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Sexual Sterilization--Constitutional Validity of Involuntary Sterilization and Consent Determinative of Voluntariness

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SEXUAL STERILIZATION—CONSTITUTIONAL VALIDITY OF INVOLUNTARY STERILIZATION AND CONSENT DETERMINATIVE OF VOLUNTARINESS

I. INTRODUCTION

In 1973 Minnie and Mary Alice Relf, ages fourteen and twelve, were sterilized under the auspices of a federally funded family planning program,[1] allegedly without the consent of their parents.[2] Public disclosure of the incident touched off a controversy of national impact. A $1,000,000 damage suit was filed; the Secretary of the Department of Health, Education, and Welfare (HEW) announced that no more federal funds could be spent on sterilizing minors and mentally incompetent adults; and the Health Subcommittee of the Senate Labor and Public Welfare Committee held hearings on the sterilizations.[3] Subsequently, HEW published guidelines governing sterilizations under federally funded programs.[4] These guidelines were later invalidated on the ground that the family planning sections of the Social Security Act[5] and the Public Health Service Act[6] did not provide statutory authority to fund the sterilization of any person incompetent under state law to consent to such an operation, because of minority or mental disability.[7]

The publicity surrounding the sterilization of the Relf sisters focused public attention on what has become a relatively common practice. In the last few years, an estimated 100,000 to 150,000 low-income persons have been sterilized annually under federally funded programs.[8] The sterilization of individuals is not, however, a practice confined to federally funded programs; many states have involuntary sterilization[9] laws applicable to mentally handicapped

1. The sterilization operations were arranged by the Montgomery County Community Action Agency which was funded by the Office of Economic Opportunity. The Community Action Agency is the largest provider of family planning services in Montgomery County, and the sterilizations were carried out as part of its family planning services. 2 FAMILY PLANNING /POPULATION REP. 77 (1973).

2. The Agency contended that the operations were carried out with the written consent of the girls' illiterate mother. The mother, on the other hand, contended that she only gave permission for shots to be administered to her daughters. The father of the girls was never contacted by the Agency. 2 FAMILY PLANNING/POPULATION REP. 77 (1973).

3. 2 FAMILY PLANNING/POPULATION REP. 77 (1973).

4. 39 Fed. Reg. 4730-34 (1974).

5. 42 U.S.C. § 703(a) (1970); 42 U.S.C. §§ 602(a)(15), 1396d(a)(vi)(4) (Supp. III, 1973).

6. 42 U.S.C. § 300a-5 (1970).

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

8. *Id.* at 1199.

9. Involuntary sterilization is the sterilization of an individual without the individual's

individuals and criminals.[10] These laws are an outgrowth of the eugenics movement[11] that swept the United States in the late 1800's and early 1900's and which culminated in the passage of the first involuntary sterilization law in Indiana in 1907.[12] Although the eugenics movement is no longer popular,[13] the involuntary sterilization laws which it produced are still in effect.[14] Furthermore, several courts have been confronted with the issue of the legality of involuntary sterilization in states not having statutes expressly authorizing such sterilizations.[15]

The proponents of eugenics contend that sterilization pursuant to a comprehensive eugenics program counteracts the alleged deterioration in the quality of man.[16] Sterilization is also advocated as a method to stem the population crisis and its adverse economic effects.[17] However, complex legal issues must be resolved before sterilization programs should be undertaken. The legal issues concerning sterilization include: (1) the validity of state legislation compelling the involuntary sterilization of specified classes of individuals; (2) a determination of what constitutes consent to voluntary sterilization; (3) the effectiveness of consent by parents or guardians to the sterilization of minors and mental incompetents; and (4) the effect of coercion in obtaining the consent of the individual to be sterilized. These issues will be the subject of this comment. At the outset it should be acknowledged that many issues in the sterilization area

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consent, often under compulsion exerted by a state or federal administrative or adjudicatory body.

10. *See, e.g.*, ARK. STAT. ANN., § 59-501 (1971); CONN. GEN. STAT. ANN., § 17-19 (Supp. 1974); GA. CODE ANN., § 84-933 (Supp. 1971); N.C. GEN. STAT., §§ 35-39 to 35-43 (Supp. 1974); OKLA. STAT. ANN., tit. 43A, § 341 (1954); ORE. REV. STAT., § 436.050-.070 (1973); UTAH CODE ANN. §§ 64-10-1 to 64-10-7 (1968).

11. Eugenics is the concept or science of improving human qualities through the regulation of heredity. *See* Note, *Eugenic Sterilization—A Scientific Analysis*, 46 DENVER L.J. 631 (1969); Vukowich, *The Dawning of the Brave New World—Legal, Ethical, and Social Issues of Eugenics*, 1971 U. ILL. L.F. 189 (1971).

12. Note, *Eugenic Sterilization—A Scientific Analysis*, 46 DEN. L.J. 631 (1969).

13. A scientific dispute over the validity of the theories on which eugenic programs were based and the sterilization of hundreds of thousands and the murder of millions for supposedly eugenic purposes by Nazi Germany led to public hostility toward eugenic ideas. Vukowich, *supra* note 11.

14. *See* statutes cited note 10 *supra*.

15. *E.g.*, Wade v. Bethesda Hospital, 337 F. Supp. 671 (S.D. Ohio 1971); Guardianship of Kemp, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974); Holmes v. Powers, 439 S.W.2d 579 (Ky. App. 1968); In the Interest of M.K.R., 515 S.W.2d 467 (Mo. En Banc 1974); Frazier v. Levi, 440 S.W.2d 393 (Tex. Civ. App. 1969).

16. Vukowich, *supra* note 11.

17. *Id.*

have not been finally resolved; analogy to comparable legal areas, however, indicates the probable resolution of these issues. The validity of the conclusions must necessarily depend on the validity of the analogies on which they are based.

II. The Constitutional Parameters of Involuntary Sterilization

A. *The Standard For Regulating*

The right to have children has been described as a basic civil right.[18] Sterilization irreversibly prevents an individual from having children.[19] Involuntary sterilization under state law[20] or any other scheme deprives the individual of the freedom to choose whether to have children. Involuntary sterilization laws which deprive certain classes of individuals of this basic right, while leaving others free from such deprivation, may be subject to the objection that they violate the Equal Protection Clause of the fourteenth amendment.

In *Roe v. Wade*,[21] the United States Supreme Court determined that "a right of personal privacy, or a guarantee of certain areas or zones of personal privacy, does exist under the Constitution."[22] These zones of personal privacy encompass fundamental rights[23]

18. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

19. Vasectomy is the most common sterilization procedure for a male. This operation is a relatively uncomplicated surgical procedure which takes less than an hour to perform. The recuperative period is often not more than one day. The operation does not prevent the male from engaging in coitus. Generally, the procedure is considered irreversible but there may be a 30 to 40 percent chance for reversal if desired. 21 Am. Jur. P.O.F. *Sexual Sterilization* §§ 6-8 (1968). For the female, sterilization involves a more complicated procedure. The most common surgical techniques for the female involve major surgery, requiring the opening of the abdominal cavity under general anesthesia. Many doctors feel the danger is limited and statistics indicate a death rate of only one per thousand operations. A recent development, laparoscopy, utilizes a surgical instrument inserted through a small incision. This can be done on an outpatient basis with local anesthesia. Either surgical method accomplishes tubal ligation of which there are 100 variations. Tubal ligation is also generally considered irreversible and statistics indicate less chance for reversal than for the male who undergoes a vasectomy. 21 Am. Jur. P.O.F. *Sexual Sterilization* §§ 12-14 (1968).

20. *See* statutes cited note 10 *supra*.

21. 410 U.S. 113 (1973).

22. *Id.* at 152. As for the constitutional provision from which these zones or rights of personal privacy arise, the Court said:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Id. at 153.

23. *Id.* at 152.

and include the decision whether to have children[24] and the right to have children.[25] Involuntary sterilization deprives the individual of these constitutionally protected fundamental rights. Constitutional protection, of course, is not an absolute prohibition of governmental deprivation or regulation of a fundamental right. A state may deprive or regulate the exercise of such a right if there is a *compelling state interest* in so doing.[26]

There is initially a question whether a compelling state interest standard should apply to all involuntary sterilization programs. Bills have been introduced into various state legislatures requiring sterilization as a condition for receiving public assistance.[27] If a scheme requires involuntary sterilization as a condition to receiving public assistance benefits,[28] then there is an argument for concluding that a compelling state interest standard is not required. In *Dandridge v. Williams*,[29] the Supreme Court upheld a Maryland maximum grant regulation which placed an upper limit on the amount of Aid to Families with Dependent Children payments a family unit could receive. The maximum grant regulation was based on the number of children in the family, and it was contended that this discrimination based on family size violated the Equal Protection Clause. The Court concluded that in the area of social welfare and economics, the classifications formulated must only have a "reasonable basis" to meet the requirements of the Equal Protection Clause. The Court stated that it would not second guess a state's allocation of welfare funds.

If this analysis is applied to a state scheme for involuntary sterilization pursuant to its public assistance program, then only a "reasonable basis" would be needed for requiring sterilization as a condition for receiving public assistance benefits which is simply social welfare legislation allocating available benefits.

The *Dandridge* "reasonable basis" rationale should not be applied to allow involuntary sterilization pursuant to a public assistance program, or any other program of involuntary sterilization. In *Dandridge*, the Court stated that it was only dealing with a state regulation in the social and economic field which did not affect

24. Eisenstadt v. Baird, 405 U.S. 438 (1972). *See also* Roe v. Wade, 410 U.S. 113 (1973).
25. Skinner v. Oklahoma, 316 U.S. 535 (1942). *See also* Roe v. Wade, 410 U.S. 113 (1973).
26. Roe v. Wade, 410 U.S. 113 (1973).
27. *See* notes 99-101 and accompanying text *infra*.
28. *See* pt. IV(B) of this comment.
29. 397 U.S. 471 (1970).

freedoms guaranteed by the Bill of Rights.[30] When involuntarily sterilized, the individual is irreversibly denied the fundamental rights to have children and to decide to have children,[31] and the Supreme Court has held that these fundamental rights may only be denied to achieve a compelling state interest.[32]

B. *Statutory Guidelines and Procedural Protections*

The right to decide whether to have children is a liberty protected by the Due Process Clause of the fourteenth amendment.[33] The deprivation of that right by involuntary sterilization must be accompanied by procedures consistent with due process.

Given a compelling state interest, procedural safeguards are necessary to protect the individual from arbitrary and capricious state regulation or deprivation of fundamental rights. As a general proposition, a state may only order an individual to be involuntarily sterilized pursuant to a valid statute.[34] Legislation affecting a fundamental right must be "narrowly drawn to express only the legitimate state interest at stake"[35] and must not needlessly impinge upon the exercise of the fundamental right.[36] The state must establish objective standards for the deprivation of a fundamental right[37] and may not allow individuals to be sterilized in the unfettered

30. *Id.* at 484.

31. *See* cases cited notes 24 and 25 *supra*.

32. Roe v. Wade, 410 U.S. 113 (1973). *But cf. In re* Cavitt, 182 Neb. 712, 157 N.W.2d 171 (1968).

33. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

34. Wade v. Bethesda Hospital, 337 F. Supp. 671 (S.D. Ohio 1971); Guardianship of Kemp, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974); Holmes v. Powers, 439 S.W.2d 579 (Ky. App. 1968); In the Interest of M.K.R., 515 S.W.2d 467 (Mo. En Banc 1974); Frazier v. Levi, 440 S.W.2d 393 (Tex. Civ. App. 1969).

35. Roe v. Wade, 410 U.S. 113, 155 (1973).

36. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

37. Giaccio v. Pennsylvania, 382 U.S. 399 (1966). In this case, the Supreme Court invalidated a Pennsylvania statute that allowed the jury in a criminal case to impose the costs of prosecution on an acquitted defendant, but did not provide standards as to when it should or should not impose costs. If the defendant did not pay the costs imposed, then he was imprisoned. The Court said that Pennsylvania had provided a procedure to deprive an acquitted defendent of his liberty and property, and this procedure was

> . . . invalid under the Due Process Clause because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs.

Id. at 402. *See also* Wyatt v. Aderholt, 368 F. Supp. 1382 (M.D. Ala. 1973); In the Interest of M.K.R., 515 S.W.2d 467 (Mo. En Banc 1974).

Specific and objective standards are necessary to meet the mandate that state legislation interfering with fundamental rights must be "narrowly drawn to express only the legitimate state interest at stake." Roe v. Wade, 410 U.S. 113, 155 (1973).

discretion of administrative or adjudicatory bodies responsible for implementing the sterilization procedure.[38] If reasonable objective standards are absent, the statute is unconstitutionally vague.

For example, a Connecticut statute allows the sterilization of individuals in the state's training schools if "procreation . . . would be inadvisable because he is incapable of comprehending the consequences of his actions."[39] As a statutory standard, this statute appears clearly inadequate. First, it does not address any compelling state interest; second, it fails to establish any guidelines for determining whether the individual lacks the requisite capacity to comprehend his actions.

Admittedly, all discretion cannot be denied the administrative or adjudicatory body that is to determine whether a particular individual is to be sterilized. Too much discretion, however, should not be allowed. The Connecticut statute provides for sterilization "if in the judgment of a majority" of the adjudicatory body, the individual fulfills the statutory criteria.[40] This statute may allow too much discretion; the statute can be drawn in more narrow terms. For example, if the compelling state interest is the prevention of incompetence,[41] the statute should require a finding by the adjudicatory body that the individual will engage in sexual intercourse and that there is a fifty per cent chance (or other specified probability) that the individual will produce mentally deficient offspring if procreation should result. This standard requires an objective finding based on the inheritability of the individual's particular mental deficiency.

A statutory scheme infringing upon a constitutionally protected freedom or right will only be upheld if the scheme is necessary to accomplish a permissible state interest.[42] The statutory scheme for accomplishing the state objective should not be upheld if there are less drastic alternatives available.[43] Involuntary sterilization is an absolute denial[44] of a fundamental right; it should only be allowed when there is no less drastic alternative available. Oral contraceptives, for example, administered as a part of an institutionalized

38. Wyatt v. Aderholt, 368 F. Supp. 1382 (M.D. Ala. 1973).
39. CONN. GEN. STAT. REV., § 17-19 (Supp. 1974).
40. *Id.*
41. *See* pt. III (A) of this comment.
42. McLaughlin v. Florida, 379 U.S. 184 (1964).
43. Griswold v. Connecticut, 381 U.S. 479 (1965); Shelton v. Tucker, 364 U.S. 479 (1960); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972).
44. *See* note 19 *supra*.

program of care for the mentally handicapped might be an effective alternative to sterilization, although, sterilization might be the only effective contraceptive method available for a noninstitutionalized individual. Nevertheless, any statutory scheme should require an investigation into the alternatives to sterilization and a finding that the available alternatives are unsuitable.

Finally, procedures consistent with due process should include a hearing to determine whether the particular individual should be sterilized.[45] In addition, notice of the hearing should be served on the individual or the individual's guardian in time to allow the party or his guardian to prepare for the hearing; a guardian *ad litem* should be appointed for incompetent individuals; and, some provision should be made to allow an appeal of the sterilization order.[46]

III. Compelling State Interests Justifying Involuntary Sterilization of the Mentally Handicapped[47]

Several states have involuntary sterilization laws applicable to the mentally handicapped.[48] To justify the denial of a handicapped individual's fundamental rights, these statutes must further a compelling state interest.

A. *Inheritability*

In 1927, in *Buck v. Bell*,[49] the validity of a Virginia statute providing for the sterilization of mentally handicapped individuals with inheritable forms of mental deficiency was upheld. The Supreme Court concluded that the sterilization of the mentally handicapped was a valid exercise of the state's police power "to prevent our being swamped with incompetence."[50] Obviously, the basis for concluding that sterilization would reduce incompetence was the assumption that mental deficiency is hereditary. However, with the advance in the study of genetics, the validity of that assumption is no longer clear. Certainly, not all forms of mental abnormalities are

45. Stanley v. Illinois, 405 U.S. 645 (1972), requiring a hearing on "fitness as a parent" before an unwed father could be deprived of the custody of his children.

46. In Buck v. Bell, 274 U.S. 200 (1927), these procedures were approved as providing due process of law.

47. "Mentally handicapped" and "mentally incompetent" will be used in this paper as generic terms to encompass all forms of mental retardation and mental illness.

48. *E.g.*, Ark. Stat. Ann., § 59-501 (1971); Ga. Code Ann., § 84-933 (Supp. 1971); N.C. Gen. Stat. § 35-39 (Supp. 1974); Okla. Stat. Ann., tit. 43A, § 341 (1954); Ore. Rev. Stat., §§ 436.050-.070 (1973); Utah Code Ann., §§ 64-10-1 to 64-10-7 (1968).

49. 274 U.S. 200 (1927).

50. *Id.* at 207.

inheritable[51] and genetic causes for others have not been established with reasonable medical certainty.[52] For example, psychotic and neurotic illnesses, sometimes characterized simply as insanity, are considered to be of developmental or environmental origin.[53] Certain mental and physical conditions such as amaurotic idiocy and Huntington's chorea, on the other hand, have evident genetic origins.[54]

It has been contended, based on a scientific analysis, that the present sterilization laws do not achieve a permissable governmental objective in preventing incompetence.[55] The inheritability of mental deficiency has not been established to a reasonable medical certainty, and the sterilization of individuals with noninheritable conditions does not achieve a eugenic purpose.

The scientific dispute over the inheritability of certain mental deficiencies, however, does not negate the constitutional validity of all involuntary sterilization of the mentally handicapped. In *Buck v. Bell*, the conclusion that the state's police power may be used to prevent incompetence was forcefully stated by Justice Holmes.[56] If this rationale is followed, the compelling state interest in preventing incompetence should allow the sterilization of individuals with mental deficiencies only if they are inheritable. Since state regulation must be narrowly drawn to encompass only the compelling interest,[57] involuntary sterilization of the mentally handicapped pursuant to a compelling state interest in preventing mental deficiency is constitutionally justifiable only in cases involving hereditary forms of mental deficiency. With a statute formulated in those terms, an adjudicatory body determining whether to sterilize a particular mental incompetent could and should rely on the latest sci-

51. Note, *Eugenic Sterilization—A Scientific Analysis*, 46 DENVER L.J. 631, 642 (1969).
52. *Id.* at 647.
53. *Id.* at 639.
54. *Id.* at 642.
55. *Id.* at 646-47.
56. In Buck v. Bell, 274 U.S. 200 (1927), the mentally retarded woman to be sterilized was the offspring of a feeble-minded mother and was already the mother of a child believed to be mentally retarded. Justice Holmes expressed the state interest involved by stating:

> We have seen more than once that the public welfare may call upon the best of citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all of the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough.

Id. at 207.
57. Roe v. Wade, 410 U.S. 113, 155 (1973).

entific information of the genetic inheritability of the individual's particular abnormality. If it could not be established that the abnormality is inheritable, then the sterilization could not be ordered.[58]

Other arguments based on a scientific analysis have also been formulated to support the contention that involuntary sterilization does not prevent incompetence. For example, it is argued that, assuming that a particular abnormality is inheritable, the number of individuals actually manifesting the abnormality is very small compared to the great number of carriers of the defective gene,[59] and for a eugenic program to be effective in reducing the number of incompetent individuals, it must take into account these carriers as well. Similarly, it is argued that abnormal genes producing mental deficiency are constantly being generated by gene mutations,[60] and therefore, the sterilization of all individuals manifesting or carrying the mental deficiency would not produce a gene pool free of genes producing mental deficiency. These arguments raise questions to which there may be no definite answers.

If it is accepted that there is a compelling state interest in preventing the birth of incompetent individuals, it can be argued that any program which will significantly reduce the number of incompetent individuals, even though it will not prevent all births of incompetent individuals, is better than no reduction in the number of incompetents at all. A statutory involuntary sterilization program when viewed in the context of the eugenics arguments, might be classified as remedial legislation. Remedial legislation selects an evil to be dealt with and attempts to apply a remedy to one or more phases of the evil while neglecting the others. In effect, the reform directed at the evil may take one step at a time.[61] Remedial legislation of this type is generally upheld.[62] However, it should be acknowledged that most of the cases upholding remedial legislation[63] are those in which only a "reasonable" or "rational" basis, rather than the higher standard of a "compelling state interest," is needed

58. It should be noted that only a probability of inheritability may be required to justify sterilization. The required probability may depend upon the state of medical knowledge concerning genetic origins of mental deficiency, and the probabilities associated with the mental abnormalities thought to be inheritable.

59. Note, *Eugenic Sterilization—A Scientific Analysis*, 46 DENVER L.J. 631, 642-44 (1969).

60. *Id.* at 644.

61. Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955).

62. *Id.*; Marshal v. United States, 414 U.S. 417 (1974); McDonald v. Board of Election, 394 U.S. 802 (1969).

63. *See* cases cited note 62 *supra*.

to uphold the classifications in the face of a challenge based on the Equal Protection Clause. It may be argued, of course, that if preventing incompetence is a compelling state interest, then a program directed at significantly reducing the number of incompetents should also be valid.

B. *Parental Fitness*

Preventing mental incompetence is not the only compelling state interest which could justify involuntary sterilization. The welfare of children born to the mentally handicapped is an alternate state interest expressed in several state statutes.[64] The state's concern for the welfare of its citizens clearly extends to future generations.[65] Evidence that a mentally handicapped parent would be unable to provide the proper care and environment to raise a child is a valid state concern.[66] However, if the justification for sterilization is the welfare of future children, then a finding that the individual suffers from an incurable mental deficiency should be required. If the individual might be able to provide proper care for a child in the future, there is no justification for involuntary sterilization.

The term "proper care" is, itself, too broad a standard. It allows too much discretion in defining proper care to the adjudicatory body determining if sterilization should be required. The statutory standard should define what constitutes proper care. For example, a statutory definition of improper care in the context of inability to provide the care that would prevent the child from becoming neglected and dependent has been upheld as expressing a proper state interest.[67] Therefore, a statutory standard providing for the sterilization of an individual with an incurable mental deficiency whose children would become neglected and dependent as a result of the individual's inability, by reason of the mental deficiency, to provide adequate care, should express a compelling state interest justifying sterilization.

64. *E.g.*, GA. CODE ANN., § 84-933 (Supp. 1971); N.C. GEN. STAT., § 35-39 (Supp. 1974); ORE. REV. STAT., §§ 436.050-.070 (1973).

65. Cook v. State, 9 Ore. App. 224, 495 P.2d 768 (1972).

66. *Id.*

67. *Id. Compare* Smith v. Wayne Probate Judge, 231 Mich. 409, 204 N.W. 140 (1925), which held invalid a statutory definition of improper care in the context of inability to support children who would become public charges. The state created a class within a class and invidiously discriminated between the mentally handicapped on the basis of wealth.

C. *Welfare of the Individual to be Sterilized*

Another alternative compelling state interest in involuntary sterilization may be the welfare of the individual to be sterilized. This interest is expressed in some states' involuntary sterilization laws.[68] This concern for the individual to be sterilized is evidenced in *Guardianship of Kemp*,[69] where the trial court found that the incompetent adult female sought to be sterilized would suffer a severe impairment to her health if she became pregnant. If a statutory scheme for sterilization is based on a state interest in the welfare of the individual to be sterilized, an argument can be made for the validity of such a scheme.

Cases outside of the sterilization area are indicative of the approach that may be taken. In *Strunk v. Strunk*,[70] the mother (as guardian) of a 27-year-old incompetent petitioned the court to allow an operation to transplant a kidney of the ward to his 28-year-old brother who was dying of a fatal kidney disease. The trial court found that the operation would be greatly beneficial to the incompetent because he was very emotionally and psychologically dependent on his brother, and that his well-being would be jeopardized more severely by the loss of his brother than by removal of the kidney. The court upheld the authorization of the transplant. A similar holding in *Hart v. Brown*[71] allowed the parents of a seven-year-old minor to consent to a kidney transplant from the minor to her twin sister. In that case, a psychiatrist testified that the operation would be of immense benefit to the donor because the donor would be better off in a happy family than in a distressed family, and that the death of the twin sister would be a great loss to the donor.

Admittedly, the holdings of these cases only concerned an equity court's power to order removal of a kidney, and did not involve the fundamental rights of the donors. They do, however, demonstrate the concern of the state for the welfare of incompetent individuals. In *Roe v. Wade*[72] the United States Supreme Court stated that "a State may properly assert important interests in safeguard-

68. *See, e.g.*, UTAH CODE ANN., §§ 64-10-1, 64-10-7 (1968); VA. CODE ANN., § 32-424 (Supp. 1974).

69. 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974). The court refused to order the sterilization without specific statutory authorization.

70. 445 S.W.2d 145 (Ky. App. 1969).

71. 29 Conn. Sup. 368, 289 A.2d 386 (1972).

72. 410 U.S. 113 (1973).

ing health" of its citizens.[73] This rationale, coupled with the demonstrated state concern for the physical, emotional, and psychological welfare of incompetent individuals, should form a basis for a compelling state interest in involuntary sterilization of the mentally handicapped.[74]

IV. VOLUNTARY VERSUS INVOLUNTARY STERILIZATION

Involuntary sterilization is the sterilization of an individual without the individual's consent, usually under compulsion exerted by a state or federal administrative or adjudicatory body.[75] Voluntary sterilization, on the other hand, is undertaken with the informed and competent consent of the individual[76] and is the assertion of a fundamental right by the individual.[77] Without the informed and competent consent of the individual, sterilization can-

73. *Id.* at 154.

74. In *Roe*, the Court concluded that a compelling state interest in the health of the mother would justify the regulation of abortion, which is encompassed within the fundamental right to decide whether to have children, when the dangers of having an abortion were greater than the dangers of childbirth.

75. This comment does not address the problem of sterilization without the consent of the individual in the absence of governmental involvement or state action. If a sterilization operation is performed without competent consent, then the doctor who performs the operation may be liable in tort for battery. Bonner v. Moran, 126 F.2d 121 (D.C. Cir. 1941); Annots., 139 A.L.R. 1370 (1942), 76 A.L.R. 562 (1932).

76. Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974). In that case, challenging HEW's proposed regulations governing sterilizations under federally funded programs, Judge Gesell determined that the family planning sections of the Social Security Act, 42 U.S.C. §§ 602(a)(15), 708(a), 1396d(a)(4) (1970) and the Public Health Service Act, 42 U.S.C. § 300a-5 (1970) allowed only voluntarily requested services, and therefore, only voluntary sterilization was permissible under these statutes. Judge Gesell held that any person incompetent under state law because of minority or mental disability lacks the capacity to consent to voluntary sterilization.

Judge Gesell also concluded that federally assisted family planning sterilizations were permissible only with the voluntary and knowing consent of individuals competent to give consent. Addressing the question of informed consent, he stated that when important human rights are involved, it

> entails a requirement that the individual have at his disposal the information necessary to make his decision and the mental competence to appreciate the significance of that information.

Id. at 1202.

For an analysis of informed consent and what it encompasses, see Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972); Shartsis, *Informed Consent: Some Problems Revisited*, 51 NEB. L.R. 527 (1972); Comment, *Informed Consent As a Theory of Medical Liability*, 1970 WIS. L.R. 879; *Annot.*, 56 A.L.R.2d 695 (1957).

77. The decision whether to have children is a fundamental right, *see* note 24 and accompanying text *supra*, and a voluntary decision to undergo sterilization is a decision whether to have children. Therefore, it should also be a fundamental right.

not be deemed voluntary.[78] If the sterilization is not voluntary, then it may only be undertaken pursuant to procedure authorized by a statute drawn[79] to encompass the constitutional standards required for involuntary sterilization.

A. *Consent for Minors and Mental Incompetents*

Neither a minor nor a mentally incompetent individual can give the competent consent necessary for voluntary sterilization.[80] Therefore, in states without involuntary sterilization laws or statutes applicable to these individuals, they may not be sterilized unless someone can give the necessary consent for them.

As a general rule, a parent or guardian must consent to a surgical operation on a minor, and a physician has no legal right to operate upon a minor without the consent of his parents or guardian.[81] There is some support for concluding that a parent or guardian may consent to the sterilization of a minor. In *In the Interest of M.K.R.*,[82] the court indicated that it would not exclude sterilization from the operations to which a parent could consent on behalf of a minor.[83] There are arguments, however, for excluding sterilization from the operations to which a parent can consent for his children. The sterilization of a minor irreversibly precludes the child from exercising the fundamental right of deciding whether to have chil-

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

79. *See* note 34 and accompanying text *supra*.

80. Minors: Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974). The court recognized that the nearly universal rule was that a minor cannot give the competent consent necessary for a medical operation, and stated that for sterilization, minors appear to lack the knowledge, maturity, and judgment to consent to an irreversible operation involving a basic human right of man. *But compare* Smith v. Seibly, 72 Wash.2d 16, 431 P.2d 719 (1967), which involved a suit for damages by an emancipated minor against the doctor who had performed a vasectomy on him. The court held that an emancipated minor may validly consent to a vasectomy. Mental incompetents: Holmes v. Powers, 439 S.W.2d 579 (Ky. App. 1968); Frazier v. Levi, 440 S.W.2d 393 (Tex. Civ. App. 1969).

81. Bonner v. Moran, 126 F.2d 121 (D.C. Cir. 1941); Annot., 139 A.L.R. 1370 (1942). *See* note 75 *supra*.

82. 515 S.W.2d 467 (Mo. En Banc 1974).

83. *Id.* In this case, the mother of a 13-year-old mentally retarded girl petitioned the juvenile court for permission to have the girl sterilized. In response to the mother's question whether the supreme court would single out sterilization from the many medical and surgical procedures to which parents could consent for their children, the court said:

> The answer is "no". It is the petitioner who has singled out sterilization from those other surgical procedures and asked the courts to "authorize," or put what petitioner deems to be a necessary stamp of approval on her "best judgment" as to what is necessary for her child.

Id. at 469.

dren. When these fundamental rights of the individual are involved it may be argued that the decision should be left for the minor to make upon reaching the age of legal discretion.[84]

Support for this argument can be based on a contention that some parents do not always have the best interests of their children in mind and are sometimes unreasonable in consenting to medical operations for their children. An unreasonable and unconcerned parent could deprive his child of the fundamental right to have children by an arbitrary decision to have the child sterilized. Several cases outside the sterilization area deal with a parent's right to make decisions concerning the desirability of medical operations.[85] In *In re Green*,[86] a 16-year-old boy had suffered two attacks of poliomyelitis, which generated obesity problems, and suffered from a 94% curvature of the spine. The child's mother gave her consent to an operation, but would not give her consent to blood transfusions necessary for a successful operation because of her religious beliefs. The court held that the state could not interfere with a parent's control over her child's physical well-being by ordering blood transfusions if the child's life was in no immediate danger and if the state's intrusion conflicts with the parent's religious belief.[87] In *Morrison v. State*,[88] however, the court of appeals cited the Declaration of Independence to the effect that every person has an inalienable right to life, and said that a parent cannot deny this right to an infant by refusing to allow blood transfusions which would save the child's life. Admittedly, a parent's decision to consent to the sterilization of a minor does not abridge the minor's right to life, and the point at which the parent's right to control medical operations for his child, short of life or death situations, is unclear. Nevertheless,

84. In Prince v. Massachusetts, 321 U.S. 158 (1944), the Supreme Court upheld the prosecution of a Jehovah's Witness for allowing her 9-year-old niece to sell religious material. The Court, in discussing the exercise of religious freedom and the harmful possibilities of street preaching, stated:

> Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice themselves.

Id. at 170.

85. Hart v. Brown, 29 Conn. Sup. 368, 289 A.2d 386 (1972); Morrison v. State, 252 S.W.2d 97 (K.C. Mo. App. 1952); *In re* Green, 448 Pa. 338, 292 A.2d 387 (1972); *In re* Hudson, 13 Wash.2d 673, 126 P.2d 765 (1942).

86. 448 Pa. 338, 292 A.2d 387 (1972).

87. *But see In re* Sampson, 29 N.Y.S.2d 900, 278 N.E.2d 918 (1972), which held that the blood transfusions could be ordered where necessary to the success of the required surgery.

88. 252 S.W.2d 97 (K.C. Mo. App. 1952).

sterilization irreversibly forecloses the minor's fundamental right to have children at a time when the minor himself cannot competently make that decision. The decision to be sterilized should be left for the minor to make upon reaching the age of majority.[89]

The parent or guardian of a mentally handicapped individual past the age of majority may not validly consent to his sterilization.[90] Similarly, juvenile courts and courts with jurisdiction over the mentally handicapped cannot order or grant permission for the sterilization of the individual solely on the petition or request of a parent or guardian.[91] The rationale of the courts is that a mentally handicapped individual may not be deprived of the fundamental right to have children without statutory authority.[92] In the absence of such authority, the court lacks jurisdiction to issue such an order[93] and compliance with procedural due process safeguards is not guaranteed.[94] Undoubtedly, this rationale is justifiable. Sterilization of a mentally handicapped individual, who cannot give competent consent, should only be allowed under a statute complying with the constitutional safeguards required for involuntary sterilization.

B. *Voluntariness of Adult's Consent: Coercion*

In *Relf v. Weinberger*,[95] there was uncontroverted evidence that a number of indigents were coerced into undergoing sterilization operations by the threatened withdrawal of federally supported welfare benefits. This coercion was allegedly done under the guise of voluntary family planning services. Similarly, in recent years, there have been several bills introduced in some state legislatures to introduce sterilization into the states' public assistance programs. These bills have taken three forms: (1) sterilization of a certain class of public assistance recipients is made a condition to receiving public assistance;[96] (2) sterilization of a certain class of current public as-

89. Arguably, however, a minor could be sterilized under a state statute authorizing the sterilization of a minor where the health and welfare of the minor necessitates sterilization.

90. Holmes v. Powers, 439 S.W.2d 579 (Ky. App. 1968) (dictum).

91. Wade v. Bethesda Hospital, 337 F. Supp. 671 (S.D. Ohio 1971); Guardianship of Kemp, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974); In the Interest of M.K.R., 515 S.W.2d 467 (Mo. En Banc 1974); Holmes v. Powers, 439 S.W.2d 579 (Ky. App. 1968); Frazier v. Levi, 440 S.W.2d 393 (Tex. Civ. App. 1969).

92. *See* cases cited in note 91 *supra*.

93. Wade v. Bethesda Hospital, 337 F. Supp. 671 (S.D. Ohio 1971); In the Interest of M.K.R., 515 S.W.2d 467 (Mo. En Banc 1974).

94. In the Interest of M.K.R., 515 S.W.2d 467 (Mo. En Banc 1974).

95. 372 F. Supp. 1196 (D.D.C. 1974). *See* note 77 *supra*.

96. H. B. No. 591, Ohio 110th General Assembly, Reg. Sess. (1973), stated: "Any female

sistance recipients is made a condition to receiving *additional* assistance;[97] and (3) incentive cash payments are made to public assistance recipients or couples with poverty level incomes who undergo sterilization.[98]

When consent to sterilization is obtained by the threatened withdrawal of welfare benefits, the consent should be deemed negated by the coercion exerted on the individual.[99] A program requiring the sterilization of a certain class of individuals as a condition for receiving public assistance is indistinguishable from the consent obtained by the threatened withdrawal of welfare benefits. The coercive effect of conditioning public assistance on sterilization should likewise negate any "voluntary" consent. In the second type of proposed statute, however, which requires sterilization for the receipt of additional public assistance and the third type which utilizes additional assistance as an incentive to undergo sterilization, the coercive impact is not as obvious.

An argument can be made that a statutory scheme requiring sterilization as a condition for receiving additional public assistance has no coercive effect because there is no actual or threatened withdrawal of existing welfare benefits; only additional benefits would be denied an individual who refuses to be sterilized. However, the definition of "voluntary" assumes an act which results from the exercise of one's own free will[100] that is not constrained, impelled, or influenced by another.[101] For the public assistance recipient, the need of additional assistance for economic subsistence may override

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receiving state aid for the support of more than two dependent, illegitimate children shall be required to submit to sterilization procedures. . . ."

97. H. B. 1199, Indiana (1972) stated:

> In all cases where an unwed mother applies to a county welfare board for assistance for a child born out of wedlock and at the same time of said application she is receiving assistance for one or more other children, of said mother, born out of wedlock, before assistance may be granted for said child, the said mother may be required to submit to the sexual sterilization operation.

98. H.B. 1022, Illinois (1973), provided for vasectomies and tubal ligations at no cost and a cash payment of $100 for a man or woman with income of less than $3000 per year. H.B. No. 339, New Hampshire (1973), provided for a $1,000 incentive award for welfare recipients who undergo voluntary sterilization operations.

99. Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974). *See* note 76 *supra*. After concluding that only voluntary sterilization was permissible under federal family planning programs, Judge Gesell discussed the threatened withdrawal of federally funded welfare benefits and concluded: "Even a fully informed individual cannot make a 'voluntary' decision concerning sterilization if he has been subjected to coercion from doctors or project officers." *Id.* at 1203.

100. Relf v. Weinberger, 372 F. Supp. 1196, 1202 (D.D.C. 1974).

101. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2564 (1961).

the exercise of his free will. The recipient may feel compelled to undergo sterilization if he thinks the additional assistance is a necessity.[102]

Likewise, it can be argued that the use of incentive awards to encourage public assistance recipients to undergo voluntary sterilization does not coerce or influence the individual's exercise of free will. The incentive award is an addition to the subsistence award provided by the basic program. Again, however, if the individual thinks the award is necessary for his economic subsistence, he may subordinate the exercise of his free will to his concern for his basic economic needs.[103] Obviously, it is difficult to conclude whether the consent to sterilization under these two schemes is voluntary or involuntary. The voluntariness of consent in these instances turns on factual determinations which should be considered on a case by case basis.

V. CONCLUSION

In summary, some broad conclusions concerning involuntary sterilization may be stated. The state may undertake a program of involuntary sterilization for certain classes of individuals to achieve a compelling state interest. Procedural due process safeguards must accompany the program of involuntary sterilization. Such a program must be undertaken pursuant to a statute authorizing the sterilization which is narrowly drawn to encompass the compelling state interest and which provides objective standards and reasonable guidelines to govern the determination of whether a particular individual may be sterilized. State concerns which may rise to the level of a compelling state interest include: (1) the prevention or reduction of mental incompetence which may be accomplished by

102. In Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974), Judge Gesell, in formulating a definition for "voluntary" which "assumes an exercise of free will and clearly precludes the existence of coercion or force," *id.* at 1202, cited United States v. Johnson, 452 F.2d 1363 (D.C.C. 1971). One of the issues involved in *Johnson* was whether the defendant had consented to the taking of a photograph from which he was identified. The photograph was taken when he voluntarily went to the police station to find a friend. As for the defendant's consent to taking the photograph, the court stated:

> His attorney reported that Johnson stated "he had little choice but to do it." Such a statement does not convey the defendant's voluntary agreement free from duress or coercion.

452 F.2d at 1372. If this rationale is applied to a public assistance recipient who feels that he has little choice but to undergo sterilization to obtain the additional assistence needed for economic subsistence, then the consent to the sterilization cannot be deemed voluntary.

103. *See* note 102 and accompanying text *supra*.

sterilizing individuals with inheritable mental deficiencies; (2) the parental fitness of the mentally handicapped and the welfare of children born to them; and (3) the welfare of the individual to be sterilized.

In the instances where statutes do not govern the sterilization, an individual's consent to the sterilization is necessary to preclude an objection to the sterilization on the ground that it does not comply with the constitutional standards required for involuntary sterilization. There must be informed consent given by a competent individual or someone who may legally consent for him. Such consent cannot be coerced by a threat of economic deprivation.

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