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STERILIZATION: A "REMEDY FOR THE MALADY" OF CHILD ABUSE?

James T. Williams was pronounced dead at Richland Memorial Hospital, November 19, 1985 at the tender age of twelve weeks.¹ A subsequent autopsy confirmed that the infant had been starved to death.² Eight months later, the child's mother, Debra Ann Williams, was charged with the murder of her son, and pled guilty to a charge of involuntary manslaughter.³

Child abuse and neglect cases ordinarily do not command much attention. However, Ms. Williams managed to make headlines.⁴ Her guilty plea was the result of a bargaining process between the district attorney and the state's attorney. Plea bargaining is a well accepted and necessary part of the criminal justice system.⁵ Ms. Williams received considerable media attention because she accepted sterilization as a term of her plea.⁶ The state's attorney did not consider sterilization a punishment, but rather a "remedy for the malady. She seem[ed] to only want to hurt her own children. With this operation, she can't have any more to hurt."⁷

This Comment discusses the inadequacies of our child welfare system at a time when mandatory reporting laws have heightened public awareness of

1. *South Carolina v. Williams*, Indictment No. 86-187 July 7, 1986 at 2, 4. (hereinafter Indictment). Although the *Williams* case is more than two years old at the time of this publication, sterilization of abusive parents is by no means an anomaly. See, e.g., Der Showitz, *Birth Control as a Penalty for Child Abuse*, L.A. Times, June 4, 1988, at 8, col. 3 (18 year old mother of two children sentenced to a life of using birth control after leaving her two sons in a sweltering apartment for two days); *Plan to Sterilize Woman Debated*, N.Y. Times, Sept. 25, 1988, at 35, col. 1; and *Woman Sterilized in Hope of Leniency in Child's Death*, N.Y. Times, Oct. 8, 1988, at 7, col. 6 (both articles discuss Melody Baldwin, age 29, who gave her son a fatal dose of prescription drugs. The prosecutor dropped murder charges pending against her after she was sterilized and pled guilty to the charge of "neglect of a dependent." The Judge proposed the "unorthodox solution to the troubles in her life" and commented: "she is a person who no longer needs to have any children." If she becomes a mother again, "the possibility is there for the same thing to happen."). This Comment is in agreement with Richard Waples, Legal Director of the Indiana Civil Liberties Union, that the judiciary in these cases is "authorizing decision[s] on reproductive capacity that [are] dangerously close to eugenics." N.Y. Times, Oct. 8, 1988, at 7, col. 6.

2. Indictment, *supra* note 1, at 4.

3. *Id.* at 2.

4. Feely, *Woman Accepts Sterilization as Term of Plea*, NAT'L L.J., Aug. 18, 1986, at 61.

5. See *Miller v. Barilla*, 549 F.2d 648, 649 n.3 (9th Cir. 1977) (recognizing plea bargaining as an "integral part of the judicial process").

6. Feely, *supra* note 4.

7. *Id.*

the problem and sparked public concern. It discusses child abuse as an illness and considers therapeutic approaches to the problem that, when available, have proven successful. It considers the present inadequacies of our child welfare system; the prosecutorial use of the plea bargain to encourage sterilization of abusive parents as a means of preventing child abuse; and the possibility of legislation mandating sterilization of recurrent and serious child abuse offenders. The Comment concludes that the plea bargain situation is being used to circumvent constitutional challenges that sterilization legislation would surely face.

Ms. Williams is used as an example of one of many abusive parents who may have been helped had society given her its attention and been willing to invest in her rehabilitation. Her case exemplifies a system that is not functioning and demonstrates how, through the use of the plea bargaining process, sterilization of abusive parents has become an alternative "remedy to the malady" of child abuse which is not subject to constitutional challenge.

I. ARE OUR CHILDREN BEING PROTECTED?

Newspaper headlines expose in graphic detail brutal beatings, intentional starvation and various psychological and sexual abuses of children which are offensive to every civilized individual's sense of human decency. Yet despite society's revulsion with the maltreatment of children, federal, state and local officials, prior to the 1960's had demonstrated a reluctance to actively⁸ interfere in private family life.⁹

It was not until the 1960's that the state actively intervened in family life by requiring professionals to report suspected cases of child abuse to local authorities.¹⁰ Present laws require police, medical, educational and social

8. While most states had laws against child abuse beginning in the 1920's, these laws were largely attributable to the juvenile court's inquiries into the problems of child abuse and neglect. Public and private welfare agencies had emerged by the 1930's, but the effectiveness of these agencies was daunted by a lack of adequate means of detection. Besharov, *Child Protection: Past Progress, Present Problems and Future Directions*, 17 FAM. L.Q. 151, 152 (Summer 1983).

9. The state's reluctance to interfere in family life may be attributable to a line of family privacy cases beginning in the 1920's wherein the Supreme Court specifically recognized the right of parents to determine the upbringing of their children. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing the fundamental right of every parent to determine the education and upbringing of his children, the Court struck down a Nebraska statute prohibiting the instruction of foreign languages in schools); *Peirce v. Society of Sisters*, 268 U.S. 510, 535 (1925) ("The child is not a mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty, to recognize and prepare him for additional obligations.").

10. *See Besharov, supra* note 8, at 154.

service professionals to report all suspected cases of child abuse.¹¹ "Abuse" includes physical and sexual assault, physical neglect and psychological abuse.¹² These reporting statutes have been successful.¹³ It is estimated that approximately 1,727,000 cases are reported annually.¹⁴ The rising statistics evidence an increased public awareness of the problem and a growing public concern. Unfortunately, these reports and passive concern do not always guarantee the safety of the child.

It is estimated that approximately twenty-five percent of all child deaths resulting from abuse or neglect involve children whose situation had already been reported to a child protection agency.¹⁵ Child deaths due to administrative inadequacies are a significant problem today.¹⁶ Children initially removed from their homes because of physical abuse are often prematurely returned home and subsequently killed by their abusive care taker.¹⁷ Violation of routine procedures of case review prior to returning the child home,

11. See, e.g., D.C. CODE ANN. § 2-161 to 166 (1973); S.C. CODE ANN. §§ 20-302.1 to 302.4 (Supp. 1973).

12. See Besharov, *The Legal Aspects of Reporting Known and Suspected Cases of Child Abuse and Neglect*, 23 VILL. L. REV. 458, 473 (1977-78).

13. See Besharov, *supra* note 8, at 154.

14. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, AN INFORMED APPROACH TO A SHARED CONCERN at 3 (DHHS 1986). It is also estimated that in 1986, 25.2 children per 1,000 children nationwide experienced some form of abuse or neglect. NATIONAL CENTER FOR CHILD ABUSE AND NEGLECT: STUDY OF THE INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT at vi (DHHS 1987).

15. Besharov, *supra* note 8, at 162.

16. For a specific case study of five children whose deaths were attributable to the inadequacies of the social service system, see Hollander, *Homicides of Abused Children Prematurely Returned Home*, 30 FOR. SCI. INT'L 85 (1986), where the author takes the position that, but for administrative flaws, these children would be alive today.

17. A number of states have declared that a state's child abuse prevention statute creates a special relationship between the child welfare agency and the class of abused and neglected children whose identity has been reported to a child abuse agency. Under this rationale, several courts have concluded that the state may be held liable for negligence in performance of the duties owed to such children. See, e.g., *Turner v. District of Columbia*, 56 U.S.L.W. 2261 (1987) (state could be sued for the starvation death of a six month old child where a report of suspected abuse was filed one month before the child's death and social worker who twice could not gain access to the apartment and once knocked on the apartment door and heard loud music, made no special effort to gain entry to the home and did nothing further in the case); *Mammo v. State*, 138 Ariz. 528, 675 P.2d 1347 (1983) (wrongful death action brought against the state alleging negligence where social service agency, after receiving a report that a child was in danger, allowed the mother to cancel a hearing regarding the child's custody because the mother had planned a vacation. No vacation was ever scheduled and the child was beaten to death. No attempt had been made to see the child prior to cancellation of the hearing and the only contact the agency had with the family was by telephone.); *People v. Beruman*, 638 P.2d 789 (Colo. 1982) (child welfare agency held liable for the death of a seven year old, prematurely returned home, whose parents, while still in treatment, beat her to death). *But see DeShaney v. Winnebago County Department of Social Services*, 57 U.S.L.W. 4218, 4221 (Feb. 1989) (state social service agency's failure to provide child with adequate

inadequate or no psychotherapy for the parents and excessive caseloads contribute to the deaths of these children.¹⁸

James T. Williams' death may well have been the result of an inadequate social service system.¹⁹ Ms. Williams had twice before been convicted of abusing her infant children.²⁰ Neither of these convictions were followed up by any kind of counseling for the mother, although this was indeed recommended by the state hospital psychologist.²¹ The Department of Social Services never became involved with her personally. Had they done so, the parent-child relationship could have been monitored and quite possibly, the child would be alive today.²²

A. Affirmative Steps For A Flawed System

Experts generally agree that four factors are frequently found among parents who abuse their children: 1) aberrant childhood nurture of the parent; 2) early attachment problems between the mother and child; 3) aggressive tendencies in relationships; and 4) high levels of stress.²³ Each one of these factors was present in Ms. Williams' life. She was abandoned at an early age by her mother, who had physically beaten her with fists and broom handles.²⁴ She was the victim of frequent sexual assault by her step-father.²⁵ Her husband beat her and deserted her for substantial periods of time.²⁶ In short, she was a low income mother, frequently subject to abuse, who was suffering the stress inherent in a failing marriage: a casebook example of a

protection against father's violence did not violate substantive Due Process under the fourteenth amendment and did not give rise to damages under 42 U.S.C. § 1983).

18. Hollander, *supra* note 16, at 87.

19. Counsel for Ms. Williams argued that both she and her son were victims in this case. He alleged that both were injured by a failure of our system. *See* Indictment, *supra* note 1, at 10.

20. In 1978, Ms. Williams pled guilty to an involuntary manslaughter charge in the suffocation death of her new born daughter. In 1981, she was imprisoned for one year on charges of aggravated assault against her four month old son. Feely, *supra* note 4. Ms. Williams voluntarily terminated her parental rights in this child. Indictment, *supra* note 1, at 9.

21. Indictment, *supra* note 1, at 14 (hospital psychologist recommended long term therapy commencing immediately).

22. *But see* McKenna, *A Case Study of Child Abuse: A Former Prosecutor's View*, 12 AM. CRIM. L. REV. 165 (1974) (expressing the view that children's lives could be spared more often if the law contained a more equal balance of responsibility between the Department of Social Services, the police and the State's Attorney's Office). *See infra* note 121 for a criticism of this view.

23. *See* Wald & Cohen, *Preventing Child Abuse — What Will it Take?*, 20 FAM. L.Q. 281, 284 (Summer 1986).

24. Indictment, *supra* note 1, at 7.

25. *Id.*

26. *Id.* at 11.

woman likely to abuse her children.²⁷

Several commentators have advanced the theory that a mother's inability to develop a bond with her child increases the likelihood that she will abuse the child.²⁸ Ms. Williams' failure to bond with her children should have been obvious in light of her two prior convictions for child abuse. Had this failure been recognized, efforts could have been made to decrease the potential for bonding failure in the future. Prevention strategies such as "rooming in," (a procedure whereby the hospital encourages immediate and continuous contact between mother and child from the moment of birth), have met with great success in preventing bonding failure.²⁹ Studies indicate that "low-income mothers who have more early contact show more affectionate behavior toward the child in the weeks after birth."³⁰ Of course, whether this procedure could have saved James Williams is speculative and many critics of this theory would deny its effectiveness.³¹

It is interesting to note, however, that Ms. Williams claimed that she did try to feed the child but he showed no interest in eating.³² Dr. Emery, a pathologist at Children's Hospital, Sheffield, U.K.,³³ espouses a theory that parents can be consciously caring for a child, but the failure to develop natural mother-child communication, (*i.e.* "a mother's response to nonverbal messages" generally termed bonding), causes the child to be "unstimulated."³⁴ The lack of stimulation can give rise to a potentially dangerous situation for the child:

This passive reaction allows the child to be less demanding for meals, have longer and longer intervals between meals, and eat less and less. Such a child does not stimulate the parents to produce food and when food is given, does not show enjoyment and so the parents do not have much emotional satisfaction from feeding the child. This can produce a progressive cycle of fall off in bonding

27. Ms. Williams' attorney argued that her history of abuse "reads like a textbook." *Id.* at 12-13.

28. The bonding theory is well accepted in medical science. *See, e.g.,* Cheung, *Maternal Filicide in Hong Kong*, 26 *MED. SCI. & LAW* 185 (1986); Emery, *The Depraved and Starved Child*, 18 *MED. SCI. & LAW* 138 (1978).

29. Wald & Cohen, *supra* note 23, at 287 n.21.

30. *Id.* at 290.

31. "There is no evidence indicating that for most mothers early contact is a necessary condition for adequate bonding." *Id.* (citing Goldberg, *Parent-Infant Bonding: Another Look*, 54 *CHILD DEVELOPMENT* 1355 (1983)).

32. Indictment, *supra* note 1, at 12.

33. Dr. Emery, MD, FRC PATH, of the Department of Pathology, Children's Hospital, Sheffield, UK. *See* Emery, *supra* note 28, at 138.

34. Emery, *supra* note 28, at 138. No evidence was presented at Ms. Williams' hearing to indicate that the child had been physically beaten, unkempt or unclean. This suggests that perhaps Ms. Williams was consciously caring for the child.

and stimulation.³⁵

Dr. Emery suggests that an unstimulated child may even refuse food all together.³⁶ When this occurs, "extra mothering" is required.³⁷ In a situation where the mother has proven incapable of developing an attachment to the child this may not be possible, and the end result could be death.³⁸

Thus, the Judge in Ms. Williams' case may have been operating under false assumptions when he stated: "You don't starve a child in a moment. You starve somebody day by day, hour by hour in a mean, premeditated and malicious killing. And that's what you did. You just literally starved this child to death slowly, slowly inflicting pain and suffering on that child."³⁹ It is quite possible that Ms. Williams did not sadistically premeditate the starvation of her infant son. The death could be attributable to her inability to bond with the child and to society's inability to recognize and cope with this problem.

Perinatal support programs, providing high-risk parents like Ms. Williams with support services for years following childbirth might have prevented the child's death.⁴⁰ Perinatal support programs consist of frequent home visits by professional persons who work with the mother in facilitating child care.⁴¹ Studies indicate that regular visits by a registered nurse before delivery and for two years after birth worked effectively as only four percent of those studied later abused their children.⁴²

Because professional services are costly, many states have begun programs that provide the same services rendered by lay persons.⁴³ Non-professionals befriend parents who have injured or who are likely to injure their own children. While lay-therapists do not replace professional services, they can limit the need for professional contact⁴⁴ and serve as a means of alleviating the problem of overburdened child welfare workers. The effectiveness of this

35. *Id.* at 139.

36. *Id.* at 140.

37. *Id.*

38. *See id.*

39. Indictment, *supra* note 1, at 17.

40. *See* Wald & Cohen, *supra* note 23, at 291.

41. *See id.*

42. *See id.* at 292.

43. Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse*, 12 AM. CRIM. L. REV. 103, 122 (1974). Lay therapists provide love and interest in the parent, suggesting a model for a good parent-child relationship. *Id.* at 123. This approach may have helped Ms. Williams who, as a victim of child abuse herself, did not have a role model to follow in rearing her own children. Furthermore, her personal history suggests she is alienated, lacks emotional support, and craves affection and understanding. Indictment, *supra* note 1, at 8-9. Perhaps if Ms. Williams had someone to rely on in times of emotional crisis, her aberrant behavior could have been modified.

44. Fraser, *supra* note 43, at 123.

type of program is impressive. During a four year period one group reported that not one child was seriously reinjured.⁴⁵

Parents Anonymous is another therapeutic approach to the problem of child abuse.⁴⁶ Through direct education, and professional guidance, abusive parents are encouraged to share their experiences and frustrations while being encouraged to recognize their problems, understand their causes and learn to control their illness.⁴⁷

While any one of these approaches may have proven successful in the Williams case, no such steps were ever taken. After her conviction for aggravated assault for beating her four-month-old child with a spoon,⁴⁸ Ms. Williams underwent a series of psychological tests which indicated that she had been sexually abused as a child.⁴⁹ Long-term therapy commencing immediately was recommended.⁵⁰ It was not received. Instead, Ms. Williams spent a year in prison repenting for her anti-social behavior.⁵¹ Our criminal justice system is theoretically a rehabilitative system, but this type of response is more similar to Kant's retributive theory of punishment:

Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime. . . . He must first be found deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens. The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it.⁵²

Again it appears that instead of addressing Ms. Williams' problems, society has found it appropriate to punish her for them. In thirty years, Ms. Williams will be free to return to society.⁵³ She will again be free to drift through life without society ever recognizing her problems or addressing them.

Society has demanded that something be done about child abuse. In Ms.

45. *Id.* (citing Alexander, *Help for the Battered Child and His Family*, in *OLDER AMERICANS IN ACTION* at 22 (Apr. 1973)).

46. Parents Anonymous is a self help group which operates in a manner substantially similar to Alcoholics Anonymous. Fraser, *supra* note 43, at 123.

47. *Id.*

48. Indictment, *supra* note 1, at 9.

49. *Id.* at 14.

50. *Id.*

51. Feely, *supra* note 4.

52. I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 100 (J. Ladd trans. 1965).

53. Indictment, *supra* note 1, at 17.

Williams' case, the prosecution, through the use of a plea bargain, has accomplished two seemingly imperative objectives: 1) society has been appeased because a heinous criminal is behind bars; and 2) by rendering her incapable of bearing children, one small step toward the elimination of child abuse has been taken.

A natural reaction to a woman who starves her child to death and watches as he slowly degenerates into a lifeless mass, is to demand that the mother be subject to the harshest punishment. Fortunately, in the past the approach to child abuse has been based upon a belief that it is a social and psychological problem that deserves therapeutic and non-punitive responses. However, as the therapeutic mechanisms break down or prove inadequate, and society's demand for the amelioration of this social ill becomes stronger, while program funding decreases, there may be a shift in emphasis from concern for the individual to a concern for the children *en masse*. This shift in priority may be reflected in the methods of abuse prevention selected.

II. STERILIZATION AS A TERM OF A PLEA

In a plea bargaining situation, the defendant waives various constitutional rights in exchange for sentencing concessions.⁵⁴ The rights waived generally include the right to a jury trial,⁵⁵ the right to call witnesses,⁵⁶ and the right against self incrimination.⁵⁷ The prosecution is relieved of the burden of proving every element of the crime beyond a reasonable doubt.⁵⁸ A defendant's waiver of constitutional rights is considered voluntary if the waiver is knowingly and intelligently made.⁵⁹ According to legal standards of voluntariness, Ms. Williams voluntarily sacrificed her ability to bear children in hope of leniency.⁶⁰ Any concern, as to whether conditioning the acceptance of a plea for a lesser offense upon a defendant's submission to tubal ligation⁶¹ is involuntary and, therefore, constitutionally infirm, has been set to rest by the courts.

54. See *Thundershield v. Solem*, 565 F.2d 1018, 1021 (8th Cir.) *cert. denied*, 435 U.S. 954 (1978). See also FED. R. CRIM. P. 11.

55. *Thundershield*, 565 F.2d at 1021.

56. *Id.*

57. *Id.*

58. *Id.* at 1024 (citing *Boykin v. Alabama*, 395 U.S. 238, 242 n.4 (1969)).

59. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Brady v. U.S.* 397 U.S. 742, 756-57 (1970).

60. At Ms. Williams' hearing, the prosecutor explained that her consent to sterilization was influential in his acceptance of her plea. Indictment, *supra* note 1, at 5.

61. Since the first tubal ligation was performed in 1823, over 200 techniques have emerged. For a description of some of the more common ones, see CURRENT OBSTETRICS & GYNECOLOGICAL DIAGNOSIS & TREATMENT 827 (M. Pernoll & R. Benson eds. 1987) [hereinafter CURRENT OBSTETRICS].

There have been many challenges to the constitutionality of conditioning acceptance of a defendant's guilty plea to lesser charges upon the defendant's submission to sterilization. In *Briley v. California*,⁶² the defendant was convicted of child molestation and given a suspended sentence provided he consent to castration.⁶³ Years later, he challenged that the terms of this plea deprived him of his right to procreate in violation of the Fourth, Fifth, Seventh, Eighth and Fourteenth Amendments to the United States Constitution.⁶⁴ The Ninth Circuit, after recognizing the necessity of plea agreements in the criminal process, held the claim invalid unless the defendant could show he was fraudulently induced to consent to the surgery.⁶⁵ *Briley* demonstrates that the acceptance of a plea bargain could constitutionally be conditioned upon the defendant's consent to sterilization, provided the ultimate decision to forego a more severe penalty in exchange for sterilization is made voluntarily by the defendant.⁶⁶

The same rationale was applied in *People v Blankenship*,⁶⁷ where the California Court of Appeals affirmed a trial judge's decision to suspend execution of appellant's sentence provided the appellant, who was convicted of statutory rape, submit to sterilization.⁶⁸ The court reasoned that appellant was not compelled by the condition which the court imposed as he was permitted to elect between acceptance of the condition or acceptance of the penalty imposed by law for the offense.⁶⁹

The *Briley* and *Blankenship* decisions impliedly authorize a court to condition the acceptance of a plea and a defendant's lesser sentence on the defendant's "voluntary" submission to sterilization. Not all courts, however, sanction this approach. In *Smith v. Superior Court*,⁷⁰ co-defendants, convicted of child abuse challenged the trial courts conditioning of a lesser sentence upon the defendants' submission to sterilization. The Supreme Court of Arizona suggested that, while a judge could consider a defendant's voluntary sterilization in child abuse cases in reducing the defendant's sentence,⁷¹

62. 564 F.2d 849 (9th Cir. 1977).

63. *Id.* at 852.

64. *Id.* at 853.

65. *Id.*

66. *Id.* Courts rarely find a guilty plea to be involuntary as the legal standard of voluntariness is very low. The law is not concerned with psychological pressures causing a defendant to act when the pressures emanate from sources other than official coercion. See *Brady*, 397 U.S. at 755.

67. 161 Cal. 2d 606, 61 P.2d 352 (1936).

68. *Id.* at 610, 61 P.2d at 352.

69. *Id.*, 61 P.2d at 353-54.

70. 151 Ariz. 67, 725 P.2d 1101 (1986) (en banc).

71. *Id.* at 69, 725 P.2d at 1103.

the court could not require sterilization absent specific statutory authority.⁷²

The *Smith* decision did not preclude the prosecutor from encouraging a defendant to bargain away his/her reproductive rights before sentencing. It merely precluded the judge from mandating sterilization of a defendant absent statutory authority. This does not afford much comfort for those who advocate a therapeutic approach to eliminating child abuse considering the history of sterilization legislation in the United States and the possibility of its revival in the criminal context.

III. STERILIZATION LEGISLATION: ITS HISTORY AND POTENTIAL FOR REBIRTH

A fundamental premise of a democratic society is that governments will be responsive to public opinion. The validity of this premise has never been more clearly demonstrated than in the Eugenic movement that swept the United States in the early twentieth century.⁷³ Eugenicists proposed that most social ills were attributable to genetic defects, and recommended sterilization of the socially inadequate as a method of improving the human race.⁷⁴ A tenuous scientific theory⁷⁵ coupled with economic and social unrest resulted in legislation requiring sterilization of a vast category of "socially inept" persons.⁷⁶ At its peak, this theory found approval in the Supreme Court. In *Buck v. Bell*,⁷⁷ the Court expressed the belief that: "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough."

While compulsory sterilization laws have been seriously challenged on sci-

72. *Id.* at 70, 725 P.2d at 1104.

73. The eugenic movement in the United States was influenced by the theories of Sir Thomas Galton, Mendel's laws of heredity and the development of a simple surgical procedure to accomplish sterilization. Social reformers advocated a belief that social inadequacy, mental deficiency, and criminal behavior were genetically transmitted. See Cynkar, *Buck v. Bell, Felt Necessities v. Fundamental Values*, 81 COLUM. L. REV. 1418, 1420-21 (1981) for a good historical account of the eugenic movement in the United States.

74. The Eugenicists were not the originators of this idea. Plato, in his Republic, advocated planned breeding methods to insure that a genetically superior class would serve as the Guardian class. PLATO'S REPUBLIC BOOK I (Gilbert P. Rose ed. 1983). This idea also served as the basis of Hitler's elimination of whole classes of people during WW II.

75. Matoush, *Eugenic Sterilization — A Scientific Analysis*, 46 DEN. L. J. 631, 646 (1969).

76. The socially inadequate included: the feebleminded, the insane, the blind, the epileptic, the dependant, the homeless, orphans and paupers. *Id.* at 632.

77. 274 U.S. 200, 207 (1927).

entific and social policy grounds,⁷⁸ these laws have not been completely eliminated. Several states still justify compulsory sterilization laws on the basis of the state's police power.⁷⁹ A number of states ground these laws in the state's *parens patriae* authority.⁸⁰ Present sterilization laws have been applied almost exclusively to mentally incompetent persons. In its consideration of whether or not to authorize compulsory sterilization of an incompetent individual, some more enlightened courts have refused to consider the state's interest in protecting society from genetically defective children who will impose a financial burden on the state, and instead base their decision to terminate an individual's reproductive capacity on their determination that sterilization is in the best interest of the individual.⁸¹ Whether these decisions and laws are couched in terms of the best interest of the individual or in terms of eugenics, the fact remains that the state retains the power to determine who should reproduce.

The existence of statutes authorizing sterilization, present acceptance of sterilization as a means of birth control,⁸² new scientific studies linking criminal and violent behavior to genetic transmission⁸³ and society's impatience with the present failures of the child welfare system may provide the impetus for legislation requiring sterilization of abusive parents in serious cases. The seeds of the eugenic movement have already been planted in our legislative and judicial bodies and careful drafting could possibly allow such a statute to withstand constitutional challenge.

78. See generally Matoush, *supra* note 75; Ferster, *Eliminating the Unfit: Is Sterilization the Answer?* 27 OHIO ST. L.J. 591 (1966).

79. See MISS. CODE ANN. § 41-45-1 (Supp. 1987); N.C. GEN. STAT. § 35-36 (1984); W. VA. CODE § 27-16-1 (1986) for examples of statutes justifying compulsory sterilization laws under the police power.

80. See, e.g., VA. CODE ANN. § 54-325.10 to .12 (1982).

81. See, e.g., *In re Grady*, 85 N.J. 235, 262 n.8, 426 A.2d 467, 481 n.8 (1981); *In re Guardianship of Hayes*, 93 Wash. 2d 228, 237, 608 P.2d 635, 640 (1980), (cited in Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 812).

82. Sterilization as a method of birth control is accepted by the court. In *Oil, Chemical and Atomic Workers International Union v. American Cyanamid Company*, 741 F.2d 444 (D.C. Cir. 1984), an employer's threat to women workers that they would lose their jobs if they did not have themselves sterilized, was implicitly sanctioned by the court. Judge Bork, rejecting the employees' challenge under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 654 stated: "The women involved were put to a most unhappy choice. But no statute redresses all grievances and we must decide according to law." 741 F.2d at 450. The decision suggests that there is no remedy for one compelled to submit to sterilization unless that remedy can be found in a statute.

83. See Van Dusen, Mednick, Gabrielle & Hutchings, *Social Class and Crime in Adoption Cohorts*, 74 J. CRIM. L. & CRIMINOLOGY 249 (1983). Based on test groups of adopted children who were removed from the custody of their natural parents, the authors conclude that criminal and violent behavior is genetically transmitted rather than environmentally induced.

A. The Constitutional Challenge

1. Cruel and Unusual Punishment

Whether sterilization of abusive parents would be constitutionally defective as imposing cruel and unusual punishment is not quite clear. The Supreme Court, in *Skinner v. Oklahoma ex rel Williamson*,⁸⁴ bypassed the opportunity to determine whether sterilization of a habitual criminal would be cruel and unusual punishment. Lower court attempts to tackle the issue have resulted in a series of conflicting opinions.

In *Mickle v. Henrichs*,⁸⁵ the Nevada District Court issued an order restraining the sterilization by vasectomy⁸⁶ of a convicted rapist. The court concluded that despite the fact that the operation could be performed with a minimal amount of discomfort to the defendant, it nevertheless was cruel and unusual in that it was "degrading and humiliating" punishment which is a "brand of infamy."⁸⁷ In *Davis v. Berry*,⁸⁸ a state statute, requiring a vasectomy to be performed on all criminals twice convicted of a felony, was held invalid by an Iowa Federal District Court as inflicting cruel and unusual punishment.⁸⁹ Again, the court stressed that physical suffering is not the only test of cruelty and stressed the humiliation and degradation that would always follow the defendant. In the early part of the century some courts had been willing to look beyond physical pain in interpreting the eighth amendment and considered the mental suffering which would result from such a punishment.

Other courts, however, have interpreted the amendment literally and require a showing of physical pain or a punishment that substantially exceeds the crime. In *State v. Feilen*,⁹⁰ the court affirmed an order for a vasectomy to be performed upon a defendant convicted of statutory rape. In doing so, the court noted the relative simplicity of the surgical procedure, the absence of pain and the heinous nature of the defendant's crime.⁹¹ More recently, in *People v. Gauntlett*,⁹² the defendant, convicted of criminal sexual conduct with his fourteen year-old stepdaughter, challenged his sentence of "castra-

84. 316 U.S. 535 (1942).

85. 262 F. 687 (D.C. Nev. 1918).

86. Vasectomy is a surgical procedure that requires a "small incision in the upper outer aspect of the scrotum. Clips are placed tightly around the vas which is then excised. The ligated and fulgurated ends are tucked back into the scrotal sac and the incision is then closed." It renders a male sterile. CURRENT OBSTETRICS, *supra* note 61, at 832.

87. 262 F. at 691.

88. 216 F. 413 (D.C. Iowa), *rev'd on other grounds*, 242 U.S. 468 (1914).

89. *Id.* at 417.

90. 70 Wash. 65, 126 P. 75 (1912).

91. *Id.* at 68-69, 126 P. at 76-77.

92. 134 Mich. App. 737, 352 N.W.2d 310 (1984).

tion by chemical means,"⁹³ as inflicting cruel and unusual punishment. The court refused to reach the constitutional arguments raised by the defendant and instead disposed of the claim, finding the penalty inappropriate in light of the experimental nature of the drug, the side effects and practical problems involving access to treatment.⁹⁴ The court's refusal to discuss the constitutional issues presented may later be interpreted as sanctioning sterilization by medically acceptable means.

Whether compulsory sterilization would be considered cruel and unusual punishment in the case of abusive parents is not made clear by case law precedent. Strong arguments, however, can be made that the reasons supporting cases like *Michel v. Henrichs* and *Davis v. Berry* are no longer true. Cases decided in the earlier part of this century considered the physical and psychological suffering associated with sterilization. Today sterilization is one of the most frequently chosen methods of birth control.⁹⁵ The procedures available are medically safe, painless and rarely involve any adverse psychological effects.⁹⁶ Sterilization as a method of family planning is federally funded,⁹⁷ socially acceptable, and involves little stigmatization or physical effects. Thus, it is unlikely that a contemporary court would find the arguments previously made regarding a defendant's humiliation and degradation convincing.⁹⁸

93. *Id.* at 739, 352 N.W.2d at 314 (referring to the requirement that as a condition of probation, defendant take Depro Provera, a drug which suppresses the male sex drive).

94. *Id.* at 741, 352 N.W.2d at 316.

95. Isaacs, *Reproductive Rights — 1983: An International Survey*, 14 COLUM. HUM. RTS. L. REV. 311, 328 (1983) (estimating that 90-100 million couples worldwide prefer sterilization as a means of birth control). See also CURRENT OBSTETRICS, *supra* note 61, at 827 ("Sterilization is a permanent method of contraception that is being chosen by increasing numbers of men and women." Approximately one million Americans choose sterilization every year).

96. CURRENT OBSTETRICS, *supra* note 61, at 828.

97. Title XIX of the Social Security Act provides for reimbursement of sterilization operations. See 42 U.S.C.A. §§ 1936(a)13(B),(C), 1936(d)(4)(A),(C) (Supp. 1988). These provisions require state Medicaid plans to offer family planning services to desirous individuals. Title XX of the Social Security Act authorizes matching federal funds for family planning services rendered. See 42 U.S.C.A. § 1397(a)(1) (1982).

98. An argument that may, however, be persuasive to the court, is that sterilization is contrary to a defendant's religious beliefs. While no court has addressed this issue in a criminal context, several courts have considered it in terms of a hospital's right to refuse to permit sterilization procedures to be conducted in its facilities. See, e.g., *Watkins v. Mercy Medical Center*, 364 F.Supp. 799 (D. Idaho 1973) (medical center has a right to adhere to its own religious beliefs and cannot be forced to make facilities available for services repugnant to that belief). See also *Swanson v. St. John's Lutheran Hospital*, 182 Mont. 439, 597 P.2d 702 (1979) (hospital liable for wrongful discharge of nurse-anesthetist who refused to assist in sterilization operation where such procedures were repugnant to her religious beliefs). *But see Hathaway v. Worchester City Hospital*, 475 F.2d 701 (1st Cir. 1973) (publicly funded hospital cannot prohibit performance of consensual sterilization where no other procedures of equal risk are prohibited).

Alternatively, a sterilization statute could survive an eighth amendment challenge if the statute were based on a eugenic rather than a punitive rationale. The idea of using sterilization as a method of preventing the continuance of child abuse rather than as a punitive measure was expressed by the prosecutor in Ms. Williams' case. "I do not consider sterilization a punishment, I consider it a remedy for the malady."⁹⁹

The cyclical nature of child abuse is well documented. Those who were abused as children are more likely to abuse their own children.¹⁰⁰ The intergenerational cycle of child abuse has been attributed to environmental forces. Basically, if the child grows up being abused, he learns that this is the proper method of child rearing and in the future will likely invoke the same methodology.¹⁰¹ Recent studies of criminal and violent behavior suggest that such behavior may be attributable to a personality disorder that is genetically transmitted.¹⁰² The familiar nature/nurture controversy seems to be settling into a compromise with scientists recognizing that genetic as well as environmental factors contribute to deviant behavior.¹⁰³ Whether the intergenerational nature of child abuse is due solely to environmental factors, to heredity or to a combination of both is still open for debate. Studies linking criminal behavior to genetic characteristics of the individual have not been conclusively proven. However, it is important to bear in mind that eugenic sterilization statutes were based on similarly inadequate and inconclusive studies. The possibility that these studies could become the basis of sterilization legislation does not seem so outrageous when understood in light of the rising incidence of child abuse, an increasing inability of the present system to control the situation and a lack of funding to secure more adequate procedures.

99. Feely, *supra* note 4.

100. The cyclical nature of child abuse is widely recognized. See, e.g., Main & Goldwyn, *Predicting Rejection of Her Infant From Mother's Representation of Her Own Experience: Implications For the Abused-Abusing Intergenerational Cycle*, 8 CHILD ABUSE & NEG. 203 (1984); Wald & Cohen, *supra* note 23.

101. Main & Goldwyn, *supra* note 100, at 16.

102. See 2 Mednick & Volavka, *Biology & Crime*, CRIME & JUSTICE: AN ANNUAL REVIEW OF RESEARCH 85 (1980) (a child who has been adopted at birth but has had no contact with his natural father is likely to become criminal if his biological father is criminal); see generally Mungas, *An Empirical Analysis of Scientific Syndromes of Violent Behavior*, 171 J. NERV. EN. DIS. 354 (1983); Weller, *Medical Concepts in Psychology and Violence*, 26 MED. SCI. & LAW 131 (1986).

103. See Gabrielli & Mednick, *Urban Environment, Genetics and Crime*, 22 CRIMINOLOGY 645 (1984) (recognizing that gene-environment interaction is pertinent to the development of human behavior); Van Dusen, Mednick, Gabrielli & Hutchings, *Social Class and Crime in an Adoption Cohort*, 74 J. CRIM. L. & CRIMINOLOGY. 249 (1983) (social class has both genetic and experiential components which predispose class members to criminal involvement).

2. *Due Process of Law and the Right to Privacy*¹⁰⁴

In *Skinner v. Oklahoma*,¹⁰⁵ the Supreme Court, in striking down Oklahoma's Habitual Criminal Sterilization Act on equal protection grounds, recognized marriage and procreation as "fundamental to the existence and survival of the race."¹⁰⁶ In recognizing a right to marry and raise children, *Skinner* provided a basis upon which the Court later developed and expanded these rights to include the right to choose sterilization as a means of birth control,¹⁰⁷ the right to terminate pregnancy,¹⁰⁸ and the right to use contraception.¹⁰⁹ All of these rights have been protected under the umbrella right to privacy. The Court has made it clear, however, that these rights are not absolute.

The Court will permit interference with these fundamental rights where the state can show a compelling interest in denying the free exercise of individual rights,¹¹⁰ and the unavailability or ineffectiveness of less drastic alternatives to protect that interest.¹¹¹ *Jefferson v. Griffin Spalding County Hosp. Auth.*¹¹² exemplifies the degree to which the state can interfere with an individual's procreative choice. In *Jefferson*, the court ordered that a caesarean section be performed on a woman whose religious convictions opposed such an operation.¹¹³ The court found that the state's interest in protecting the unborn fetus was more compelling than the mother's exercise of her religious and personal beliefs.¹¹⁴ Thus, while one has a fundamental right to bear children, the court will not hesitate to infringe upon that right where the state can show a compelling interest.

The state has a legitimate interest in the health and welfare of its citi-

104. This Comment does not consider procedural due process or equal protection arguments against sterilization as it assumes that a statute could be drawn with requisite procedural safeguards and without discriminating against an invidious class of persons. For a constitutional analysis of eugenic sterilization statutes as they relate to the mentally ill, which discusses these two issues, see Note, *Eugenic Sterilization Statutes: A Constitutional Reevaluation*, 14 J. FAM. L. 280 (1975).

105. 316 U.S. 535 (1942).

106. *Id.* at 541.

107. *Ponter v. Ponter*, 135 N.J. Super. 50, 342 A.2d 574 (1975).

108. *Roe v. Wade*, 410 U.S. 113 (1973).

109. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

110. *Roe v. Wade*, 410 U.S. 113, 163-65 (1973) (a state cannot control a woman's right to terminate her pregnancy until it can express a compelling interest in the health of the mother or the life of the unborn).

111. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) ("the breath of legislative abridgement must be viewed in light of less drastic means for achieving the same purpose").

112. 247 Ga. 86, 274 S.E.2d 457 (1981).

113. *Id.* at 89, 274 S.E.2d at 459-60.

114. *Id.* at 89, 274 S.E.2d at 460.

zens.¹¹⁵ This interest becomes compelling in reproductive privacy cases, when life is endangered. If the state has an interest in protecting the unborn, its interest in protecting living children must be equally compelling. The states have expressed their interest in the welfare of children by creating child welfare agencies and by requiring individuals to report cases of child abuse and neglect. The extremely costly¹¹⁶ state programs have proven unsuccessful. While parents undergo psychological treatment for their illnesses, the children must be temporarily removed from the parent's custody, but there is nowhere for them to go.¹¹⁷ If the theory that personality disorders contributing to child abuse are genetically transmitted should prove well founded, current counselling efforts would be worthless. To some, compulsory sterilization of the recurrent offender is the only solution to a problem that demands immediate attention.¹¹⁸ We may reach a point where the state could justify circumscribing the individual's fundamental right to bear children in order to benefit the whole. At least a few lawmakers believe that the time has come for drastic measures to be taken in an effort to protect innocent children.¹¹⁹ However, at present, and hopefully in the future, the constitution will provide "limits on the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority — even those who have been guilty of what the majority defines as a crime."¹²⁰ This is not to say that the possibility of sterilizing abusive parents has been foreclosed. Despite the lack of legislative authority, prosecutors, through plea negotiations, have avoided the constitutional challenge by encouraging the willing child abuse defendant to bargain away his/her reproductive rights. Thus, the prosecutor, in the plea situation plays the role of judge, jury and legislator in determining whether sterilization of abusive parents is an appropriate "remedy for the malady" of child abuse.¹²¹

115. See *Roe v. Wade*, 410 U.S. 113 (1973).

116. See *N.Y. Times*, March 5, 1987, at A17, col. 1 (budget for child abuse prevention increased by \$ 37.7 million between 1981-85).

117. Even the Supreme Court recognizes that foster homes are often more harmful to the children, than the homes from which they are removed. See, e.g., *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977).

118. Mill argued that the government should only suppress individual freedom when it is used to harm others. J.S. MILL, *ON LIBERTY* 77 (1859). Apparently there are some who believe the time to suppress individual freedom has come. See, e.g., *Bangor Daily News*, January 6-7, 1979, at 34 (bill introduced in Maine legislature authorizing castration in cases of child abuse); *L.A. Daily J.*, July 6, 1981, at 1, col. 4 (Judge calls for sterilization of defendants in child abuse cases).

119. *Id.*

120. *Skinner*, 316 U.S. at 546 (Jackson, J., concurring).

121. For the view of a former prosecutor concerning rehabilitation of child abusers, see McKenna, *supra* note 22. McKenna advocates giving discretion to the prosecutor to deter-

IV. CONCLUSION

Federal, state and local governments in the 1960's took the initial step in recognizing child abuse as a major problem in our society. In requiring the populace to report known and suspected cases of child abuse to the authorities, the government impliedly committed itself to finding a solution to the problem. Initially, perhaps the government did not anticipate the magnitude of cases that would be reported. Perhaps the financial and administrative burden of the child welfare system was not foreseen. But we have had over twenty years in which to perfect the system. The initial commitment to alleviating the problem seems to have waned. Agencies are inundated with cases and short on financial and professional resources. Liability in the courts for their administrative inadequacies, further deplete an already insufficient budget. Meanwhile, the population is exposed to newspaper stories which detail the frightful situations in which some children live and die. Society is demanding that something be done, while the government is making substantial cuts in its social welfare budget. When Pandora's box is opened, and the government shies away from the commitment it made over twenty years ago to protect our children and to help those parents who find it necessary to abuse them, through therapeutic and non-punitive measures, people demand other avenues of relief.

As the situation worsens, particularly in light of our current fiscal crisis, the possibility of finding relief in sterilization legislation becomes less and less remote. Such legislation would and should face serious constitutional challenge. In the meantime, abusive parents are encouraged, through plea arrangements and sentencing concessions to submit to "voluntary" sterilization. Given the choice of submitting to a relatively safe surgical procedure or taking the risk of being able to convince a jury of parents that one did not intend to starve the child or beat him or burn him with cigarettes, most rational individuals would choose sterilization. But such a choice, by no stretch of the imagination can be considered truly voluntary in lay-persons terms.

"Voluntary" sterilization under these circumstances is a punitive measure,

mine whether an offender should be criminally prosecuted or referred to social service agencies. Among the factors to be considered in making this determination, McKenna includes: treatment facilities available; financial resources available for such treatment; character of the beatings; and previous treatment of the offenders. *Id.* at 175. This approach, however, is necessarily discriminatory. In assessing the financial resources available for such treatment, the prosecutor in a state that has limited funds available for treatment programs would be likely to recommend conviction, whereas, the prosecutor in a state with a well funded program would recommend treatment. Moreover, this approach may discriminate against the poor, as wealthier offenders are more likely to be able to afford their own treatment.

regardless of how one who advocates it chooses to describe it. Sterilization is not a remedy for the malady of child abuse. Child abuse, like alcoholism or drug addiction is a disease and should be treated as such. Sterilization does not cure the deeply rooted psychological problems of people like Debra Williams, who were themselves physically, sexually and psychologically abused as children: psychotherapy does. Ms. Williams is not only an aggressor, she is a victim. She and others similarly situated could be helped if the government would renew and strengthen its commitment to finding (and funding) a workable cure for the disease instead of merely treating its symptoms.

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