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I. INTRODUCTION

Barring the sudden extinction of our species by a global catastrophe, the most pressing single problem facing mankind is an uncontrolled population explosion.[1] For geneticists there are, in fact, two overlapping population problems: the quantity of life and the quality of life. If the quality of the gene pool or the environment declines, there will be increased human suffering even if there are fewer people; life, liberty and the pursuit of happiness will be unrealizable goals. In addition, if the quantity of people continues to increase, the quality of life will diminish correspondingly and the goals of our society will be similarly inaccessible.

II. THE RIGHT TO PROCREATE

Our government and society have an interest in limiting the growth of this country's population in order to maintain a high quality of life. The interest of the country as a whole, however, must give way to those individual rights that are afforded to all citizens by the Constitution. Among these is the right to conceive and raise one's children, which has been held by the United States Supreme Court to be "essential,"[2] and "far more precious . . . than property rights."[3] In *Skinner v. Oklahoma ex rel. Williamson*[4] the Supreme Court found the interest in procreation to be "fundamental,"[5] among "the basic civil rights of man"[6] and within the reach of the equal protection clause of the fourteenth amendment.[7]

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1. Inadequate food supplies and energy depletion are secondary problems resulting from overpopulation.
2. Meyer v. Nebraska, 262 U.S. 390, 399 (1922).
3. May v. Anderson, 345 U.S. 528, 533 (1953).
4. 316 U.S. 535 (1942).
5. *Id.* at 541.
6. *Id.*; *accord*, Grissom v. Dade County, 295 So. 2d 59, 62 (Fla. 1974).
7. 316 U.S. at 541. But Justice Marshall, dissenting in a later opinion, disagreed,

The right to reproduce has, in the past, been considered primarily within the marital setting.[8] For example, the Court stated in *Skinner* that "[m]arriage and procreation are fundamental to the very existence and survival of the race,"[9] and in *Meyer v. Nebraska*[10] that "the liberty guaranteed . . . by the Fourteenth Amendment . . . denotes . . . the right . . . to marry, establish a home and bring up children . . . ."[11] Within the past decade, however, the Court has made it clear that rights based on family relationships continue to exist although those relationships have not been legitimized by a marriage ceremony.[12]

In addition, any time certain classes of individuals are prohibited or discouraged from reproducing, the statute or regulation imposing that limitation is subject to strict scrutiny under the equal protection clause in order to prevent invidious discrimination. Prohibitions based on racial classifications are inherently suspect;[13] classifications based on sex have also been struck down as discriminatory.[14] These equal protection requirements create an additional hurdle that must be surmounted by

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saying, "I would like to know where the Constitution guarantees the right to procreate . . . ." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 100 (1973). He argued that the Court had neither stated explicitly nor implied that the interest in procreation enjoys independent, full-blown constitutional protection. *Id.* Although the right of procreation may be included in the right of privacy recognized by the Supreme Court in Roe v. Wade, 410 U.S. 113 (1973), Justice Marshall insisted that its stature was limited in *Roe* when Buck v. Bell, 274 U.S. 200 (1927), was reaffirmed. 411 U.S. at 101; *see* 410 U.S. at 154.

8. Catholic Charities v. Zalesky, — Iowa —, —, 232 N.W.2d 539, 552 (1975).

9. 316 U.S. at 541.

10. 262 U.S. 390 (1922).

11. *Id.* at 399.

12. *See, e.g.,* Stanley v. Illinois, 405 U.S. 645 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).

13. *See, e.g.,* Korematsu v. United States, 323 U.S. 214 (1944). Anti-miscegenation laws were designed to prevent marriage and procreation between races. In 1948 a California miscegenation statute was struck down as unconstitutional under the due process and equal protection clauses of the fourteenth amendment. Perez v. Lippold, 32 Cal. 2d 711, 198 P.2d 17 (1948) (en banc). Not until 1967, however, did the Supreme Court declare that all statutory bans against mixed marriages were in violation of the Constitution. *See* Loving v. Virginia, 388 U.S. 1 (1967).

14. Several school teachers have won suits against their employers for discrimination because of pregnancy. *See* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974). The Court ruled that overly restrictive maternity leave regulations "penalize the pregnant teacher for deciding to bear a child." *Id.* at 640. Such rules violate the due process clause of the fourteenth amendment. *Id.* at 648. *See also* Buckley v. Coyle Pub. School Sys., 476 F.2d 92 (10th Cir. 1973) (teacher not required to forego employment because of pregnancy). A woman in the Air Force was reinstated after discharge for pregnancy in Robinson v. Rand, 340 F. Supp. 37 (D. Colo. 1972). "The regulations in force at the time plaintiff became pregnant forced a woman to choose between having a family or having an Air Force career." *Id.* at 38. An indigent woman with a felony conviction who had two illegitimate children was relieved of the requirement that she use contraceptives as a condition of her probation in People v. Dominguez, 256 Cal.

any legislation seeking to interfere with the fundamental right of procreation.

III. Limitations on the Right To Procreate

Cultural limits on reproduction have existed throughout man's history. Primitive peoples devised various methods of maintaining population size at an optimum, consonant with the available food supply. These methods included enforced rules of celibacy, prohibitions against certain kinship matings and limitations of family size by contraception, abortion, infanticide and gerontocide. Legal regulation of procreation has also been widespread. These include prohibitions against incest, consanguinity laws forbidding marriage between close relatives, laws concerning age at marriage, sterilization laws and criminal statutes involving illegitimacy, rape, fornication and adultery.

Though the right to procreate is presently regarded as basic, essential, fundamental and, in some situations, constitutionally protected, in an ordered society no right is absolute. Certain legislative limitations of individual rights are necessary for the common welfare. As early as 1925 the Supreme Court of Michigan stated: "It is true that the right to beget children is a natural and constitutional right, but it is equally true that no citizen has any rights superior to the common welfare."[15] In *Roe v. Wade*,[16] Justice Blackmun wrote:

> [I]t is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past.[17]

App. 2d 623, 64 Cal. Rptr. 290 (1967). This decision overturned People v. Blankenship, 16 Cal. App. 2d 606, 61 P.2d 352 (1936) (requiring sterilization of convicted rapist as a condition of probation is not an abuse of judicial discretion). Most recently, however, the high Court has held that women employees whose pregnancies are not covered by group health insurance do not suffer sex discrimination under Title VII of the Civil Rights Act of 1964. General Elec. Co. v. Gilbert, 97 S. Ct. 401 (1976), *rehearing denied*, 97 S. Ct. 825 (1977).

State intervention to prevent procreation of the mentally retarded and other "unfit" persons by sterilization is under bitter attack and is discussed at text accompanying notes 115-146 *infra*.

15. Smith v. Wayne, 231 Mich. 409, 415, 204 N.W. 140, 142 (1925).

16. 410 U.S. 113 (1973).

17. *Id.* at 154. He cited Jacobson v. Massachusetts, 197 U.S. 11 (1905), in which the Court held that

> the liberty secured by the Constitution . . . does not import an absolute right in each person to be . . . wholly freed from restraint. . . . Real liberty for all could not exist under the . . . principle which recognizes the right of each

The family has therefore been held to be subject to governmental regulation in the public interest. Recently the United States Supreme Court has attempted to define some areas of governmental interest that would justify an intrusion into family planning. In 1970 the Court upheld a Maryland regulation that placed an upper limit on the amount of money one family could receive under Aid to Families With Dependent Children.[18] Maryland justified the regulation in terms of "legitimate state interests in encouraging gainful employment, . . . in providing incentives for family planning, and in allocating available public funds in such a way as fully to meet the needs of the largest possible number of families."[19] The Court found that these were valid state interests and that the classification made by the statute was rationally related to their promotion.[20] In 1974, Justice Powell stated, "Undoubtedly, Congress could . . . constitutionally seek to discourage excessive population growth by limiting the deductions for dependents."[21] The Court may be implying in these cases that legislation limiting family size is more acceptable than an absolute prohibition on procreation for certain classes of people because it is not as serious an infringement of personal liberty.

Occasionally, marital partners disagree on their desire for children, and the conflict is brought to court for adjudication. In *Murray v. VanDevander*[22] a husband strenuously objected to his wife's hysterectomy and sought recovery from the doctor and hospital for damage to his right to reproduce.[23] The Oklahoma court said:

> We have found no authority . . . which holds that the husband has a right to a child-bearing wife as an incident to their marriage. We are neither prepared to create a right in a husband to have a fertile wife nor to allow recovery for damage to such a right.[24]

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individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.

Id. at 26. Justice Goldberg, discussing the dissenting opinion of Justices Stewart and Black in Griswold v. Connecticut, 381 U.S. 479 (1965), said that, by their logic, an invasion of marital privacy requiring parents to be sterilized after having two children "would not be subject to constitutional challenge because, while it might be 'silly,' no provision of the Constitution specifically prevents the Government from curtailing the marital right to bear children and raise a family." 381 U.S. at 497 (Goldberg, J., concurring).

18. Dandridge v. Williams, 397 U.S. 471 (1970).

19. *Id.* at 483-84.

20. *Id.* at 486-87.

21. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651 (1974) (Powell, J., concurring).

22. 522 P.2d 302 (Okla. Ct. App. 1974).

23. *Id.* at 302.

24. *Id.* at 304.

In *Ponter v. Ponter*[25] a New Jersey court upheld the right of a married woman to be sterilized over her spouse's objection. Finally, last year the United States Supreme Court upheld the right of a woman to have an abortion without her husband's consent in *Planned Parenthood v. Danforth.*[26] The case law seems to lean toward the existence of a right of procreation primarily in the wife; the husband's desire to have children does not come within the constitutional protection if it clashes with the wife's desire not to have them.

IV. THE RIGHT NOT TO PROCREATE

The two previous sections have reviewed the right to procreate and some of the limitations placed on that right. The right *not* to procreate would seem to be a corollary right, but only recently have American courts recognized the constitutional dimensions of an individual's right actively to prevent conception or to prevent birth after conception.

Twelve years ago, in *Griswold v. Connecticut*,[27] the Supreme Court handed down a landmark decision protecting a married couple's right to use contraceptives. Justice Douglas, writing for the Court, found a zone of privacy in the marital relationship that was protected by the Constitution under the first, third, fourth, fifth, ninth and fourteenth amendments.[28] Seven years after *Griswold*, in *Eisenstadt v. Baird*,[29] the Supreme Court expanded the holding of *Griswold* to include the right of unmarried persons to use contraceptives. Justice Brennan said:

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. . . . If the right of privacy means anything, it is the right of the *individual*, married

25. 135 N.J. Super. 50, 342 A.2d 574 (Super. Ct. Ch. Div. 1975).

26. 96 S. Ct. 2831 (1976); *accord*, Doe v. Doe, — Mass. —, 314 N.E.2d 128 (1974).

27. 381 U.S. 479 (1965).

28. *Id.* at 484, 486. The state statute under attack did not prohibit the use of contraceptives to prevent disease but only to prevent conception. Law of March 28, 1879, ch. 78, 1879 Conn. Pub. Acts 428 (formerly codified at CONN. GEN. STAT. ANN. § 53-32 (West 1960)) (repealed 1969) read as follows: "Any person who uses any drug, medicinal article or instrument *for the purpose of preventing conception* shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned" (emphasis added). The purpose of the law may have been not only to encourage population expansion in the marital setting but also to prevent illegitimate births by allowing the use of condoms in extramarital relationships where venereal disease would be more likely to occur. The state, however, argued that the purpose of the statute was to further their policy against all forms of illicit relationships. 381 U.S. at 498 (Goldberg, J., concurring).

29. 405 U.S. 438 (1972).

> or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[30]

Thus, it is settled that the state cannot interfere with the right not to conceive.

A thornier issue, however, confronted the Court in 1973: Could a pregnant woman decide *after* conception not to give birth? In *Roe v. Wade*,[31] the Court found that the decision to abort during the first trimester was protected by the zone of privacy surrounding the mother and her physician and that it could not be disturbed by the state.[32] Within certain limits, then, there is a right not to give birth, even after conception.

In addition to contraception and abortion, sterilization may be used as a method of exercising the right not to procreate. Judge (later Justice) Cardozo described the existence of a right that may extend to form the basis of the right to be sterilized: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body."[33] There are, however, practical roadblocks to

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30. *Id.* at 453.

31. 410 U.S. 113 (1973).

32. *Id.* at 163. But after the first trimester, "[A] State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." *Id.* After fetal viability, "[T]he State . . . may, if it chooses, regulate and even proscribe, abortion except . . . for the preservation of the life or health of the mother." *Id.* at 164-65.

Many controversies arose after the *Roe* decision. For the next three years there were numerous attempts by state legislatures to test the guidelines enunciated in *Roe*. For an exhaustive legal review of the types of statutory provisions designed to regulate abortion, *see* Bryant, *State Legislation on Abortion after Roe v. Wade: Selected Constitutional Issues*, 2 AM. J.L. & MED. 101 (1976). Then last year the Court spoke again. It held that the requirement for spousal consent and parental consent (in the case of minors) was unconstitutional, that the saline method of abortion would not be prohibited and that the physician need not take the same care to preserve the life of a fetus as would be taken in a live birth. Planned Parenthood v. Danforth, 96 S. Ct. 2831 (1976). In a companion case, Bellotti v. Baird, 96 S. Ct. 2857 (1976), the Court addressed only the issue of parental consent for minors.

33. Schloendorff v. Society of N.Y. Hosp., 211 N.Y. 125, 126, 105 N.E. 92, 93 (1914). This right has not gone unchallenged, however. In an Alabama opinion in 1935 the court scrutinized a compulsory sterilization bill for certain classes of citizens. *In re* Opinion of the Justices, 230 Ala. 543, 162 So. 123 (1935). The proposed bill, H. 87, § 9, 1935 Ala. Legis., 1st Sess., *reprinted in* 230 Ala. 544, 547, 162 So. 125, 127 (1935), included the remarkable statement that "[t]his act shall not be construed to authorize the sterilization of any normal healthy person upon his or her own request, or upon the request of any relative or interested party, for the purpose of preventing child-bearing or propagation . . . ." Voluntary sterilization has gained rapid acceptance during recent times. One commentator has pointed out that the total number of sterilized adults in 1974 alone had reached close to seven million, a 42% increase over the number sterilized in 1973 and a 210% increase over those in 1969. Baron, *Voluntary Sterilization of the Mentally Retarded*, in NATIONAL SYMPOSIUM ON GENETICS AND THE

exercising this right. Indigency or unwillingness of a hospital or physician to provide the necessary services, for example, may successfully prevent a desired sterilization. The courts, however, have removed some of these roadblocks. In *Ferro v. Lavine*,[34] a New York court noted that the legislature had clearly expressed its intent to provide family planning services and supplies and that there was "no indication of any legislative intent to exclude sterilization from the meaning of 'family planning services and supplies.' "[35] For these reasons the court required the provision of state social services funds to pay for the indigent's sterilization.[36] In another case, a federal district court held that an indigent woman might have a contract claim against the hospital when the tubal ligation she requested during another operation was not performed because of a hospital employee's religious beliefs.[37] In *Hathaway v. Worcester City Hospital*[38] the First Circuit found that in a decision to terminate the possibility of any future pregnancy "a fundamental interest is involved, requiring a compelling rationale to justify permitting some hospital surgical procedures and banning another involving no greater risk or demand on staff and facilities."[39] The court held that the hospital's policy prohibiting sterilization operations was violative of the equal protection clause.[40] Thus, in the last dozen years the courts have recognized the right not to procreate by legalizing voluntary sterilizations and the use of contraceptives by both married and unmarried people and by allowing abortions in the early stages of pregnancy without state interference.

In addition to constitutional protections of the right not to reproduce, individuals may have valid claims in tort against those whose negligence interfered with the effective exercise of that right.[41] A series of tort cases involved the birth of an unwanted child to parents who

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LAW 267 (A. Milunsky & G. Annas eds. 1975). The most common operation now performed on adult males is a vasectomy. *Good Housekeeping* magazine reported that tubal ligation has become the favored form of contraception among married women between the ages of 30 and 44 and is second only to oral contraceptives among women of all ages. *The Growing Use of Sterilization for Birth Control*, GOOD HOUSEKEEPING, May 1973, at 196.

34. 46 App. Div. 2d 313, 362 N.Y.S.2d 591 (1974).
35. *Id.* at 317, 362 N.Y.S.2d at 595.
36. *Id.* at 315, 362 N.Y.S.2d at 593-94.
37. Padin v. Fordham Hosp., 392 F. Supp. 447, 448-49 (S.D.N.Y. 1975).
38. 475 F.2d 701 (1st Cir. 1973).
39. *Id.* at 705.
40. *Id.* at 706 (citing Doe v. Bolton, 410 U.S. 179, 199 (1973)).
41. For a discussion of cases involving the birth of unplanned, defective children following unsuccessful sterilizations, see text accompanying notes 94-100 *infra*.

asserted such claims.[42] In *Shaheen v. Knight*,[43] a child—the couple's fifth—was born after the husband's vasectomy. The Pennsylvania court refused to recognize a cause of action despite the possibility of negligence, saying that the granting of damages "for the normal birth of a normal child is foreign to the universal public sentiment of the people."[44] Similarly, in an earlier case the Minnesota Supreme Court observed that "the plaintiff has been blessed with the fatherhood of another child."[45]

As long as children were regarded as unequivocal blessings they were assumed to mitigate any detriment to the parents. In *Custodio v. Bauer*,[46] however, a California appellate court was willing to consider the element of damages for a healthy child.[47] The court stressed that conditions had changed since the days when the birth of a child was invariably good fortune: "With fears being echoed that Malthus was indeed right, there is some trend of change in social ethics with respect to the family establishment. City, state, and federal agencies have instituted programs for dispensing contraceptive information with a view toward economic betterment of segments of the population."[48] The Michigan Court of Appeals followed *Custodio* in *Troppi v. Scarf*.[49] A woman conceived after a pharmacist negligently dispensed tranquilizers instead of the oral contraceptive pills prescribed for her.[50] In its opinion the *Troppi* court stated a contemporary social policy regarding birth control:

> Contraceptives are used to prevent the birth of heathly children. To say that for reasons of public policy contraceptive

42. Most of the cases involve the failure of an operation to sterilize either the father or the mother. An unusual element in some of these cases is the request for compensation for rearing the normal, but unplanned, child to adulthood.

43. 11 Pa. D. & C.2d 41 (C.P. Lycoming County 1957).

44. *Id.* at 45.

45. Christensen v. Thornby, 192 Minn. 123, 126, 255 N.W. 620, 622 (1934). In Ball v. Mudge, 64 Wash. 2d 247, 391 P.2d 201 (1964), another case of vasectomy failure, the court echoed this sentiment, stating that the jury may have concluded that the "cost incidental to such birth was far outweighed by the blessing of a cherished child, albeit unwanted at the time of conception and birth." *Id.* at 250, 391 P.2d at 204. *Ball v. Mudge* is discussed in Note, *Torts—Contraception—Determination of Damages for the Negligent Dispensing of an Oral Contraceptive Resulting in the Birth of an Unwanted Child*, 18 WAYNE L. REV. 1221, 1222-23 (1972).

46. 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967).

47. *Id.* at 321, 59 Cal. Rptr. at 475.

48. *Id.* at 325, 59 Cal. Rptr. at 477. Other decisions recognizing a claim for negligent sterilization are Bishop v. Bryne, 265 F. Supp. 460 (S.D. W. Va. 1967); Jackson v. Anderson, 230 So. 2d 503 (Fla. Dist. Ct. App. 1970).

49. 31 Mich. App. 240, 187 N.W.2d 511 (1971).

50. *Id.* at 243, 187 N.W.2d at 512.

> failure can result in no damage as a matter of law ignores the fact that tens of millions of persons use contraceptives daily to avoid the very result which the defendant would have us say is always a benefit, never a detriment. Those tens of millions of persons, by their conduct, express the sense of the community.[51]

The court also allowed the jury to weigh all considerations of having an additional, though normal, child and to base damages on the balancing of these considerations.[52]

In *Coleman v. Garrison*[53] the couple's first four children were co-plaintiffs with their parents.[54] The Delaware court held that recovery of damages for rearing and educating a child conceived after a negligently performed sterilization operation could no longer be denied on grounds of a public policy favoring childbirth in view of *Griswold's* recognition of the constitutional right not to have children.[55] Recovery by the children as co-plaintiffs was not considered by the court in *Coleman*, but in *Aronoff v. Snider*[56] three siblings of an infant born after the father's vasectomy alleged that their love, care and economic benefits had been reduced from one-third to one-fourth.[57] The court dismissed the complaint as to the siblings but not as to the parents.[58]

These cases illustrate that the concept of a right not to conceive is gaining momentum and that physicians who promise an effective sterilization may be found liable if conception occurs after the operation. Since the right of women to seek a legal abortion in early pregnancy has been recognized by the United States Supreme Court,[59] doctors may also be liable if they fail to make a timely diagnosis of pregnancy.

Divergent opinions were handed down in two 1974 cases involving the physician's failure to diagnose pregnancy in time for a safe abortion. In *Rieck v. Medical Protective Co.*[60] the Wisconsin Supreme Court disallowed such a cause of action, stating that the injury was too remote from the negligence, that the imposition of this liability would place an unreasonable burden on physicians and that recovery would be too likely to open the way for fraudulent claims.[61] A New York appellate

51. *Id.* at 253, 187 N.W.2d at 517.
52. *Id.* at 262, 187 N.W.2d at 521.
53. 281 A.2d 616 (Del. Super. Ct. 1971).
54. *Id.* at 617.
55. *Id.* at 618 (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).
56. 292 So. 2d 418 (Fla. Dist. Ct. App. 1974).
57. *Id.* at 419.
58. *Id.*
59. Roe v. Wade, 410 U.S. 113, 163-64 (1973).
60. 64 Wis. 2d 514, 219 N.W.2d 242 (1974).
61. *Id.* at 517-19, 219 N.W.2d at 244-45.

court ruled otherwise in *Ziemba v. Sternberg*.[62] The mother told her physician that she did not want to have children and followed his directions for contraception. When she thought she was pregnant he advised her that she was not. Another physician then found that she was four and one-half months pregnant and told her it was medically inadvisable to seek an abortion.[63] The court denied defendant physician's motion to dismiss the case for failure to state a cause of action. It also said that the woman's failure to undergo an abortion in mid-pregnancy did not bar her claim.[64] The case seems to hold that a woman's right to discontinue her pregnancy is supplemented by an affirmative duty on the part of her physician to discover the pregnancy in time for her to exercise that right. The right not to procreate has itself given rise to those subsidiary rights necessary to assure its exercise.

V. THE RIGHT TO HAVE HEALTHY CHILDREN

One commentator has written, "[F]or the individual the paramount right is not the right to reproduce, often denied in past societies; it is the right of the child to be born physically and mentally sound."[65] Only recently has it become possible to exercise limited parental control over the quality of fetuses that are brought to term by selectively aborting defective offspring. This control has developed because of our rapidly expanding knowledge of medical genetics.

All chromosomal abnormalities and over sixty-five genetic diseases can now be diagnosed during pregnancy,[66] giving parents the option to abort those fetuses found to be affected. In addition to those cases when there is a certainty of abnormality, there are other situations when the risk, although undiscoverable, is confined to males (such as hemophilia or muscular dystrophy). In these cases the parents can choose to have only daughters, as the sex of the fetus can be determined at an early stage.

A high risk of birth defects may sometimes be predicted statistically through family history or known exposure to certain environmental agents before or after conception.[67] An example of the latter is the

62. 45 App. Div. 2d 230, 357 N.Y.S.2d 265 (1974).
63. *Id.* at 230-31, 357 N.Y.S.2d at 267.
64. *Id.* at 233, 357 N.Y.S.2d at 269.
65. Glass, *The Goals of Human Society*, 22 BIOSCIENCE 137, 137 (1972).
66. Milunsky, *Medico-Legal Issues in Prenatal Genetic Diagnosis*, in NATIONAL SYMPOSIUM ON GENETICS AND THE LAW 53, 54 (A. Milunsky & G. Annas eds. 1976).
67. Such agents include radiation, drugs and viruses which are known to be mutagenic or teratogenic.

rubella (German measles) virus that produces only a skin rash and fever in the pregnant woman but often devastates the embryo, resulting in congenital blindness, deafness, mental retardation and heart defects. Several couples have sued their physicians for failing to inform them of the high risk of an abnormal baby after the mother contracted rubella during pregnancy.

Two rubella cases were decided before *Roe v. Wade*. In the 1967 case of *Gleitman v. Cosgrove*[68] the New Jersey Supreme Court refused to recognize a cause of action based on a physician's negligence in failing to inform the parents that they might have a defective child.[69] One of the grounds for the court's decision was the countervailing public policy supporting the preciousness of life. The court said, "The right of life is inalienable in our society."[70] It would not acknowledge that sometimes nonexistence might be preferable to existence; it would not tacitly sanction abortion. Though the court was ostensibly operating on the premise that plaintiff could have obtained a legal abortion,[71] its anti-abortion policy stance was tantamount to regarding all abortion as illegal.[72]

One year later another rubella case, *Stewart v. Long Island College Hospital*,[73] was decided. In this case the woman was referred by her physician to a hospital to seek an abortion because the physician feared that her rubella infection would cause defects in the child. She was told at the hospital that she did not need an abortion and should not seek one elsewhere. She was not told, however, that two of the four members of the hospital abortion committee disagreed.[74] The New York trial court found that the hospital had breached duties it owed to the mother by failing to make reasonable disclosure of the committee members' difference of opinion and by giving the mother false assurances that an

68. 49 N.J. 22, 227 A.2d 689 (1967).
69. *Id.* at 31, 227 A.2d at 694.
70. *Id.* at 30, 227 A.2d at 693.
71. *Id.* at 27, 227 A.2d at 691.
72. The conflict among the members of the New Jersey Supreme Court in their attitudes toward abortion is reflected most vividly in the concurring and dissenting opinions. *Id.* at 32, 227 A.2d at 694 (Francis, J., concurring); *id.* at 49, 227 A.2d at 703 (Jacobs, J., dissenting); *id.* at 55, 227 A.2d at 707 (Weintraub, C.J., dissenting); *see* Note, *Torts—Dignity as a Legally Protectable Interest*, 46 N.C.L. REV. 205 (1967); Note, *Torts—Gleitman v. Cosgrove*, 10 S. TEX. L.J. 174 (1968); Note, *Torts—Malpractice—Gleitman v. Cosgrove*, 64 TEX. L. REV. 1004 (1968).
73. 58 Misc. 2d 432, 296 N.Y.S.2d 41 (Sup. Ct. 1968), *modified*, 35 App. Div. 2d 531, 313 N.Y.S.2d 502, *appeal dismissed*, 27 N.Y.2d 804, 264 N.E.2d 354, 315 N.Y.S.2d 863 (1970).
74. *Id.* at 438, 296 N.Y.S.2d at 48.

abortion was not indicated.[75] The appellate court reversed, holding that the parents' claim must await legislation.[76]

In the 1975 case of *Jacobs v. Thiemer*[77] a Texas court awarded substantial damages to the parents of a child born with congenital rubella defects.[78] Defendant physician had failed to diagnose rubella in the pregnant woman and therefore did not advise her of the high risk of birth defects. The parents sued, claiming that the woman would have had an abortion had she been aware of the risk. Their cause of action was recognized and their request for damages for medical expenses sustained.[79] Although the events in *Jacobs* occurred before *Roe*, the Texas court's attitude toward abortion was probably tempered by *Roe*. Like the *Gleitman* majority, this court assumed that the woman could somehow obtain a legal abortion,[80] but, unlike the *Gleitman* court, it did not neutralize that assumption by regarding abortion as contrary to social policy.[81]

In these three rubella cases the courts addressed the duty of care owed by a physician to reveal to his patient certain risks and hazards of having a defective child. As public acceptance of abortion evolves and the medical profession gains better knowledge of how to predict risks, that duty is increasingly recognized by the courts.

Two cases in which the plaintiffs claimed that a doctor's failure to warn of the risks of genetic disease constituted malpractice came before courts in New York last year. The first case, *Howard v. Lecher*,[82] involved a child who died of Tay-Sachs disease at twenty-two months of age. This disease produces progessive mental and motor retardation and blindness with eventual fatality in early childhood.[83] Parents can be tested to determine if they are "carriers" of the Tay-Sachs gene. If both parents are carriers, the risk to each child is twenty-five percent that he will be afflicted.[84] When such a risk is discovered, the fetus can be

75. *Id.* at 438-39, 296 N.Y.S.2d at 48.
76. 35 App. Div. 2d 531, 532, 313 N.Y.S.2d 502, 503 (1970).
77. 519 S.W.2d 846 (Tex. 1975).
78. *Id.* at 850.
79. *Id.* at 849-50.
80. *Id.* at 847.
81. *Id.* at 848.
82. 53 App. Div. 2d 420, 386 N.Y.S.2d 460 (1976).
83. *See* O'Brien, *Tay-Sachs Disease: From Enzyme to Prevention*, 32 FED'N PROC. 191 (1973).
84. Tay-Sachs disease is an autosomal recessive condition which follows a simple Mendelian inheritance pattern. A mating between two carriers is expected to produce one-fourth normal offspring, one-half carriers, and one-fourth affected children. Since

tested for the enzyme deficiency that causes the disease.[85] The parents sued for emotional distress and for the recovery of medical, hospital, nursing and funeral expenses, alleging that the physician was negligent in failing to take a genealogical history, in failing to test the parents and in failing to determine that the fetus was affected. The parents stated that had the physician made that determination, they would have elected to terminate the wife's pregnancy by means of a legal abortion. The trial court held that such damages are recoverable in New York. The cause of action for mental distress and emotional disturbances, however, was disallowed on appeal on the grounds that the physician's negligence did not directly injure the parents.[86]

In *Park v. Chessin*,[87] responsibility for the birth of a child with polycystic kidneys, another genetic disease that causes death in early childhood, was in issue. In spite of the fact that the risk of recurrence of polycystic kidneys after the birth of one child with the disease is twenty-five percent, two physicians reassured parents whose first child had died of the disease that there was no reason to fear that a future pregnancy would result in a defective child. The judge refused to dismiss a malpractice action brought on behalf of the second infant for the pain and suffering caused by her disease and the violation of her claimed right "not to be conceived and therefore not to be born."[88] The judge declared that it is possible to incur a conditional prospective liability in tort to one not yet in being. Once the child was conceived and born alive it came within the "orbit of danger" for which defendant physicians were liable.[89]

These two cases involved substantial genetic risks (twenty-five percent) to the children of these couples prior to conception. This risk is a much higher one than that of Down's Syndrome (mongolism), which occurs most frequently in infants born to mothers over forty years

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each pregnancy is an independent event, every fetus has one chance in four of being affected. *See* V. MCKUSICK, HUMAN GENETICS 36-37 (1964). Infantile polycystic kidneys, *see* text accompanying note 87 *infra*, is also an autosomal recessive disease. Both are fatal in early childhood.

85. O'Brien, Okada, Chen & Fillerup, *Tay-Sachs Disease: Detection of Heterozygotes and Homozygotes by Serum Hexosaminidase Assay*, 283 NEW ENG. J. MED. 15 (1970).

86. 53 App. Div. 2d at 423, 386 N.Y.S.2d at 461. The decision as to the cause of action for medical and funeral expenses was not appealed.

87. 88 Misc. 2d 222, 387 N.Y.S.2d 204 (1976).

88. *Id.* at 225-26, 387 N.Y.S.2d at 207.

89. *Id.* at 230, 387 N.Y.S.2d at 210.

of age.[90] In *Park v. Nissen*[91] a woman in her mid-forties who had given birth to a child with Down's Syndrome brought suit against her obstetrician for failure to refer her for prenatal diagnosis. The court dismissed the suit on the grounds that such diagnostic tests were not standard medical practice.[92] One author has suggested that defendant's success in this 1974 case would probably not be repeated today and that an obstetrician would likely be held to a legal duty to discuss the risks with his older patients and offer them prenatal tests.[93]

Two cases should be mentioned involving defective children born after an unsuccessful sterilization procedure. In *Doerr v. Villate*[94] a couple sued the physician for breach of warranty and contract after the husband's sterilization failed to prevent the birth of an additional child who was mentally retarded and physically deformed.[95] The couple had already had two retarded children prior to the vasectomy. The *Doerr* court did not reach the social policy issues; it reversed the trial court's finding that the suit was barred by the statute of limitations and remanded the case for substantive consideration.[96] Similarly in *Hays v. Hall*[97] the parents of two deformed children sued when two more children were born after the husband's vasectomy. The third child was defective but the fourth child was normal. The court refused to recognized a claim for damages for either child.[98]

Finally, in the Oklahoma case of *Jorgensen v. Meade Johnson Laboratories, Inc.*,[99] plaintiff father sued a pharmaceutical company

90. H. SUTTON, AN INTRODUCTION TO HUMAN GENETICS 63 (2d ed. 1975). Women who give birth between the ages of 40 and 44 have greater than a 1% risk of having a child with Down's Syndrome while those women 45 and over run nearly a 2% chance. *Id.*

91. No. 190033 (Orange County Cal. Ct. Dec. 13, 1974), *cited in* A. HOLDER, LEGAL ISSUES IN PEDIATRIC AND ADOLESCENT MEDICINE 64 (1977).

92. *Id.*

93. A. HOLDER, *supra* note 91, at 64-69. Two well designed studies in Canada and the United States have compared maternal and fetal morbidity after 2,263 amniocenteses with matched controls. Results indicate that the procedure is highly accurate and safe, and does not significantly increase the risk of fetal loss or injury. *Prenatal Diagnosis of Genetic Disease in Canada: Report of a Collaborative Study*, 115 Can. Med. Ass'n J. 739 (1976); *The NICHD National Registry for Amniocentesis Study Group*, 236 J. A.M.A. 147 (1976).

94. 74 Ill. App. 2d 332, 220 N.E.2d 767 (1966).

95. *Id.* at 334, 220 N.E.2d at 768.

96. *Id.* at 338, 220 N.E.2d at 770.

97. 477 S.W.2d 402 (Tex. Ct. App.), *rev'd on other grounds*, 488 S.W.2d 412 (Tex. 1972).

98. 477 S.W.2d at 406.

99. 336 F. Supp. 961 (W.D. Okla. 1972), *rev'd*, 483 F.2d 237 (10th Cir. 1973).

after the mother, who had been taking oral contraceptive pills, gave birth to twins with Down's Syndrome. Plaintiff asserted a breach of warranty, alleging that the pills caused chromosome damage to the mother's ovum prior to conception. The lower court dismissed the complaint,[100] but the appellate court reversed and remanded for trial.[101] This recognition of a claim for damage to the germ cells (sperm and egg) prior to fertilization could become a significant precedent. Preconception injuries are more likely to occur in the future as a result of increasing exposure to radiation, drugs and industrial chemicals that cause genetic mutations.

The tort cases discussed in this section illustrate a desire on the part of parents to have normal, healthy children and a tendency to search for blame when an abnormal child is born. The courts have been willing, in many cases, to compensate the parents for their disappointment and loss when negligence can be found. An unsettled issue is whether the child himself has the right to be born mentally and physically healthy. No child has been awarded damages for pain and suffering due to prenatal defects. In *Gleitman* and *Stewart* both infants failed in their claims for damages.[102] In *Jacobs v. Thiemer* the child did not sue.[103]

The *Gleitman* court was unwilling even to recognize the injured infant plaintiff's standing to sue.[104] It based this rejection of standing on a metaphysical argument presented by Tedeschi, who defines damages as compensation for the difference between what has occurred because of the tort and what might have been but for the tort.[105] Tedeschi maintains that when a child claims he should never have been born he creates a logical and legal absurdity. By his very cause of action "[t]he plaintiff cuts from under himself the ground upon which he needs to rely in order to prove his damage."[106] Tedeschi also claims that it is meaningless to compare a "loss or detriment"[107] in relation to a state of non-being in which "there is neither happiness nor misery whatsoever."[108]

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100. *Id.* at 963.
101. 483 F.2d at 241.
102. *See* text accompanying notes 68-76 *supra.*
103. 519 S.W.2d at 847.
104. 49 N.J. at 29, 227 A.2d at 692.
105. Tedeschi, *On Tort Liability for "Wrongful Life"*, 1 ISRAEL L. REV. 513, 529 (1966). The court that decided Stewart v. Long Island College Hosp., 58 Misc. 2d 432, 296 N.Y.S.2d 41 (Sup. Ct. 1968), also considered the theories of this writer.
106. Tedeschi, *supra* note 105, at 529.
107. *Id.*
108. *Id.* at 530.

Tedeschi's legal analysis sprang from *Zepeda v. Zepeda*[109] a suit in which a bastard sued his father seeking damages to compensate for the stigma and the social and legal deprivations associated with bastardy.[110] The court admitted that a tort had occurred[111] but refused to award damages on the ground that such a sweeping innovation in remedies should be created only by the legislature.[112]

Zepeda is the only case in which a suit was brought by a child against his parent for "wrongful life." Bastardy is a handicap, but the pain and suffering an illegitimate child must endure are emotional pains, which are not always considered compensable by the courts. A child with a grave genetic disease, however, may be seriously physically and mentally handicapped throughout life and, in some cases, destined to an early death. An interesting question, not yet adjudicated, is whether such a child would have a claim for relief against his own parents if they had had genetic counseling, were forewarned of either a high risk or a certainty that their child would be afflicted, and with that knowledge brought the child into being.

VI. The State's Interest in Procreation

Thus far this article has addressed the right of the individual to decide for himself or herself whether to reproduce and the extension of this right to assure an interest in having normal and healthy children. This section will examine the interests of the state in the quality of its future citizens.

Consanguinity statutes, which proscribe the marriage of close relatives, have been enacted in all states.[113] In addition to the state's concern in preserving healthy family relationships, there is a sound genetic basis for preventing matings between individuals who may have inherited identical abnormal genes from a common ancestor—their children are apt to receive such genes in a "double dose," resulting in autosomal recessive disorders.[114]

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109. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963).
110. *Id.* at 245-46, 190 N.E.2d at 851.
111. *Id.* at 254, 190 N.E.2d at 855.
112. *Id.* at 262-63, 190 N.E.2d at 859.
113. The degree of relation necessary before a marriage is prohibited varies from state to state. Farrow & Juberg, *Genetics and Laws Prohibiting Marriage in the United States*, 209 J. A.M.A. 534, 535-37 (1969).
114. For a discussion of the coefficients of relationship of various consanguineous matings and the coefficients of inbreeding of resultant offspring, see J. Neel & W. Schull, Human Heredity 70-73 (1954).

Our consanguinity laws have existed since primitive times and have survived until the present. More recent laws that were written as the result of a eugenics movement that followed the rediscovery of Mendel's laws of inheritance in 1900 are more difficult to justify on a scientific basis.[115] Many states have enacted compulsory sterilization statutes aimed at the feeble-minded, the insane, the habitual criminal, the rapist and other categories of the "hereditarily unfit."[116] The most horrendous of these statutes was the National Origins Quota Law,[117] a restrictive immigration act passed by Congress in 1924 that was based on conscious and unconscious racism and prejudice disguised as biologic fact and genetic theory.[118] Attacks on some of these laws have caused them to be repealed or declared unconstitutional.[119]

Carefully drafted statutes providing for the compulsory sterilization of the mentally retarded have survived constitutional scrutiny up to the present time.[120] In *Buck v. Bell*,[121] Justice Holmes declared that "society can prevent those who are manifestfly unfit from continuing their kind."[122] The Court has tacitly affirmed this holding as recently as 1973.[123]

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115. J. Thompson & M. Thompson, GENETICS IN MEDICINE 2 (2d ed. 1973).

116. Carlson, *Eugenics Revisited: The Case for Germinal Choice*, in 5 STADLER GENETICS SYMPOSIA 13, 14 (G. Kimber & G. Rédei eds. 1973).

117. Immigration Act of 1924, ch. 190, 43 Stat. 153 (repealed 1952).

118. See K. LUDMERER, GENETICS AND AMERICAN SOCIETY (1972) for a scholarly, historical perspective on the impact of eugenic theories on the sterilization and immigration laws in the United States during the early part of this century.

119. The grounds for declaring some of the statutes unconstitutional include lack of notice and a hearing, lack of equal protection because limited to those imprisoned or committed, and cruel and unusual punishment. For case citations, see *In re* Moore, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976). *See also* Annot., 53 A.L.R.3d 960 (1973).

120. Compulsory sterilization statutes extant include the following: ALA. CODE tit. 45, § 243 (1958); ARK. STAT. ANN. §§ 59-501, -502 (1971); CAL. WELF. & INST. CODE § 7254 (West Cum. Supp. 1977); CONN. GEN. STAT. ANN. § 19-569(g) (West Cum. Supp. 1977); DEL. CODE tit. 16, §§ 5701-5705 (1974); GA. CODE ANN. §§ 84-931 to -936 (1975); IDAHO CODE §§ 39-3901 to -3910 (1977); IOWA CODE ANN. §§ 145.1 to .22 (West 1972 & Cum. Supp. 1977-78); ME. REV. STAT. tit. 34, §§ 2461-2468 (1964); MICH. STAT. ANN. § 14.800(716) (1976); MINN. STAT. ANN. § 252A.13 (West Cum. Supp. 1977); MISS. CODE ANN. §§ 41-45-1 to -19 (1972); N.C. GEN. STAT. §§ 35-36 to -50 (1976); N.D. CENT. CODE §§ 25-04.1-01 to -04.1-08 (1970); OKLA. STAT. ANN. tit. 43a, §§ 341-346 (West 1951); OR. REV. STAT. §§ 436.010 to .150 (1973); S.C. CODE §§ 44-47-10 to -47-100 (1977); UTAH CODE ANN. §§ 64-10-1, -10-3 to -10-4, -10-10 to -10-13 (Supp. 1975); VT. STAT. ANN. tit. 18, §§ 8701-8704 (1968); VA. CODE §§ 32-424.1, 37.1-171.1 (1976 & Cum. Supp. 1977); WASH. REV. CODE ANN. § 9.92-100 (1961); WIS. STAT. ANN. § 46.12 (West 1957).

121. 274 U.S. 200 (1927).

122. *Id.* at 207.

123. Roe v. Wade, 410 U.S. 113, 154 (1973).

An ignorance of the laws of heredity is reflected in various court opinions following the *Buck* decision in which it is presumed that congenital feeble-mindedness is hereditary.[124] In fact, prenatal environmental insults (such as congenital syphilis, maternal rubella, toxoplasmosis, cytomegolic inclusion disease and poor nutrition of the mother during pregnancy) and birth trauma resulting in an insufficient oxygen supply to the brain may result in mental retardation at birth with no hereditary basis.[125] Furthermore, most of the hereditary forms of severe mental retardation are due to an inborn error of metabolism resulting in autosomal recessive disease which is rarely passed on to the offspring.[126]

An example of faulty reasoning about the hereditary nature of mental retardation is provided by the Nebraska Supreme Court's pronouncement in *In re Clayton*[127]:

> Clayton's feeble-minded condition is congenital, and not acquired, and . . . his offspring, if any there should be, would inherit about the same degree of mentality that is discovered in him. . . . [S]ince his is an established case of hereditary feeble-mindedness, his condition would be transmitted in the germ plasm of his body to his offspring.[128]

The Idaho Supreme Court in *State v. Troutman*[129] reiterated this hereditary theory, saying that there was no doubt "that heredity plays a controlling part in the blight of feeble-mindedness."[130] The court also

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124. *See, e.g.*, State v. Troutman, 50 Idaho 673, 229 P. 668 (1931); *In re* Clayton, 120 Neb. 680, 234 N.W. 630 (1931).

125. V. APGAR & J. BECK, IS MY BABY ALL RIGHT? (1972). When pregnant women are infected with the toxplasma organism about 20% of the infants are "born with major defects, including mental retardation, hydrocephalus, epilepsy, eye damage, and hearing loss." *Id.* at 444. Cytomegalic inclusion virus may cause "as much, possibly more, damage to unborn infants" as rubella. *Id.* at 105. "Studies have shown that approximately five or six percent of pregnant women become infected with cytomegalovirus during pregnancy." *Id.* at 106. Other suspect maternal infections producing retardation and/or congenital defects in the fetus include Coxsackie B, ECHO and influenza viruses. *Id.* at 107. Syphilis, which is epidemic in the United States, can also be transmitted from a pregnant woman to her fetus with disastrous results. *Id.* at 415. Unlike the viral diseases, syphilis can be cured with antibiotics. The risk to the fetus would depend upon the stage of pregnancy at which the mother was infected and how long the disease had gone untreated. *See also* Marx, *Cytomegalovirus: A Major Cause of Birth Defects*, 190 SCI. 1184 (1975).

126. Only in the rare instance when an affected individual mates with a carrier of the same recessive disease is there a 50% chance that the progeny will be retarded. The more likely event of mating with a non-carrier is expected to result in mentally normal children. *See* V. APGAR & J. BECK, *supra* note 125, at 315.

127. 120 Neb. 680, 234 N.W. 630 (1931).

128. *Id.* at 681-82, 234 N.W. at 631-32.

129. 50 Idaho 673, 299 P. 668 (1931).

130. *Id.* at 679, 299 P. at 670.

invoked public policy in its opinion: "If there be any natural right for natively mental defectives to beget children, that right must give way to the police power of the state in protecting the common welfare . . . ."[131]

These two 1931 cases are of historical interest. More recent cases demonstrate a reluctance to claim a hereditary basis for mental retardation, relying instead on other grounds for upholding compulsory sterilization statutes. In *Cook v. State*[132] it was found that "procreation by the examinee would produce a child or children . . . who would become neglected or dependent children as a result of the parent's inability . . . to provide adequate care."[133] The court noted that "the state's concern for the welfare of its citizenry extends to future generations and . . . the state [therefore] has sufficient interest to order sterilization."[134]

One modern case is of interest because the hereditary nature of the mental defect was correctly surmised. Down's Syndrome[135] (also called mongolism or trisomy-21) results in male sterility, but some of the affected females are fertile and give birth to children who have a fifty percent chance of being mongoloid.[136] In *In re M.K.R.*[137] the mother petitioned unsuccessfully for sterilization of her mongoloid daughter because she had been correctly advised that "should she become pregnant 'there is a strong likelihood . . . [her] child would also be abnormal,' and because of her mental retardation she would be unable to care for her child."[138]

Two 1976 North Carolina cases have upheld the constitutionality of the state statutes providing for sterilization of the mentally ill and mentally retarded.[139] In *In re Moore*,[140] the Supreme Court of North Carolina said, "The interest of the unborn child is sufficient to warrant sterilization of a retarded individual . . . . The people of North

131. *Id.*
132. 90 Or. App. 224, 495 P.2d 768 (1972).
133. *Id.* at 226, 495 P.2d at 769.
134. *Id.* at 230, 495 P.2d at 771-72.
135. *See* text accompanying note 90 *supra.*
136. A 1971 survey of fourteen offspring born of women with Down's Syndrome revealed that six were retarded and eight were mentally normal. 2 J. HAMERTON, HUMAN CYTOGENETICS 214-15 (1971).
137. 515 S.W.2d 467 (Mo. 1974).
138. *Id.* at 469. Since Missouri has no statute allowing the juvenile court to authorize the involuntary sterilization of a child the request was denied for lack of jurisdiction to enter judgment. *Id.* at 470.
139. Under attack were N.C. GEN. STAT. §§ 35-36 to -50 (1976), entitled, *Sterilization of Persons Mentally Ill and Mentally Retarded.*
140. 289 N.C. 95, 221 S.E.2d 307 (1976).

Carolina also have a right to prevent the procreation of children who will become a burden on the State."[141] In a federal district court opinion the North Carolina statutes in question were construed to authorize sterilization when there is clear, strong and convincing evidence that the subject is likely to engage in sexual activity without contraceptives and that either a defective child or a child that cannot be cared for by its parent is likely to be born.[142] The court further stated that the state's interest had risen to the dignity of a compelling one.[143]

Dicta in these cases suggest the existence of a compelling state interest in protecting the welfare of future generations and preventing the birth of children who are destined to be burdensome to the state. Congress has thus far resisted the imposition of mandatory controls on reproduction but has subsidized contraceptives and sterilization operations for indigents. After a great deal of publicity concerning the sterilization of two minor females in Alabama under a federally funded program for family planning services, a federal district court struck down regulations promulgated by the Secretary of the Department of Health, Education, and Welfare providing for the sterilization of minors and mental incompetents.[144] The court held that such individuals are incapable of the voluntary consent required by statute;[145] the court did not reach the question of whether involuntary sterilization *could* be funded by Congress.[146]

VII. CONCLUSION

India is the first country in the world to legalize compulsory sterilization to control its population growth.[147] It is unlikely that any of the countries with advanced technological development will attempt to institute such drastic measures to control population in the foreseeable future. Education, advertising, social pressures and legislative incentives and disincentives are more likely to be the methods used to convince the public that unrestricted reproduction is undesirable.

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141. *Id.* at 103, 221 S.E.2d at 312.

142. North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451, 456 (M.D.N.C. 1976).

143. *Id.* at 457.

144. Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974).

145. *Id.* at 1202.

146. *Id.* at 1203. Judge Gesell did not rule out the possibility of federally funded involuntary sterilization. He stated that "[w]hatever may be the merits of limiting irresponsible reproduction . . . it is for Congress . . . to determine the manner in which federal funds should be used to support such a program." *Id.* at 1204.

147. INTERCOM, Sept. 1976, at 5.

Advances in our knowledge of genetics have made screening programs for carriers of hereditary disease and prenatal testing programs highly fashionable.[148] These efforts are aimed at improving the quality of our posterity rather than decreasing its quantity. Both mandatory and voluntary genetic screening programs have been offered by state and federal legislatures.[149] More drastic steps to prevent genetically defective offspring—mandatory contraception, sterilization or abortion —have not been suggested as appropriate subjects for legislation. Most parents are concerned with the health and welfare of their offspring and will voluntarily take the necessary measures to prevent tragedy. It may be shown that the frequency of genetic disease decreases as more educational and service facilities become available; if this is so there will be no need for the state to intervene. The least restrictive measures may achieve the goal of healthier children in future generations and may be the only measures that are required.

148. COMM. FOR THE STUDY OF INBORN ERRORS OF METABOLISM, NATIONAL RESEARCH COUNCIL, GENETIC SCREENING (1975).

149. *Id.* at 287-93. *See also* Reilly, *State Supported Mass Genetic Screening Programs*, in NATIONAL SYMPOSIUM ON GENETICS AND THE LAW 159-84 (A. Milunsky & G. Annas eds. 1975).