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Legal Aspects of Compulsory Sterilization in America

Michael A. Vaccari

FIFTY YEARS before Indira Gandhi foisted compulsory sterilization upon India's populace,[1] the United States Supreme Court validated the practice in a decision entitled *Buck* v. *Bell.*[2] Since 1927 certain Americans, declared unfit, have been involuntarily sterilized. *Buck* v. *Bell* has rightly acquired for itself, along with *Scott* v. *Sanford*[3] and *Roe* v. *Wade,*[4] the dishonor of being labeled one of the three worst judicial decisions in American history.[5]

The recent expansion of the right to privacy contains a paradox. On the one hand, it paves the way for abortion on demand; on the other, it provides a sound basis for overruling *Buck* v. *Bell.* This paper consists of three parts: first, a discussion of the present law in the United States on compulsory sterilization;[6] second, an analysis of the recent expansion of the right to privacy insofar as that expansion is pertinent to the issue of compulsory sterilization; and third, an argument that compulsory sterilization violates the due-process and equal-protection guarantees of the Fourteenth Amendment to the United States Constitution.

The Present State of the Law

In 1907 Indiana enacted the first eugenic-sterilization statute in the United States.[7] Shortly thereafter, the Indiana Supreme Court declared the statute unconstitutional as a violation of due process.[8] Six years after the Indiana decision the U. S. Supreme Court definitively resolved the issue of compulsory sterilization in the case of *Buck* v. *Bell.*

Buck v. *Bell* involved a Virginia statute which had authorized the operation of salpingectomy upon Carrie Buck. The Court characterized eighteen-year-old Carrie Buck as "a feeble minded white woman . . . the daughter of a feeble minded mother . . . and the mother of an illegitimate feeble minded

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child."[9] After concluding that Virginia law had established sufficient procedural guidelines to satisfy the procedural requirements of due process,[10] the Court, in one paragraph, analyzed the substantive argument.

The basis of Miss Buck's argument was that the contemplated operation, and all compulsory-sterilization operations, constituted an infringement upon the health and welfare of herself and all others subjected to such procedures.[11] The foremost case in opposition to her argument was *Jacobson* v. *Massachusetts*.[12] In *Jacobson*, the Court had upheld a conviction under a statute which imposed a fine on adults who refused to be vaccinated.[13] The Court had justified compulsory vaccination in the interest of protecting other citizens from contagious diseases while rejecting the defendant's argument of a right to bodily integrity.[14]

Relying upon *Jacobson*, Mr. Justice Holmes, writing for the Court, rejected Carrie Buck's claim. In markedly infamous language, he resolved the case as follows:

> We have seen more than once that the public welfare may call upon the best 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 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. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson* v. *Massachusetts*, 197 U.S. 11. Three generations of imbeciles are enough.[15]

After *Buck*, little litigation arose either to overturn the decision or to clarify its scope.[16] By 1974 twenty-seven states had authorized compulsory sterilization.[17] However, there exists a current trend in several states to repeal these statutes.[18] The North Carolina provision is typical of current eugenic-sterilization statutes.[19]

An introductory section of this North Carolina statute defines a mental defective as follows:[20]

> A "mental defective" shall mean a person who is not mentally ill but whose mental development is so retarded that he has not acquired enough self-control, judgement, and discretion to manage himself and his affairs, and for whose own welfare or that of others, supervision, guidance, care, or control is necessary or advisable. The term shall be construed to include "feeble-minded," "idiot," and "imbecile."

People characterized as "mentally defective" under this provision are subjected to the institution of sterilization proceedings by the director of North Carolina health-care personnel or by the county director of social services:

1. When he feels that sterilization is in the best interests of the mental, moral, or physical improvement of the retarded person
2. When he feels that sterilization is in the best interests of the public at large
3. When, in his opinion, the retarded person "would be likely, unless sterilized, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency; or, because of a physical, mental, or nervous disease or deficiency which is not likely to materially improve, the person would be unable to care for a child or children"
4. When the next of kin or legal guardian of the retarded person requests that he file the petition[21]

These conditions are to be read in the disjunctive, so that any one of them is sufficient to require the health-care director or the county director to institute proceedings.

The most recent cases which have reconsidered the issue of eugenic sterilization have dealt with this North Carolina statute. Both state and federal constitutional attacks were made on its provisions. In *In Re Sterilization of Moore*, petitioners attacked the statute on three grounds.[22] First, they alleged that it violated the Eighth Amendment's prohibition of cruel and unusual punishment. Second, they argued that it was unconstitutionally vague and arbitrary. Finally, they argued that it violated the due-process and equal-protection guarantees of the Fourteenth Amendment.[23]

The court dealt with the first two arguments summarily. With respect to the Eighth Amendment's prohibition of cruel and unusual punishment, the court stated that the clause applied only to punishments inflicted on persons convicted of a crime. Therefore, since the procedure was not prescribed as punishment for a crime, the argument was without merit.[24] Regarding the vagueness claim, the court held that the terms "mental disease," "illness," and "defective" were "capable of being understood and complied with by the triers of fact with the help of experts in the field."[25] It held that the terms "likely" and "probably" were sufficiently precise as long as the evidence establishing those propensities was "clear, strong and convincing."[26]

The court then analyzed the Fourteenth Amendment claims. The first step in such an analysis is to characterize the right being interfered with by the state. If it is a fundamental right,[27] then the strict-scrutiny mode of review is applicable.[28] Under this two-pronged test, the state must advance a compelling interest to justify the infringement upon the fundamental right, and the means utilized by the state to pursue that interest must be means which are least restrictive of that right.[29] If the right is not a fundamental one, then the rational-basis test is applicable. Under this test, legislation will be upheld if it bears a reasonable relation to some legitimate state interest.[30]

Although the right to procreate had previously been labeled fundamental by the U. S. Supreme Court,[31] the North Carolina court characterized the right as "not absolute but vulnerable to a certain degree of state regulation."[32]

In support of this interpretation, the court cited *Roe* v. *Wade* and *Buck* v. *Bell*. Pursuant to this characterization, the court employed a lesser degree of scrutiny than required by the strict-scrutiny test and upheld compulsory sterilization as "a valid and reasonable exercise of the police power," never even referring to the appropriate "least-restrictive means" standard.[33] Furthermore, it found several state interests to "rise to the level of a compelling state interest."[34] Ironically, after citing *Roe* v. *Wade*, the court found a compelling interest in the future well-being of unborn children.[35] Additionally, basing itself upon the famous language in *Buck* v. *Bell* concerning the wisdom of preventing the manifestly unfit from continuing their own kind,[36] the court found "the welfare of all citizens [to] take precedence over the rights of individuals to procreate."[37]

In *North Carolina Association for Retarded Children* v. *North Carolina*, a three-judge federal district court considered the federal constitutional attacks upon North Carolina's eugenic-sterilization statute.[38] Unlike the North Carolina Supreme Court, the federal district court commenced its analysis by limiting the construction of the statute. Initially, the court invalidated subsection 4 of section 35-39 concerning sterilization at the request of next of kin[39] as being "an arbitrary and capricious delegation of unbridled power [to the next of kin or legal guardian] and a correspondingly irrational withdrawal of responsibility sensibly placed upon the director of the institution."[40]

Next, the court construed the remaining three subsections of section 35-39 to be conjunctive and to contain an implicit requirement that certain findings of fact be established as a prerequisite to any sterilization procedure. Prior to sterilization the judge must find that the mentally retarded person is sexually active *and* unwilling or unable to utilize contraceptive devices. Additionally, he must find that the mentally retarded person is either likely to procreate a defective child *or* unable to care for a nondefective child.[41] This interpretation would adequately reflect the legislative dual purpose, namely, "to prevent the birth of a defective child or the birth of a nondefective child that cannot be cared for by its parent."[42]

Given this construction, the court found the statute to be neither vague nor overbroad. Competent professionals who adduced clear, strong, and convincing evidence could predict with reasonable accuracy the likelihood of the birth of genetically defective offspring and the likelihood of inability to care for nondefective children.[43]

The court also considered the Fourteenth Amendment due-process and equal-protection arguments. Finding the right to procreate to be fundamental, Judge Craven, writing for the court, required the showing of a compelling state interest to justify infringement of the right. He found a compelling state interest in the dual legislative purpose mentioned above.

As to the second prong of the test, the classification of mentally retarded persons was justified since "such persons are in fact different from the general population and may rationally be accorded different treatment for their benefit and the benefit of the public."[44] This classification rested "upon a difference having a *fair and substantial relation* to the object of the legislation."[45] Employing this milder form of strict scrutiny, the court concluded that the statute did not violate the due-process and equal-protection guarantees of the Fourteenth Amendment.

While these decisions explicitly hold that the states have the power to impose sterilization upon certain individuals, no decision since *Buck* v. *Bell* has explicitly afforded the same authority to the federal government. The most recent decision in this area, *Relf* v. *Weinberger*, has construed federal law to authorize regulations permitting only voluntary sterilization.[46] *Relf* involved reported instances of coercion on the part of federal officers and employees.[47] Minors, incompetents, and the poor were often threatened with the withdrawal of federal welfare benefits unless they were sterilized.[48]

Stating that "involuntary sterilizations directly threaten" the fundamental right to decide whether to bear or beget a child, the court held that "federally assisted family planning sterilizations are permissible only with the voluntary, knowing, and uncoerced consent of individuals competent to give such consent."[49] The court, however, explicitly declined to consider the constitutional attacks on the statute involved.[50]

Subsequent litigation involving these and modified regulations[51] became moot when the Department of Health, Education, and Welfare withdrew the existing regulations and declared its intention to issue new ones.[52] In the meanwhile, interim regulations conform to the order of the district court in *Relf*.[53] In addition, Congress has enacted legislation aimed at insuring the voluntariness of sterilization procedures against coercion by federal officers or employees.[54] Current federal law also protects individuals or hospitals refusing to perform sterilization procedures on the basis of religious beliefs or moral convictions.[55]

In addition to the state- and federal-law aspects of compulsory sterilization, two other related issues are of interest: private hospitals and judicial immunity. A short discussion of recent developments in these areas is appropriate.

Most decisions have upheld the right of a private hospital to refuse to perform elective sterilizations.[56] Courts have recognized this right despite the reception by these private institutions of the benefits of public funding[57] or the existence of a practical monopoly in the area by the private hospital.[58] However, a recent case concerning elective abortions held that a private, nonsectarian, nonprofit hospital which made its facilities available to the public was a quasi-public institution and could not, constitutionally, fail

to provide facilities for elective abortions.[59]

The issue has apparently been resolved by the recent Supreme Court decision in *Poelker* v. *Doe*. [60] In *Poelker*, the Court upheld the refusal of municipal hospitals in St. Louis to perform non-therapeutic abortions. On the assumption that there are no constitutionally significant differences between elective abortion and elective sterilization, if public hospitals can refuse to perform these procedures, *a fortiori*, private hospitals can make the same choice.

The question of judicial immunity has dramatically come to the foreground with last term's five-to-three Supreme Court decision in *Stump* v. *Sparkman*.[61] In *Stump*, an Indiana circuit court judge had approved a mother's petition to have her minor daughter sterilized because the daughter was "considered to be somewhat retarded" and "had stayed out overnight with [older youth or young men] on several occasions."[62] The mother had sought the operation "in the daughter's best interest"[63] in order "to prevent unfortunate circumstances to occur."[64] The daughter was never informed of the operation. The judge approved the operation despite an Indiana Court of Appeals decision holding that a parent could not have a minor child sterilized.[65]

Mr. Justice White, writing for the Court, held the judge absolutely immune from liability for his judicial acts.[66] In dissent, Mr. Justice Stewart succinctly enunciated the fallacy of the majority opinion:

> [T]he scope of judicial immunity is limited to liability for "judicial acts," and I think that what Judge Stump did on July 9, 1971, was beyond the pale of anything that could sensibly be called a judicial act. . . . [F]alse illusions as to a judge's power can hardly convert a judge's response to those illusions into a judicial act.[67]

Recent Developments

The Right to Privacy

The history of the right to privacy, insofar as it relates to human sexuality, begins with *Skinner* v. *Oklahoma*.[68] *Skinner* involved an Oklahoma statute which prescribed sterilization as the penalty for certain habitual criminals. The Court, in invalidating the statute as a denial of equal protection, neither overruled nor even questioned *Buck* v. *Bell* but, rather, hinted that eugenics might be a justification for sterilization.[69] The two situations, however, were deemed distinguishable. The importance of *Skinner* is the status it accorded to the right to procreation. Mr. Justice Douglas, writing for the Court, characterized the case as follows:

> This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring.[70]

Not only was this right recognized in *Skinner*, but it was also elevated

to the status of a fundamental right. This elevation required the invocation of the strict-scrutiny test of constitutional review to justify infringements upon the right.

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching, and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the State. We advert to them merely in emphasis of our view *that strict scrutiny of the classification which a State makes in a sterilization law is essential*, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.[71]

This rather lengthy quotation from *Skinner* provides the foundation upon which to view later developments in the right to privacy. Two of the most famous privacy cases, *Griswold* v. *Connecticut*[72] and *Roe* v. *Wade,*[73] struck down legislation for quite different concerns than those expressed in *Skinner*. The principle behind *Griswold* and *Roe* is that certain aspects of human sexuality, such as the use of contraceptives and the decision to procure an abortion, are so intimately personal that no social value attaches to those activities which would justify state penal interference.[74]

Later cases made clear that the reasoning in *Griswold* and *Roe* was not limited to married persons.[75] Rather, as the Court held in *Eisenstadt* v. *Baird,*[76] the reasoning was applicable to individuals.

> If the right of privacy means anything, it is the right of the *individual*, married 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.[77]

This statement from *Eisenstadt*, together with a further clarification of *Griswold*, was used in *Carey* v. *Population Services International*[78] to extend to minors the protection of decisions concerning matters of childbearing.[79]

The Court in *Eisenstadt* cited *Skinner* v. *Oklahoma* as authority.[80] *Skinner* was also cited, in a public funding of abortion case, for the proposition that the right to childbirth and the right of procreation are "at least an equal right" to the right to choose to abort.[81] In addition, as stated earlier, one federal court has stated not only that the right to procreate is fundamental but that involuntary sterilization directly threatens that right.[82]

Despite the strong protection afforded decisions concerning procreation and childbearing, *Buck* v. *Bell* has not been overruled. To the contrary, it has been indirectly reaffirmed. In *Roe* v. *Wade* the right to procreate, as

recognized specifically in *Skinner*, was listed among the rights deemed "fundamental."[83] Yet a few pages later the Court, with equal force, cited *Buck* for the proposition that these rights are not unlimited.[84] The Court apparently perceives no inconsistency between labeling as fundamental the right to procreate and justifying compulsory sterilization. However, this perception is applicable only in the *unexamined* state of the question, for, as will be demonstrated, the Court cannot consistently follow the principles established by current cases and, simultaneously, uphold eugenic-sterilization statutes.

Individualized Determinations

Throughout history, for various reasons, society has regarded and labeled certain classes of individuals as "unfit." The landmark discussion of the constitutionality of this activity occurred in *Stanley* v. *Illinois*.[85] *Stanley* involved an Illinois statute which had conclusively presumed that all unwed fathers were unfit parents who, as such, were never entitled to custody of their children. The Court found that the irrebuttable presumption of unfitness created by this statute violated due process.[86] Unwed fathers possessed a "cognizable and substantial" interest in maintaining the parent-child relationship.[87] Even *assuming arguendo* that most unwed fathers were neglectful parents, all unwed fathers were not in this category.[88] Therefore, due process required that unwed fathers be afforded notice and a hearing on the issue of their fitness.[89]

Two years later, in *Cleveland Board of Education* v. *LaFleur*,[90] the Court applied the reasoning of *Stanley* to invalidate school-board regulations which had conclusively presumed women in their fifth month of pregnancy to be unfit to perform their duties and had therefore required them to take a leave of absence.[91]

The present importance of *Stanley* and *LaFleur* is recognized when one considers two later cases. These later cases distinguished *Stanley* and *LaFleur* as involving fundamental personal rights—the right to raise children (*Stanley*) and freedom of choice in matters relating to marriage and family life (*La Fleur*).[92] These later cases held that the presence of such fundamental interests mandated a stricter standard of constitutional review.[93]

In *O'Connor* v. *Donaldson* the Supreme Court again addressed the need for individualized determinations when substantial rights are involved.[94] *O'Connor* concerned the rights of mental patients involuntarily committed. The case is particularly relevant because of the similarity between mental and physical disabilities. In *O'Connor* the Supreme Court unanimously held that the involuntary civil commitment of Kenneth Donaldson deprived him of his constitutional right to liberty, since he was "a nondangerous individual . . . capable of surviving safely in freedom by himself or with the help

of willing and responsible family members or friends."[95]

The state of Florida had advanced three justifications for involuntary civil commitment of the mentally ill—danger to others, danger to self, and need for treatment. However, the Court refused to consider the constitutional sufficiency of these reasons, because Donaldson was neither dangerous nor being given treatment.[96] Furthermore, the Court dismissed, as insufficient, state interests in providing superior living standards for the mentally ill and sparing others exposure to the mentally ill.[97]

Subsequent to *O'Connor*, courts have considered what test should be applied in matters involving the substantial curtailment of the right to liberty as recognized in *O'Connor*. One case involved the transfer of a patient from one state mental hospital to another which was substantially more restrictive. The court invalidated such transfer as violative of due process.[98] Given the fundamental right implicated, the court held:

> [A]t a minimum, where a state has varying available facilities for the mentally ill which differ significantly in the amount of restriction on the rights and liberties of the patients, due process requires that the state place individuals *in the least restrictive setting* consistent with legitimate safety, care, and treatment objectives.[99]

However, at least one court has stated that the least-restrictive alternative test is not required in civil commitment proceedings.[100]

The cases discussed in this section demonstrate that individualized determination is required when the state deals with the fundamental rights of individuals. No longer may people be imprecisely characterized when such characterization interferes with the exercise of basic rights.

An Argument for the Unconstitutionality of Compulsory-Sterilization Statutes

Compulsory sterilization is a major social evil both because it violates the basic dignity of individuals by forcibly and directly destroying their ability to procreate new human life and because it offers itself to those in authority as a tool for subjugating the weak and the outcast by branding them "unfit."[101] The difficult task of this section is to structure an argument which will tumble the already-eroded foundation of *Buck* v. *Bell*.[102]

The major development in constitutional law which provides the basis for repudiating *Buck* is the recognition of procreation as a fundamental right.[103] Such recognition clearly defuses any reliance on *Jacobson*, a case which did not involve a fundamental right.[104] However, the parameters of the right to procreate have not been completely delineated. For example, the government may be able to make a reasonable distinction between the right and the exercise of the right and, in so doing, prohibit fornication.[105] However, regardless of the areas of uncertainty, the right to procreate certainly includes the right of adults to engage in sexual intercourse with members of the opposite sex.[106] The reasoning employed in *Griswold* to forbid

state interference with the use of contraceptives would apply equally were the state to attempt to proscribe procreative sex.[107] Therefore, I shall focus the following discussion on procreative sexual relations between consenting adults. The invalidation of compulsory-sterilization statutes, however, would not *per se* invalidate laws prohibiting fornication.[108] The proscription of fornication is not analogous to compulsory sterilization; the former suspends the exercise of the right to procreate, while the latter irrevocably destroys the possibility of its exercise.[109]

Since the infringement of a fundamental right traditionally invokes the strict-scrutiny standard of review,[110] that standard should be applied in reviewing compulsory-sterilization legislation. As indicated above,[111] under this test the challenged legislation must further a compelling state interest and must do so by means least restrictive of the right being infringed.[112]

However, recent literature suggests dissatisfaction with this test, applying in its place a lesser level of scrutiny. Courts which have adopted the intermediate test require more than a rational basis for the challenged legislation but less than a compelling state interest. Rather, to be upheld, the legislation must bear a fair and substantial relationship to the end it attempts to achieve.[113] Although one would readily expect courts to use the strict test when evaluating an infringement of a right as basic as the right to procreation, I shall analyze compulsory-sterilization statutes under the middle-level standard in order to guide courts which might choose it.

Two justifications are generally advanced for compulsory-sterilization statutes: to prevent the transmission of inheritable genetic defects and to prevent the birth of children whose parents are unable to care for them.[114] Among the impairments currently known to be genetically transmitted are Down's syndrome, Superfemale, and Turner's syndrome.[115] The state's interest in preventing the birth of children who will be uncared for is an interest in the future life and health of unborn children and in preserving the fiscal integrity of state welfare programs.[116]

These state interests may be applied only to certain individuals. In *In Re Sterilization of Moore*,[117] the North Carolina Supreme Court failed to limit the scope of the pertinent statute to individuals who would violate the purposes of the statute.[118] In light of the federal district court's decision in *North Carolina Association*,[119] the construction *Moore* applied to the North Carolina statute is unconstitutional. The federal district court had held that sterilization could be performed only on individuals who would violate the purposes of the statute. This holding demanded a finding that the proposed subject of the compulsory sterilization be likely to engage in sexual activity without using contraceptive devices and that as a result either a defective child would likely be born or a nondefective child would be born who could not be cared for by his or her parents.[120] If such a finding was not made, there

would be no reasonable relationship between the legislation and its application.

Even if the above finding is made, preventing the transmission of inheritable genetic defects is nevertheless neither a compelling nor a substantial state interest. The state cannot adopt one theory of life at the expense of human rights.[121] That is, the state cannot decide that certain classes of human persons are unfit for existence in the human race and implement that decision by infringing upon fundamental rights.[122] The language used in a case involving eugenic abortion is highly appropriate:

> The right to life is inalienable in our society. A court cannot say what defect should prevent an embryo from being allowed life. . . . Examples of famous persons who have had great achievements despite physical defects come readily to mind, and many of us can think of examples close to home. A child need not be perfect to have a worthwhile life. . . . The sanctity of the single human life is the decisive factor in this suit in tort. Eugenic considerations are not controlling. We are not here talking about the breeding of prize cattle.[123]

The recent case of *O'Connor* v. *Donaldson*[124] confirms this view. *O'Connor* stands for the proposition that the state cannot violate the constitutional rights of the mentally ill. Mental illness alone, without a finding of dangerousness, is an insufficient basis upon which to deny one the constitutional right to liberty.[125] This rationale is equally applicable to the physically disabled. Fundamental rights, such as the right to procreation, cannot be denied the genetically affected mentally and physically ill *merely because of their status* as persons with genetic defects. If this status alone is insufficient to justify an infringement, then an infringement based upon the offspring of such individuals would be equally unjustifiable. No evidence is adducible to indicate that the physically and mentally handicapped are *dangerous* individuals. The mere existence of such "defects" is of no legitimate concern to the state. Language from *O'Connor* is appropriate:

> May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity canot constitutionally justify the deprivation of a person's physical liberty.[126]

A recent decision by the Supreme Judicial Court of Massachusetts, *Superintendent of Belchertown* v. *Saikewicz*, reaffirms this position that the presence of defects is an insufficient reason to deny fundamental rights.[127] In this case, Joseph Saikewicz, a sixty-seven-year-old mental patient with an IQ of ten and a mental age of approximately two years and eight months, contracted an incurable form of leukemia. In determining whether or not to forego extraordinary treatment for him, the court held that Saikewicz's rights were not altered because of his profound mental retardation:

> [W]e recognize a general right in all persons to refuse medical treatment in appropriate circumstances. The recognition of that right must extend to the case of an incompetent, as well as a competent, patient because the value of human dignity extends to both.[128]

Even to those mentally or physically handicapped individuals who do become dangerous to themselves or to others, alternatives less drastic than institutionalization and sterilization are available. Many of these individuals could be adequately cared for by friends and family members.[129]

Even as to extreme cases, sterilization is unreasonable. Dangerousness is not a transmittable genetic defect. Once it has been concluded that the status of being handicapped is an insufficient basis for compulsory sterilization, subsequent harmful activity by the parents' offspring becomes irrelevant to the issue of reproducing offspring. Whether or not the genetically defected parents are dangerous is irrelevant to the interest in preventing transmission of genetic defects, dangerousness not being an inheritable genetic disease.

In addition to the due-process argument, compulsory-sterilization statutes are vulnerable on equal-protection grounds. The category of individuals to be subjected to sterilization is underinclusive. Excluded therefrom are unaffected individuals who are just as likely as affected individuals to transmit genetic diseases and who with similar ease and accuracy can be predicted, as a class, to transmit them. Numerous states prohibit marriage and sexual intercourse between parties within certain degrees of consanguinity, labeling such relationships incestuous.[130] One of the reasons for these prohibitions is the greater likelihood of genetic defects in offspring of closely related parents.[131] However, compulsory-sterilization statutes do not provide for the sterilization of closely related individuals found likely to engage in procreative sexual intercourse.

The second justification advanced for compulsory sterilization is the prevention of the birth of children to parents who are unable to care for them. This purpose is not concerned with the transmission of genetic defects but is specifically addressed to nondefective children of defective parents who, because of their handicap, are unable to care for their children.

This purpose, unlike the prior one, does further a legitimate state interest. Many, although not all, individuals *found* to be unable to care for their nondefective offspring will in fact, even with the help of family members and friends, be unable to care for them. Thus, the responsibility for the care and education of these children will fall upon the state. In view of this result, the "valid [state] interest in preserving the fiscal integrity of its programs" arises.[132] With limited and diminishing financial capabilities, the state has a legitimate interest in attempting to circumscribe the scope of public-assistance programs.

However, a long line of Supreme Court decisions clearly holds that this legitimate state interest is a constitutionally invalid reason for infringing a fundamental right.[133] Social and economic programs which have incidental effects on fundamental rights are evaluated by the rational-basis test.[134] In a recent case the Court upheld a durational-residency requirement as a condition for obtaining a divorce on the ground that the relief sought by the appellant "was not *irretrievably foreclosed*."[135] But compulsory sterilization does not have a merely incidental effect on the fundamental right to procreate, and it does irretrievably foreclose the possibility of the exercise of the right. Such activity by the state, for economic purposes, is a gross violation of due process.

Additionally, the sterilization of the physically and mentally handicapped because of their inability to care for their offspring constitutes a denial of equal protection. Handicapped parents are sterilized to prevent an increased number of children who will become public charges. Yet, through juvenile-status-offense and child-neglect statutes parents can divest themselves, almost at their discretion, of undesirable or unwanted children, and the state, practically without restriction, can remove children from their parents.[136] For example, children have been declared incorrigible and have been institutionalized on charges of refusing to come home early, for sleeping all day, or for slamming doors during an argument.[137] States can challenge parental control on the basis of neglect on grounds such as inadequate parenting or unconventional parental behavior.[138]

The state's acceptance of children as public charges for virtually any reason and the state's broad ability to remove children from parental custody are inconsistent with the insidious goal of reducing the number of uncared-for children. While engaging in these activities the state cannot arbitrarily address part of the problem of uncared-for children by forcibly sterilizing certain classes of potential parents.

Conclusion

In this paper I have traced the history of compulsory sterilization in America since the 1927 landmark case of *Buck* v. *Bell*. Although the current trend by state legislatures is to repeal existing statutes, recent decisions indicate that courts would uphold the right of states to pass compulsory-sterilization laws.

However, developments in the law since 1927 have afforded significant protection to fundamental rights and, in particular, to decisions regarding procreation. State infringements into areas encompassed by the right to privacy require substantial justification. The Court, in *Skinner* v. *Oklahoma*, expressly recognized that sterilization irretrievably deprives the individual of the exercise of a basic right. Cases such as *Stanley* v. *Illinois* and *O'Connor* v. *Donaldson* establish that the Court will insist upon scrupulously precise

categorizations where individual rights are concerned.

Given these developments, the state interests traditionally advanced to justify compulsory sterilization are inadequate. The state does not have a compelling interest in deciding that certain physical and mental defects make individuals with those defects unfit for existence in the human race. While the state may legitimately desire healthy future generations, it cannot implement that desire through the infringement of a fundamental right. To argue that persons with a genetic defect may be dangerous is irrelevant to the issue of procreating offspring. Dangerousness is not a transmittable genetic defect, and sterilization is not a remedy for dangerousness.

Even the valid state interest in the health and welfare of future generations when parents are unable to care for their offspring is insufficient to override the fundamental right involved. The basis of this interest is the additional economic burden on the state for the care and education of these children. Such an economic burden has never been held sufficient justification to violate basic rights.

The state is a society of individuals and groups united to protect and advance all its members, including the less fortunate. Surely, everyone would wish that burdens and sacrifices would be unnecessary. But then, what need would there be for the state? Society exists to care for the underprivileged, not to eliminate them. These individuals will repay such human compassion tenfold, for they will realize that society did not abandon or stigmatize them. Thus, society will ultimately benefit as it reaps the abundance of talent and love deep within the beings of those we have arrogantly labeled "defective."

Notes

1 *See* Narasimh Acharya, *The Sin That Led to Indira Gandhi's Defeat*, 1 International Review of Natural Family Planning 136 (1977); N.Y. *Times*, Feb. 6, 1978, § 1, at 2, col. 3.

2 274 U.S. 200 (1927).

3 60 U.S. (19 How) 393 (1857).

4 410 U.S. 113 (1973).

5 Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807, 862 (1973):

> First, *Dred Scott*, then *Buck* v. *Bell* and now the most tragic of them all—*Roe* v. *Wade*. Three generations of error are three too many—and the last of them shall be called the worst.

6 The issue of sterilization has many possible tangents, not all of which can be discussed in this article. Issues excluded from the purview of this article include the procedural due-process aspect of compulsory sterilization, the degree and content of information necessary to provide informed consent, civil liability, spousal and parental consent, and medical malpractice.

7 Comment, *Eugenic Sterilization Statutes: A Constitutional Re-evaluation*, 14 J. Family L. 280, 283n.12 (1975).

8 Williams v. Smith, 190 Ind. 526, 131 N.E. 2 (1921).

9 274 U.S. 200, 205.

10 *Id.* at 206–7.

11 *Id.* at 207.

12 197 U.S. 11 (1905).

13 *Id.* at 12.

14 *Id.* at 24–31. For a discussion of compulsory medical treatment in general, *see* Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 Fordham L. Rev. 1 (1975).

15 274 U.S. at 207.

16 The cases, up to 1973, dealing with compulsory sterilization are collected in *Validity of Statutes Authorizing Asexualization or Sterilization of Criminals or Mental Defectives*, 53 A.L.R. 3d 960 (1973).

17 The statutes are listed in *Interest of M.K.R.*, 515 S.W. 2d 467, 470n.3 (Mo. 1975).

18 Several states have repealed their compulsory sterilization laws. *See e.g.*, 1974 Ariz. Sess. Laws, ch. 185 § 1; 1974 Ind. Acts, P.L. 60, § 1; 1974 S.D. Sess. Laws, ch. 187.

19 N.C. Gen. Stat. §§ 35–50.

20 *Id.* § 35-11.

21 *Id.* § 35-39.

22 289 N.C. 95, 221 S.E.2d 307 (1976).

23 221 S.E.2d at 308.

24 *Id.* at 315.

25 *Id.*

26 *Id.*

27 Rights which have been held to be fundamental include the right to vote, Dunn v. Blumstein, 405 U.S. 330 (1972); the right to travel interstate, Shapiro v. Thompson, 394 U.S. 618 (1969); and the right to terminate a pregnancy, Roe v. Wade, 410 U.S. 113 (1973).

28 The only law ever to withstand scrutiny under this test was the Executive Order in Hirabayashi v. United States, 320 U.S. 81 (1943), and Korematsu v. United States, 323 U.S. 214 (1944).

29 Shapiro v. Thompson, 394 U.S. 618 (1969); Loving v. Virginia, 388 U.S. 1 (1967).

30 McGowan v. Maryland, 366 U.S. 420 (1961). The invocation of this test usually signals validation of the legislation under review.

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

32 221 S.E.2d at 312.

33 *Id.* at 313.

34 *Id.*

35 *Id.* at 312.

36 *See* text accompanying note 15 *supra*.

37 221 S.E.2d at 312.

38 420 F. Supp. 451 (M.D.N.C. 1976).

39 *See* text accompanying note 21 *supra*.

40 420 F.Supp. at 455–56.

41 *Id.* at 456–57.

42 *Id.* at 457.

43 *Id.* at 458.

44 *Id.* at 457.

45 *Id.* at 458 (emphasis added).

46 372 F.Supp. 1196 (D.D.C. 1974).
47 *Id.* at 1199.
48 *Id.*
49 *Id.* at 1201.
50 *Id.*
51 Relf v. Mathews, 403 F.Supp. 1235 (D.D.C. 1975).
52 Relf v. Weinberger, 565 F.2d 722 (D.C. Cir. 1977).
53 *Id.* at 726.
54 42 U.S.C. § 300a-8 (1975).
55 Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974).
56 *See, e.g.*, Taylor v. St. Vincent's Hospital, 523 F.2d 75 (9th Cir. 1975), *cert. denied*, 424 U.S. 948 (1976); Chrisman v. Sisters of St. Joseph of Peace, 506 F.2d 308 (9th Cir. 1974); Ham v. Holy Rosary Hospital, 529 P.2d 361 (Mont. 1974); and cases cited in Hodge v. Paoli Memorial Hospital, 433 F.Supp. 281, 284 (E.D. Pa. 1977). *Contra*, Hathaway v. Worchester City Hospital, 475 F.2d 701 (1st Cir. 1973).
57 Taylor v. St. Vincent's Hospital, 523 F.2d 75 (9th Cir. 1975), *cert. denied*, 424 U.S. 948 (1976).
58 Ham v. Holy Rosary Hospital, 529 P.2d 361 (Mont. 1974).
59 Doe v. Bridgeton Hospital Association Inc., 71 N.J. 478, 366 A.2d 641 (1976).
60 432 U.S. 519 (1977).
61 98 S.Ct. 1099 (1978).
62 *Id.* at 1102n.1. The "retarded" daughter attended public school and had been promoted each year with her class. *Id.*
63 *Id.* at 1102.
64 *Id.* at 1102n.1.
65 A.L. v. G.R.H., 325 N.E.2d 501 (Ind. Ct. App. 1975).
66 98 S.Ct. at 1106.
67 *Id.* at 1109, 1110 (Stewart, J., dissenting).
68 316 U.S. 535 (1942).
69 *Id.* at 542.
70 *Id.* at 536.
71 *Id.* at 541 (emphasis added).
72 381 U.S. 479 (1965).
73 410 U.S. 113 (1973).
74 As to Roe v. Wade, this statement is accurate insofar as one considers *Roe* to be a contraception case. That is, the Court in *Roe* refused to recognize the personhood of the preborn and, therefore, argued as if only the sexually related decisions of one person were involved. A subsequent decision has made clear that the abortion right in *Roe* was based on the autonomy of the pregnant woman rather than on the intimacy of the familial or medical relationship. Whalen v. Roe, 429 U.S. 589, 598-600 n.26 (1977).
75 Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraceptives); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (abortions).
76 Eisenstadt v. Baird, 405 U.S. 438 (1972).
77 *Id.* at 453.
78 431 U.S. 678 (1977).
79 The actual basis for *Carey* is unclear. Only three justices joined with Mr. Justice Brennan in buttressing the decision on the language in *Eisenstadt*. Justices White, Powell, and Stevens, while concurring in the result, did not join in the apparently overbroad state-

ments of the plurality. Rather, they suggested that they would accept as constitutional certain carefully tailored restrictions on the sexual activity of unemancipated minors. *Id.* at 702, 703, 712.

The right to an abortion was extended to minors in Planned Parenthood v. Danforth, 428 U.S. 52 (1976).

80 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

81 Maher v. Roe, 432 U.S. 464, 472n.7 (1977).

82 *See* text accompanying note 49 *supra*. *See also* Application of A.D., 90 Misc.2d 272, 394 N.Y.S.2d 139, 140 (Sur. Ct. 1977).

83 410 U.S. 113, 152 (1973).

84 *Id.* at 154. Mr. Justice Douglas, the author of *Skinner*, cites the right of procreation as fundamental, 410 U.S. at 212, and yet also suggests that Buck v. Bell possesses continued validity, *Id.* at 215.

85 405 U.S. 645 (1972).

86 *Id.* at 650. The Court concluded summarily that since the statute applied only to unwed fathers, it was also violative of the equal protection clause. *Id.* at 658.

87 *Id.* at 652.

88 *Id.* at 654.

89 *Id.* at 656–57.

90 414 U.S. 632 (1974).

91 *Id.* at 644.

92 Weimberger v. Salfi, 422 U.S. 749, 771 (1975); Quilloin v. Walcott, 98 S.Ct. 549, 554–55 (1978).

93 *Id.*

94 422 U.S. 563 (1975).

95 *Id.* at 576.

96 *Id.* at 573.

97 *Id.* at 575.

98 Eubanks v. Clarke, 434 F.Supp. 1022, 1028 (E.D. Pa. 1977).

99 *Id.* (emphasis added). Other courts employing the least restrictive alternative test include Stamus v. Leonhardt, 414 F.Supp. 439 (S.D. Iowa 1976); Davis v. Watkins, 384 F.Supp. 1196 (N.D. Ohio 1974); Welsch v. Likins, 373 F.Supp. 487 (D. Minn. 1974) (mentally retarded); Kesselbrenner v. Anonymous, 33 N.Y.2d 161, 350 N.Y.S.2d 889, 305 N.E.2d 903 (1973).

100 Appeal of Niccoli, 372 A.2d 749, 752–53 (Pa. 1977).

In addition, another aspect of *individualized determinations* might include the question of vagueness. The language of many compulsory-sterilization statutes is ambiguous as to its intended application. At some point such vagueness and ambiguity can rise to the level of a constitutional defect. However, the language is often capable of specificity and, since an attack on these grounds does not directly address the issue of eugenic sterilization, further discussion of this potential area of litigation is unwarranted.

Various statutes have been declared unconstitutionally vague because the conduct proscribed was so vague as to constitute an unlawful restriction of personal liberty. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Coates v. City of Cincinnati, 402 U.S. 611 (1971); Lanzetta v. New Jersey, 306 U.S. 451 (1939).

101

> The potential for social oppression and invidious discrimination is so clear where compulsory sterilization on socioeconomic grounds is involved that one can reasonably expect our courts to strike down such legislation as unconstitutional.

Giannella, *Eugenic Sterilization and the Law*, in *Eugenic Sterilization* 75 (J. Robitscher

ed. 1973). *See also* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

102 The Supreme Court has reversed itself on significant matters. *E.g.*, Monell v. New York City Dep't of Social Servs., — U.S. —, 56 L.Ed.2d 611 (1978), *rev'g* Monroe v. Pape, 365 U.S. 167 (1961); Mapp v. Ohio, 367 U.S. 643 (1961), *rev'g* Wolf v. Colorado, 338 U.S. 25 (1949).

103 Skinner v. Oklahoma, 316 U.S. 535 (1942); *see* text accompanying note 71 *supra.*

104 *See* text accompanying notes 12–14 *supra.*

105 Carey v. Population Services International, 431 U.S. 678, 702 (1977) (White, J., concurring).

106 It appears that the right does not extend to deviant sexual behavior between unmarried consenting adults. Doe v. Commonwealth's Attorney for City of Richmond, 425 U.S. 901 (1976), *aff'g without opinion* 403 F.Supp. 1199 (E.D.Va. 1975) (three-judge court).

107 The pertinent language in *Griswold* (*see* note 72 *supra* at 485–86) clearly extends to the intimacy of legitimate sexual relations, whether they be contraceptive or procreative:

> Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

The language in North Carolina Association for Retarded Children v. North Carolina, 420 F.Supp. 451, 456 (M.D.N.C. 1976), indicating a *duty* to use contraceptives, would clearly be unconstitutional.

108 However, if compulsory sterilization is unconstitutional as applied to consenting adults, it would apparently be unconstitutional as applied to minors. *Cf.* Eisenstadt v. Baird, 405 U.S. 438 (1972).

109 Sterilization, of course, forecloses the possibility of procreative sex, the right under discussion, although not the ability to engage in sexual intercourse.

110 Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

111 See notes 27–29 *supra* and accompanying text.

112 Roe v. Wade, 410 U.S. 113, 155 (1973); Shapiro v. Thompson, 394 U.S. 618 (1969); Loving v. Virginia, 388 U.S.1 (1967).

113 Of extreme importance is the use of this test in North Carolina Association for Retarded Children v. North Carolina, 420 F.Supp. at 457–58. The Supreme Court has also resorted to an intermediate level of review in different contexts. See Moore v. City of East Cleveland, 431 U.S. 494, 498 (1977) (housing ordinance); Craig v. Boren, 429 U.S. 190, 197 (1976) (classification based on gender); Trimble v. Gordon, 430 U.S. 762, 767 (1977) (classification based on illegitimacy).

114 420 F.Supp. at 457–58. In the past many other justifications were advanced on behalf of compulsory sterilization. Such justifications were based on the belief that the following types of individuals would genetically transmit their activities or conditions: syphilitics, criminals, drunkards, prostitutes, twice-convicted felons, sodomists, habitual sexual criminals. Comment, *Eugenic Sterilization Statutes: A Constitutional Re-evaluation*, 14 J. Family L. 280, 285n.20 (1975). The discussion in the text considers the two strongest arguments advanced at present.

115 *Id.* at 286n.22.

116 In Re Sterilization of Moore, 289 N.C. 95, 221 S.E. 2d 307, 312 (1976). The interest in the future life and health of unborn children translates into a fiscal interest. In Re Simpson, 180 N.E.2d 206, 207 (Ohio 1962):

> There is the further probability that such offspring will also be mentally deficient and become a public charge for most of their lives. . . . To permit [them] to have further children would result in additional burdens upon the county and state welfare departments.

See notes 132-138 *infra* and accompanying text. Insofar as this interest may also relate to the transmission of genetic defects, the discussion at notes 121-131 *infra* and accompanying text is relevant.

117 For a discussion of this case *see* notes 22–37 *supra* and accompanying text.

118 Despite this unconstitutional application of the statute, commentators found the decision acceptable. *See, e.g.*, Comment, *Sexual Sterilization—Constitutional Validity of Involuntary Sterilization and Consent Determinative of Voluntariness*, 40 Miss. L. Rev. 509 (1975); Note, 8 Tex. Tech L. Rev. 436 (1976); Note, 15 J. Family L. 344 (1977).

119 *See* text accompanying notes 38–45 *supra*.

120 420 F.Supp. at 456–57.

121 *Cf.* Roe v. Wade, 410 U.S. 113, 162 (1973):

> [W]e do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.

122 Insofar as *Roe* declared unborn children not to be human persons, *Roe* is consistent with the statement in the text.

123 Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689, 693 (1967).

124 *See* notes 94–97 *supra* and accompanying text.

125 422 U.S. at 575.

126 *Id.*

127 370 N.E.2d 417 (Mass. 1977).

128 *Id.* at 427. The court rejected any reliance on quality-of-life considerations, *id.* at 432, and stated that this patient's right to life was the same as that of anyone else:

> With regard to the second factor, the chance of a longer life carries the same weight for Saikewicz as for any other person, the value of life under the law having no relation to intelligence or social position. [*Id.* at 431]

129 *Cf.* 422 U.S. at 576.

130 *E.g.* N.Y. Penal Law § 255.25.

131 R. Rugh and L. Shettles, *From Conception to Birth: The Drama of Life's Beginnings* 207 (1971). People v. Yocum, 31 Ill. App. 3d 586, 335 N.E.2d 183, 185 (1975); People v. Boyer, 24 Ill. App. 3d 671, 321 N.E.2d 312, 314 (1974); People v. Baker, 69 Cal. Rptr. 595, 442 P.2d 675, 677–78 (1968) (giving history of incest laws). The above cases also indicate that another reason for laws prohibiting incest was to promote domestic peace.

132 Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

133 *Id.* (right to travel); Dunn v. Blumstein, 405 U.S. 330 (1972) (right to vote); Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (right to health care).

134 Weinberger v. Salfi, 422 U.S. 749 (1975); Dandridge v. Williams, 397 U.S. 471 (1970).

135 Sosna v. Iowa, 419 U.S. 393, 406 (1975).

136 For a thorough discussion of these and related areas *see* Comment, *The Rights of Children: A Trust Model*, 46 Fordham L. Rev. 669, 685–94, 746–50 (1978).

137 Meyers, *Bad Girls before the Law*, 6 Student Law. 34-36 (1977); Wald, *Making Sense out of the Rights of Youth*, 4 Human Rights 13, 21 (1974). *See also* Rosenberg & Rosenberg, *The Legacy of the Stubborn and Rebellious Son*, 74 Mich. L. Rev. 1097 (1976).

138 Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 Stan. L. Rev. 985, 1007-8 (1975).