58.

117. Id. at 60.

118. Id. at 61.

by their effect, direct or indirect, on population growth. Laws with direct effect are enacted for the specific purpose of dealing with population growth.<sup>119</sup> Examples are laws concerning contraception, sterilization, and abortion.<sup>120</sup> On the other hand, there are laws which are not intended to affect demographics but, in fact, do so indirectly.<sup>121</sup> These include laws dealing with obscenity, old age security, marriage age, polygamy, extended family, child allowances, employment of women, child labor, housing, education, medical practices, customs, taxes, migration, land tenure, and inheritance.<sup>122</sup> It becomes obvious that the most popular population laws are those with indirect effects, whether positive or negative, incentive or disincentive. Many countries have contradictory laws creating inconsistent effects on their demographic structure. This is mostly due to the failure to adequately consider the effects, short or long range, the law will have on population trends. It is essential for states to adopt well formulated, comprehensive population policies, under which their laws can be evaluated.

#### F. What Policies Are Possible?

Finally, one must ask what types of policies can be implemented and whether these policies are acceptable in light of the duty to protect the human rights declared by the United Nations and the realities of the modern world. The types of policies chosen depend on many factors, of which human rights is only one consideration. Other important elements include socio-economic development; literacy rate and receptiveness to education; population structure, both age and distribution of people; political, cultural, and religious influences and traditions; public opinion; available resources, data, and personnel; and so on. On the other hand, the policies themselves affect many

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119. Id. at 60.

120. Legal Implications, supra note 4, at 377.

121. Paraiso, supra note 109, at 60.

122. Legal Implications, supra note 4, at 377-78.

different areas. For example, a campaign for family planning education and clinics requires trained personnel as well as money; a plan to encourage less migration to the cities may affect economic development. The Population Council of the UN has suggested criteria to evaluate different control policies. These include technical, political, administrative, and economic feasibility, ethical acceptability, and effectiveness.<sup>123</sup> Thus, it is crucial that these policies be chosen after full consideration of the effects they will have both in the long and short run. This is clearly an area where the UN can assist countries in their original decisions by supplying information as to possible policies and their potential effects.<sup>124</sup> It is essential for governments to recognize the interdependence of all the above factors and to follow an interdisciplinary approach in its decision making processes.<sup>125</sup>

#### 1. Policies With Direct Effect On Population Growth.

##### a. Contraception

Most countries have not banned the use of contraceptives, but some have in effect prohibited their use through laws against publicity, manufacture, sale, importation, use of mails, and advertising.<sup>126</sup> Laws requiring sales to be made in pharmacies limit access to contraceptives for people in rural areas. However, most

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123. P. Ehrlich & A. Ehrlich, supra note 15, at 250.

124. Study Committee of the Office of the Foreign Secretary, National Academy of Sciences, Rapid Population Growth: Consequences and Policy Implications 97 (1971) [hereinafter cited as Rapid Population Growth].

125. Id.

126. Kellogg, Reform of Laws Affecting Population Growth: Recent Developments, 10 J. Int'l L. & Econ. 1, 2-3 (1975).

governments, India's for example,<sup>127</sup> do not enforce these laws and even distribute contraceptives themselves through family planning services.<sup>128</sup> The importation barriers are serious for LDC's which have not established their own contraceptive industries.<sup>129</sup> Overall, these laws present serious obstacles to achieving any effective birth control program. It is widely believed that removal of all direct barriers to birth control must be the first step towards an effective policy.<sup>130</sup>

#### b. Voluntary Sterilization

Until recently, voluntary sterilization was very unpopular. Therefore, the prohibitive laws in this area are modern. In the absence of a specific statutory prohibition, sterilization is dealt with under general tort principles. The UN in its Second International Convention on Voluntary Sterilization in 1973 declared the right to voluntary sterilization is viewed as part of the right of family planning.<sup>131</sup> Since then the trend in the United States has been to liberalize these laws.<sup>132</sup>

#### c. Abortion

Although most civilizations have dealt with abortion, by the mid-1800's most countries had made it a crime. There have been eight different statutory schemes dealing with abortion.<sup>133</sup> The most

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127. Singh, supra note 18, at 107. The Indian government employs the "cafeteria" approach by leaving the actual choice of birth control method to the individual. Id.
128. Kellogg, supra note 126, at 5.
129. Id. at 6.
130. See Population and the American Future, supra note 10, at 99.
131. Kellogg, supra note 126, at 8-10.
132. See Population and the American Future, supra note 10, at 101.
133. Kellogg, supra note 126, at 11-13. From most to least restrictive: (1) totally prohibited; (2) permitted to save woman's life; (3) permitted if woman's health is threatened; (4) permitted if pregnancy is the result of rape or incest; (5) permitted if fetus will be born defective; (6) permitted for mental health and economic reasons; (7) permitted for protection of a woman's reputation; and, (8) permitted if woman is within a certain age group.

populous nations—the USA, the USSR, China, India, and Japan—all have fairly liberal abortion laws.<sup>134</sup> In general, there may be religious moral objections to abortion, but it should be made available as an alternative method of family planning.<sup>135</sup>

The Plan of Action does not specifically refer to any of the above direct methods of birth control, but instead deals with family planning as a whole and encourages each country to choose the policies best suited to their needs.<sup>136</sup> The UN and Realist positions would not be at odds here, as advocates of both would encourage liberalization of laws in the above areas. UN proponents feel that real freedom of choice necessitates availability of the options. Realists would encourage such methods because their overall effect is to reduce population growth without violating human rights. Thus, no real conflict exists here.

## 2. Policies With Indirect Effect on Population Growth

These policies are of major concern in the population field today. This is mainly due to the past ignorance of the effect of such laws on population trends. Now that this interrelationship is recognized, emphasis is placed on finding the policy which will produce the desired result in terms of population. This is the area in which the UN has come out most strongly and has been most helpful. Again, the UN generally does not advocate specific policies, but leaves the decision to the sovereign State.<sup>137</sup>

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134. Id. at 13.

135. See Population and the American Future, supra note 10, at 104.

136. Plan of Action, supra note 35 at paras. 14, 28, 97.

137. Id.

a. Raising the Minimum Age for Marriage.

It is believed, by raising the minimum age for marriage, many births could be prevented because the childbearing years of a married woman would be reduced. However, this will only effect those births to young married women who would not have children otherwise, but will not prevent births to unmarried women.<sup>138</sup> Thus, this alone is clearly of limited use for lowering fertility levels, but may have greater impact if used in conjunction with other indirect policies.<sup>139</sup> However, the more important effect of this would be to encourage family stability and reduce the divorce rate,<sup>140</sup> which in turn should promote more efficient family planning.

This is one approach which the Plan of Action specifically encourages,<sup>141</sup> and it is likely that through regional and national programs minimum ages will be set which are appropriate for the area. Taking the United States as an example, there should be no constitutional impediment. Although marriage is a fundamental right, it is possible that environment concerns would be deemed a compelling state interest.<sup>142</sup> Because changing an age limit does not prohibit marriage, but rather only affects those who might now be under the legal age, it is likely the law would be considered in the category of age discrimination. Thus, the change might be upheld on the rational basis test alone. Since states already have minimum age requirements, to change the age limit the state need only show a rational basis, which environmental concerns would most probably be.<sup>143</sup> Therefore, this proposal appears both desirable to and practicable for all positions.

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138. Barnett, supra note 6, at 368.

139. Id.

140. Id. at 366-67.

141. Plan of Action, supra note 35 at para. 32(f).

142. Barnett, supra note 6, at 370.

143. Id.

### b. Sex Education

Sex education appears to be singularly the most popular indirect method of affecting fertility rates. This general heading includes education for children in the school systems, and education for parents relating to the care of children, nutrition and health, costs of raising a family, and family life. Also, general knowledge of demographic trends and effects is desirable.<sup>144</sup> "The object is to promote knowledge and understanding of population phenomena within the framework of economic, social and cultural development."<sup>145</sup>

In its statement to the Bucharest Conference, UNESCO proposed action at both the national and international levels. Suggested were: (1) innovation and renovation of formal educational systems; (2) expansion of adult education through formal education, mass and traditional folk media, and industrial and commercial establishments; (3) promotion of research on attitudes and behavior of people in the population and human rights areas; (4) development of courses, methods and techniques of population education at all levels and for different groups; and, (5) education and training of teachers.<sup>146</sup> The Plan of Action adopted most of these proposals, and generally advocated formal and nonformal education programs in all population related fields.<sup>147</sup> In fact, the main theme of the World Population Plan of Action deals with education, as it is believed to be the best means for achieving individual choice regarding family planning. However as previously discussed, reliance must not be placed solely on educational methods. Mass education is essential for human freedom to exist while population policies are in effect. The aggregation of individual decisions does not ensure that

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144. Population and the American Future, supra note 10, at 79-80.

145. UNESCO, supra note 29, at 432.

146. Id. at 433.

147. Plan of Action, supra note 35, at paras. 15(h), 29(b), 29(g), 32 (d), 33, 71, 72-77 (promotion of knowledge and policies); 78-80 (research); 81-93 (management, training, education and information).

the overall desired results will occur. Thus, other means of affecting population growth must be implemented at the same time to ensure that the demographic goals of the country are attained.

c. Women's Rights

Women's rights are inextricably linked with sex education. Much of the work done to raise the status of women is accomplished through education. By changing the view of women, held by both sexes, from the traditional role of homemaker and mother, and providing a wider range of activities for women, the rate of child births is likely to drop. In fact, demographic conditions, as compared with economic conditions, stage of development, social and cultural beliefs and governmental actions, play a small role in determining the position of women in the family and society.<sup>148</sup> The birth rate, however, may be greatly affected by any change in women's status.<sup>149</sup>

This is another area specifically dealt with in the Plan of Action.<sup>150</sup> Realists would support the UN proposal because the result would be a lowering of the fertility rate. However, they would warn that programs to improve women's status and promote equality should not proceed without careful evaluation. The end result should not be to merely create men out of women by giving them equality of opportunity. That would only serve to aggravate the overall situation and increase the tragedy of the commons because although population growth might slow down, industrial growth might increase immensely. This alone would create such an environmental crisis and degradation of human life that the overall world situation would not be more hopeful than if women remained in their present position and population growth threatened the quality of life. The result of raising women's status should be a

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148. United Nations Secretariat, Women's Rights and Fertility, 2 The Population Debate: Dimensions and Perspectives 370,380 (1974).

149. Id. at 381.

150. Plan of Action, supra note 35, at paras. 14(h), 15(e), 32(b), 41 (a)-(d), 42, 43.

a transcendence of the growth ethic society, in order to preserve the quality of life and promote genuine freedom.

d. Fees for Education

This proposal would change the present American system of funding education to one in which parents would bear all or most of the costs of educating their children.<sup>151</sup> This could operate only under the following assumptions: (1) that school is compulsory until sixteen or seventeen,<sup>152</sup> so that parents would not try to avoid the tax by taking their children out of school; (2) that the government would subsidize indigent children,<sup>153</sup> so that education could not be denied on basis of poverty; and, (3) that the change would only be imposed on children born after the plan took effect,<sup>154</sup> because it could be a deterrent only after enactment. Larry Barnett concludes this plan would be constitutional since education is not deemed a fundamental right,<sup>155</sup> and regulation of taxing is subject to the rational basis test.<sup>156</sup> However, for the plan to be effective, it must be instituted nationwide. The federal government may lack the power to force states to adopt this plan because education has traditionally been considered a state governmental service.<sup>157</sup>

Although theoretically this plan seems acceptable, for it does not violate any human rights, it is questionable how realistic it is. In the United States, concerted action would be needed, and in view of the past instances where uniform legislation was required, it is highly

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151. Barnett, supra note 6, at 360.

152. Id. at 361.

153. Id.

154. Id.

155. Id. at 363 (construing *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973)).

156. Id. at 364.

157. Id. at 365 (construing *Nat'l League of Cities v. Usury*, 426 U.S. 833 (1976)),

unlikely that all states would adopt any proposal. Other developed countries with different governmental division could possibly enact such a plan. It would probably have little success in LDC's where the government would have to subsidize most of the cost in any case. In most areas the quality of education would probably decline. In addition, it is unclear as to what results it would have on population growth. Most likely, the effect would be minimal. Thus reliance should not be placed on this type of plan, but it could be used to complement other, more effective policies and to maintain a consistent approach to the population problem.

e. Limiting Housing Space

By providing a smaller living space to young couples, their desire for children would lessen. This appears to have a definite effect on reducing fertility.<sup>158</sup> Such a concept is connected with land use planning and would provide greater land space for agriculture and recreation.<sup>159</sup> Although there have been no real attempts in this area in the US, both state and federal governments have authority over housing and could probably regulate living space—state governments under their zoning and police powers, and the federal government under the commerce power.<sup>160</sup> Such an approach has been used in other countries, for example Singapore.<sup>161</sup>

Disincentives of this type would probably be encouraged by the Realists because they would, in addition to reducing population growth, favorably affect the environment and better use scarce resources. On the other hand, this would probably be challenged by UN advocates on the ground that it restricts human freedom. The Plan of Action states that family size may be affected by incentives and disincentives, but that they must not violate human rights.<sup>162</sup> Thus, although this plan appears both practical and feasible it is likely to induce much

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158. Id. at 374.

159. Id.

160. Id. at 376-77.

161. Chacko, Some Considerations of Incentives and Disincentives in the Promotion of Family Planning: India's Experience, 7 Colum. Human Rights L. Rev. 46, 53 (1975) [hereinafter cited as Incentives and Disincentives].

162. Plan of Action, supra note 35, at para. 34.

negative reaction. However, acceptance of such a plan might come about as a result of population education.<sup>163</sup>

f. Family Size Restrictions for Government Employees

Restricting the family size of government employees is considered in countries with a large public sector, because the overall effect on fertility would be great.<sup>164</sup> However, such a plan would probably violate the US Constitution on due process or equal protection grounds.<sup>165</sup> Because these restrictions only affect government employees, a separate class with different treatment is created. A fundamental right to choose the size of family may also be involved. There is no rational relationship between family size and the qualifications required for a particular job. However, some Indian states have employed this method and restricted social benefits to government employees with more than three children.<sup>166</sup>

Overall, this policy does not seem very desirable. It is not advisable to single out government employees. The result of such a program would more likely be to discourage people from working for the government rather than to induce people in the private sector to reduce their desired family size. Any such plan runs the risk of exploiting the poor.<sup>167</sup> The overall effect on morale would not be beneficial. The UN would discourage such programs because they violate the human right to freely choose the family size.<sup>168</sup>

g. Cash Incentives

Cash payments have generally been used to promote voluntary sterilization in India. However, there is limited acceptance of these payments by the propole because they do not understand their purpose.<sup>169</sup>

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163. See note 70, supra and accompanying text.

164. Barnett, supra note 6, at 378.

165. Id. at 379.

166. Incentives and Disincentives, supra note 161, at 48.

167. Id. at 49.

168. Plan of Action, supra note 35, at para. 34.

169. Incentives and Disincentives, supra note 161, at 48.

Such programs have been caught between two arguments. Given the serious living conditions in India, incentives should be employed to reduce the population growth.<sup>170</sup> On the other hand, cash payments are viewed as primarily exploitive of the poor people and a crude device.<sup>171</sup> What most people fail to realize is that the governments are not paying the people to be sterilized, but are compensating them for lost work and other effects due to the voluntary sterilization.<sup>172</sup> But the point is well taken that without knowledge and understanding of the program, the choice may not be a voluntary one. Presently, the Indian government is trying to encourage private businesses to provide cash incentives for their employees to be sterilized in return for favorable tax treatment.<sup>173</sup> But employers are hesitant to introduce such plans, unsure of their acceptance and success. "[B]usiness motivation may be derived more from a desire to avoid incurring unbeneficial costs rather than from a desire to make a profit out of family planning activities."<sup>174</sup>

Acceptance of such a program is highly unlikely. Probably, a plan to encourage sterilization would be viewed as a last resort by most countries, regardless of position. Unfortunately, the program in India received a considerable amount of bad publicity, but this was primarily due to administrative inefficiencies and insufficient education in conjunction with the sterilization. This type of birth control should not be taken lightly since it is the only truly irreversible method, aside from abortion, which is only irreversible as to the fetus involved. Although human rights proponents would argue strongly against cash incentives, with the proper understanding these programs may become more acceptable to the general public.

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170. Id.

171. Id.

172. Id. at 49.

173. Id.

174. Id. at 50.

#### h. No Birth-Bonus

This program is closely related to the cash incentives discussed above. India uses the no birth-bonus as a type of deferred incentive by paying wage-incentive bonuses to women workers not having children. The plantations fund the program as part of a comprehensive labor welfare program.<sup>175</sup> This approach appears much more successful than cash incentives because it caters to the desire and need for long term welfare rather than an immediate increase of cash. It also tends to improve the quality of life for the workers and their families by increasing their capabilities to care for themselves both in the present and the future.<sup>176</sup>

The UN position would probably accept this type of incentive because it does not violate any human rights.<sup>177</sup> The choice is left totally to the woman, although the incentive is provided to make the alternative of having less children more attractive. This seems perfectly legitimate, and also quite practical. Although it may seem ideal for everyone to have as many children as they wish, people have to eat. For those who are likely to have difficulties supporting themselves, a reasonable alternative is to have less children to have more per capita. The plan is not exploitive of the poor, but aimed at raising their socio-economic level. The fact that more affluent people may not be influenced by the program is of little consequence because the more affluent seem to have less children anyway. Such a program may help to redistribute income and raise the overall quality of life.

#### i. Other Financial Incentives and Disincentives

These include such programs, used in Canada and Europe, as family allowances, which allocate a set amount of money for each additional

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175. Id. at 51.

176. Id.

177. Plan of Action, supra note 35, at para. 34.

child.<sup>178</sup> It is argued that the use of family allowances has not increased population growth, but if the goal is to reduce fertility, a disincentive would be much more effective.<sup>179</sup> Other possibilities would be to alter the social security system to provide payments for childless women, or larger awards for people with less children.<sup>180</sup> Also, welfare payments could be readjusted to provide less per capita the larger the family.<sup>181</sup> These disincentives are not desirable solutions because they would only make it harder for poor people to survive. The larger the family, the more money that is needed. More equitable means of discouraging fertility must be found so that the poor and the aged do not suffer unjustly. The UN would not advocate such a plan on a global level, because the distribution of income would become increasingly concentrated in the hands of the developed states. Thus, it is reasonable to infer they would not accept a similar proposal on a national scale.

#### j. Tax Incentives and Disincentives

Tax incentives and disincentives is the main approach considered in the United States. Many proposals have been made in the tax area in connection with reducing population growth. The Packwood Plan suggested elimination of personal exemptions for families with more than two children.<sup>182</sup> However, since most families have only two children, and those with more than two tend to be poor or non-white, the effect of the plan is questionable. This plan appears not to have a large impact

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178. Rabin, Population Control Through Incentives, 23 *Hastings L.J.* 1353, 1364-65 (1972).

179. Id. at 1365.

180. Id. at 1392.

181. Id. at 1395-98. See generally Dandridge v. Williams, 397 U.S. 471 (1970) and the discussion of this case in Legal Analysis, supra note 68.

182. Id. at 1366.

on fertility, but to disproportionately burden lower income families.<sup>183</sup>  
 Another idea was to completely abolish the exemption for children.<sup>184</sup>  
 This would affect all people on its face, but again would place a  
 greater strain on lower income groups. Probably the long range effect  
 would be to reduce population growth as the economic burden of large  
 families became too great.<sup>185</sup> A compromise plan was devised which would  
 permit no exemption for the first three children, and moderate exemptions  
 for additional children.<sup>186</sup> This is not expected to encourage large  
 families, because the tax benefits of the fourth child would be negligible  
 and large families are generally unpopular, but is more equitable.<sup>187</sup>  
 Another alternative dealt with tax surcharges on children. Here there  
 would be a different tax rate for childless couples, and those with  
 children, or alternatively, those with two or less children and those  
 with more than two.<sup>188</sup>

Some of these ideas have been combined into a "contingency plan"  
 which would "let parents with above average incomes pay an annual  
 premium or tax according to how many children they produce and let  
 persons with below average incomes be paid an annual subsidy according  
 to how few children they produce."<sup>189</sup> Payments to all women would  
 commence upon reaching eighteen or some other specific age.<sup>190</sup> A  
 woman of above average income would only pay a premium for children  
 born after implementation,<sup>191</sup> and then would be taxed a percentage  
 of her income<sup>192</sup> for her entire life, unless the death of

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183. Id. at 1367.

184. Id.

185. Id. at 1368.

186. Id.

187. Id. at 1369.

188. Id. at 1370.

189. Hollingsworth, supra note 76, at 312.

190. Id. at 316.

191. Id. at 314.

192. Id. at 317.

her child cut off her tax liability with respect to that child.<sup>193</sup> A woman of below average income would receive a percentage of her income as a subsidy,<sup>194</sup> which would be reduced by each child she had throughout her entire lifetime.<sup>195</sup> However, since women could not be taxed fairly as to children conceived before implementation, but women without children would, immediately upon adoption, receive subsidies to deter them from having children, the plan would be extremely expensive to institute. If the assumption that both income groups would develop similar fertility rates and patterns is true, the plan would become self-supporting after the first ten to twenty years, and even produce profits to offset the expenses incurred during the first two decades.<sup>196</sup> But if lower income women continue to have more children than upper income females, the plan would be an economic failure. A method would have to be devised to set the subsidies and premiums at levels which would balance each other and also serve to reduce population growth.<sup>197</sup> Another drawback is that, because of the monetary consequences, many accidental or unwanted pregnancies will be aborted. It would be better to encourage use of contraceptives and wise family planning. This plan probably would not be sufficient by itself,<sup>198</sup> and would require complementary birth control programs.

Theoretically, this plan is quite attractive because it uses incentives and disincentives but does not violate any human rights,<sup>199</sup> as each woman makes the choice of family size. However, the practical difficulties in implementing the "contingency plan" are numerous, as even the author recognizes.<sup>200</sup> On closer examination, the internal

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193. Id. at 321.

194. Id. at 319.

195. Id. at 320-21

196. Id. at 323.

197. Id. at 340.

198. Id. at 343.

199. Plan of Action, supra note 35, at para. 34.

200. Hollingsworth, supra note 76, at 339-43.

weakness of the plan becomes obvious. This plan operates on the assumption that people should be able to make the final decision on how many children they want, and that monetary rewards can be used as a type of bribe. In reality, all materially oriented schemes will only serve to reduce the birth rate if people remain selfish and greedy in seeking more for themselves.

In the LDC's such plans are not practical because people have too little to be able to sacrifice for a child. As a result, this type of plan will not change people's perception of the world situation and promote a non-growth ethic. It will encourage the presently common concept of buying everything and reducing life to material terms. These monetary incentives and disincentives will not clearly effect a long range change in attitude, but will only temporarily reduce population growth. People will eventually have to face the realities of the times, and the sooner they do, the smoother change will be.

In the developed countries, with fairly low birth rates, the emphasis must be placed on less consumption and waste, which monetary proposals do not do. In the less developed areas, where the situation is more acute, temporary incentives, if not discriminatory, may be helpful in alleviating the potential population crisis.

### 3. A Proposal For America

It would seem as though most of the devices considered by Americans to reduce population growth do not get to the center of the issue. However, in the report made by the Commission on Population Growth and the American Future,<sup>201</sup> a very realistic approach was taken. The basic theme was to substitute quality for quantity.<sup>202</sup> Although monetary incentives were discussed, they were related to proper use of the environment and resources. It was noted, however, that most monetary inducements actually create more waste and pollution,<sup>203</sup> and were deemed to be very undesirable. The Commission realized a long

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201. Population and the American Future, supra note 10.

202. Id. at 13.

203. Id. at 52.

term approach is required, with new technologies and new procedures to replace the current short-sightedness of business and government.<sup>204</sup>

"We need to study our social, political, and economic institutions with a view towards recommending modifications that will reduce the discrepancy between the private and the public interest."<sup>205</sup>

The Commission urged reform of government because as population grows, need for basic services will increase.<sup>206</sup> Presently, the system is inadequate and will not be able to deal with the increasing demands. Also, citizens feel estranged and alienated from the government.<sup>207</sup>

Reform is needed regardless of population growth, but may be essential due to it.

Thus, the Commission recommended extensive population education of all types and for all people be adopted.<sup>208</sup> They also recommended that: all existing legal barriers to contraceptives be eliminated,<sup>209</sup> states enact laws to assure that "all persons have ready and practicable access to contraceptive information, procedures and supplies";<sup>210</sup> such information and services be available to minors;<sup>211</sup> all restrictions against voluntary sterilization be removed;<sup>212</sup> and, abortion laws be liberalized.<sup>213</sup> In addition, research in reproductive biology and birth control methods was recommended.<sup>214.</sup>

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204. Id. at 53.

205. Id.

206. Id. at 61.

207. Id.

208. Id. at 79-80. See note 144, supra and accompanying text.

209. Id. at 99. See note 130, supra and accompanying text.

210. Id.

211. Id. at 100.

212. Id. at 101. See note 132, supra and accompanying text.

213. Id. at 104. See note 135, supra and accompanying text.

214. Id. at 106.

It was argued that the most preferable course would be one which "minimizes fluctuations in the number of births, minimizes further growth of population; minimizes the change required in reproductive habits and provides adequate time for such changes to be adopted and maximizes variety and choice in life styles, while minimizing pressures for conformity."<sup>215</sup> There are factors weighing both for and against such policies being adopted,<sup>216</sup> but there is little choice involved.

The federal government must be better equipped to deal with population matters, thus it was suggested that a Department of Community Development be established to research the factors of population growth and economic development,<sup>217</sup> and an Office of Population Growth and Distribution be formed within the executive branch,<sup>218</sup> as well as adding population experts to the staffs of other related governmental offices and agencies.<sup>219</sup> The legislative branch, as well, should set up a joint committee in this area.<sup>220</sup> State governments should adopt similar plans.<sup>221</sup> Lastly, private efforts in reducing population growth were strongly encouraged.<sup>222</sup> It cannot be emphasized enough that these recommendations must all be acted upon, and the sooner the better. A comprehensive policy must be enacted, dealing with all population related aspects. Only a strong, whole-hearted effort will provide the people, now and to come, with the best life possible.

#### 4. A Proposal For the World

The Study Committee of the Office of the Foreign Secretary conducted by the National Academy of the Sciences in 1971, announced many broad recommendations<sup>223</sup> quite similar to those in the World Population Plan

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215. Id. at 111.

216. Id. at 112-13.

217. Id. at 138.

218. Id. at 139.

219. Id.

220. Id.

221. Id. at 140.

222. Id.

223. Rapid Population Growth, supra note 124.

of Action. They believed each person should have the freedom to determine their family size, by having access to information and services,<sup>224</sup> that each country should implement policies best suited for its particular situation,<sup>225</sup> and that an interdisciplinary approach should be taken.<sup>226</sup> They also discussed the desirability of reducing growth, death, and birth rates,<sup>227</sup> with an overall trend towards smaller families.<sup>228</sup>

The Committee argued that long term assistance for the LDC's would be needed,<sup>229</sup> and that the UN could be instrumental in guiding countries to set appropriate goals and policies and aiding in international interchange and cooperation.<sup>230</sup> They suggested the establishment of an international research center which would aid countries in understanding the many facets of the population issue and allow for global exchange of information.<sup>231</sup>

Although these proposals closely resemble the noncommittal Plan of Action, they cannot be altogether condemned. The recognition of the problem exists. The fear is that policies chosen to deal with the problem will infringe upon human rights. Short-range policies will more likely than not aggravate the situation by postponing the eventual confrontation between the systems and the facts surrounding them. The issue comes down to one of priorities. The time has come for a reevaluation of the priorities of the existing systems in light of the present realities.

#### V. CONCLUSION

The UN position, as evaluated in this paper, is not satisfactory for dealing with the population problem. Stronger action, more in keeping with the present global situation, is needed. "At present,

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224. Id. at 93.  
 225. Id. at 93-94.  
 226. Id. at 96-97.  
 227. Id. at 95.  
 228. Id. at 96.  
 229. Id. at 97.  
 230. Id. at 98.  
 231. Id. at 99.

aspirational goals are not formulated in a manner that is responsive to these concerns."<sup>232</sup> The UN has continuously avoided the critical issues and masks the problem under a heading of inalienable rights.<sup>233</sup> The right to freely and responsibly determine family size is not enough to solve our population problem. Family size must be limited.<sup>234</sup> The world situation requires population policies which will reduce the number of inhabitants to a manageable level and maintain that level. These policies must hold the quality of life, measured in humanistic terms, above material and quantitative standards. To reach such a point and continue to exist in harmony with the environment, people must develop a social conscience. This will enable them to think in broader terms and base decisions on the present and future effects as well as taking an interdisciplinary approach to life.

However, the problem with the UN position is not one inherent in it, but rather due to the inadequacies of the present stance in light of the modern realities. The UN, as the leading international organization, and a proponent of natural law, should critically review its present position. Natural law must serve its function as source, censor and principle of action.<sup>235</sup> One particular manifestation of natural law is no more "right" than another in universal terms. However, only one form will be correct for any given situation. The present human rights position of the UN is incongruous with the global circumstances, and a more realistic approach is needed.

The crucial point which must be understood is that the correct embodiment of natural law cannot, by its own definition, violate the principles of natural law. If the realities of the time are used as a guide, natural law will ensure protection of the human rights most appropriate to it. The UN position is quickly becoming antiquated. The right to

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232. Falk, supra note 20, at 519.

233. Id.

234. Id.

235. Gross, supra note 101, at 29-32. See text surrounding notes 104-106, supra and accompanying text.

determine family size stems from the industrial revolution, expansionism, and development of the twentieth century when people had no concept of scarcity. If the right to freely decide family size is no longer deemed to be absolute, and the population levels are reduced in accordance with global needs, new human rights and freedoms may emerge which can be better actualized within that social framework. This must be a continuous process through which natural law can ensure the best for people in any given time. What is needed now may well be inadequate or inappropriate in a century. The process is the same, only the results change. In order for human freedom to exist in some form at all times, it must not be given one shape and labeled the "Absolute Truth" but must be permitted to manifest itself in accordance with the human needs in each situation. Thus, the current definition of freedom to choose family size must be replaced with new freedoms which enhance the quality of life in humanistic terms.

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