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STERILIZATION OF THE MENTALLY HANDICAPPED

by

Nicholas Robert Chabin

A RESEARCH PAPER
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CHAPTER I

INTRODUCTION

An important issue dealing with the mentally handicapped is that of sterilization. Arguments are being presented both pro and con concerning sterilization and guidelines are needed for congruent handling of these cases. In all circumstances care must be taken to ensure that the individual rights, including that of procreation, are not being violated.

The Problem

"When they done that [sterilize] to me I cried. I'm a Catholic and that's [sterilization] wrong. We're brought in this world to bear children. I see all my friends and they have children. I love kids. Sometimes now when I baby sit, I hold the baby to myself and I think to myself, 'Why was I ever sterilized?'"¹

"In March 1972, the mother expressed concern about the presence in the home of the patient's [nineteen year-old girl] two half-brothers, who were in their 20s, but she did not think birth control was necessary for her daughter. In June 1972, the patient was ten weeks pregnant, and both parents requested abortion and tubal ligation. The patient was able to describe several experiences of sexual

intercourse with a brother but did not understand the relation of these experiences to pregnancy."²

In one case a mentally handicapped woman questions her sterilization and expresses her dissatisfaction, and in the second case a sterilization is performed on a girl at the request of her parents. Additional case history mentions that this girl also did not understand what pregnancy actually meant.

Questions one should ask when dealing with such a sensitive issue as sterilization include: Who shall decide whether or not the person should be sterilized? If the mentally handicapped person made the decision herself was she properly informed and did she have the mental capacity to give consent? If the family or court appointment made the decision were they truly acting in the best interest of the mentally handicapped individual?

This paper will cover a gamut of problems as they relate to sterilization, both voluntary and involuntary. Additional questions that must be answered include: If the sterilization was voluntary were the criteria for voluntary consent present? The American Association on Mental Deficiency states that for voluntary consent the elements of mental capacity (competence), information, and voluntariness must be present. Did the mentally handicapped individual

have the mental capacity to understand what sterilization is? Was she properly informed, i.e., were the medical procedure and benefits/hazards of sterilization explained, were terms such as irreversibility adequately explained, and were alternatives to sterilization; namely, contraceptives offered? Finally, was the mentally handicapped individual coerced into being sterilized? Did she have the power of free choice in this decision or were there other forces hindering her freedom? If one or more of these elements was missing, the mentally handicapped individual, may not, in fact, did not give voluntary consent.³

If involuntary consent arises, one must question who has the power to determine who will be sterilized and who will not, and, perhaps more importantly, does the state (society) have this power of determination?

In 1927, a Virginia statute authorizing sterilization of mentally handicapped individuals in institutions before release was questioned. Justice Holmes in Buck v. Bell upheld the Virginia statute saying that the state must be prevented from being "swamped with incompetence."⁴ However, in another court case Skinner v. Oklahoma ex rel. Williamson, the court ruled: "We are dealing here with legislation which involved one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race!"⁵ This in direct conflict with Buck v. Bell.

With substitute consent the main problem is determining whether or not the substitute is acting in the best interest of the mentally handicapped person.

Additional questions that are posed when discussing sterilization include: Why sterilization--is it a eugenics issue? Society does not want any additional mentally handicapped individuals. Are the mentally handicapped unfit for parenthood? Is the issue purely economical? Society does not want to waste money in caring for additional mentally handicapped persons.

Justification

The mentally handicapped are guaranteed the inalienable rights of life, liberty, and the pursuit of happiness outlined in the Constitution of the United States.

Involuntary sterilization or substitute (court appointed) consent to sterilization are delicate issues. In all cases other than voluntary sterilization there must be "just cause" for the sterilization; all other alternatives having failed sterilization is a "last resort"; lastly, there must be "due process" in order to protect these individuals' rights.

Definition of Terms

For the purposes of this paper mental retardation (mentally handicapped) refers to significantly subaverage general intellectual functioning existing concurrently with

deficits in adaptive behavior, and manifested during the developmental period.⁶

Subaverage intellectual functioning refers to the mentally handicapped individual's lower level of intellectual functioning as compared to others of similar chronological ages. This intellectual deficiency is manifested especially when dealing in the abstract skills.

Before explaining subaverage adaptive behavior it is necessary to explain adaptive behavior. "Adaptive behavior" is defined as the effectiveness or degree with which the individual meets the standards of personal independence and social responsibility expected of his age and cultural group."⁷ It is necessary to remember that many mentally handicapped individuals will never reach the level of complete personal independence, and will rely on others for this personal care. Yet, many, through education, may come close to being personally independent and socially responsible citizens.

Other terms requiring definition and clarification will be explained as they are presented.

Summary

Sterilization of the mentally handicapped is a complex issue.

Involuntary consent to sterilization should be decided upon only in the best interest of the mentally handicapped person; in no way can their rights be infringed.

With voluntary consent for sterilization care must be taken to ensure that the mentally handicapped individual has the mental competence to understand what she is agreeing to, i.e., there is no outside coercion; and that she has been properly informed, especially concerning the irreversibility of the operation.

After reviewing both alternatives, an objective personal position will be presented.

CHAPTER II

A REVIEW OF THE LITERATURE

Historical Background

Laws concerning sterilization of the mentally deficient vary from state to state. Forty-seven percent of the states permit sterilization of the mentally handicapped; 43% have no law dealing with it; 4% prohibit sterilization; the remaining 6% either give no reply or no information.⁸

With such significant figures as the above it is worth examining the historical background of some of the sterilization laws.

From the literature reviewed it seems conclusive that sterilization came about mainly as a result of the eugenic movement. The eugenicists wanted to rid society of the mentally handicapped and unfit. They believed most of these conditions to be hereditary, thus they recommended sterilization of these individuals to prevent further offspring from possessing the same condition.

It was in 1905 that the Commonwealth of Pennsylvania first attempted to pass a statute dealing with sterilization. It was appropriately called, An Act for Prevention of Idiocy; this was in complete congruence with the purpose of the

eugenic movement. The statute read in part,

Each and every institution . . . entrusted . . .
with the care of idiots . . . to appoint a neurolo-
gist and a surgeon . . . to examine the mental and
physical condition of the inmates. If, in their
opinion, procreation was inadvisable, and there was
no probability of improvement of the mental condition
of the inmate, the surgeon was authorized to perform
such operation for the prevention of procreation
as shall be decided safest and most effective.⁹

The statute was not passed. The governor refused to sign it because it lacked mentioning a specific operation to accomplish the goal of preventing procreation.

In 1907 Indiana succeeded in passing a sterilization statute; however, it was declared unconstitutional by Williams v. Smith.¹⁰

In 1919 the State of Alabama also succeeded in passing a sterilization statute granting the Mental Health Superintendent the authority to determine who would be sterilized. This statute lacked provisions for a hearing, prior notice, legal counsel, and the right of appeal. The statute was designed to give permission to sterilize residents at the Partlow State School and Hospital. In 1935 Alabama again passed a more comprehensive statute; again, there were no provisions for a notice, hearing, legal counsel, and appeal. This statute was declared unconstitutional by the Alabama Supreme Court which declared procreation to be a guaranteed liberty.¹¹

In 1918 statutes governing sterilization in Michigan and New York were declared unconstitutional because they violated the 14th Amendment's equal protection clause.¹²

In 1925 the States of Virginia and Michigan both passed sterilization statutes. It was on November 12, 1925, that the Virginia statute was officially declared constitutional by both the Virginia Supreme Court of Appeals and the United States Supreme Court. It was in Euck v. Bell that the constitutionality was specifically upheld. Justice Holmes declared,

The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes .

. . . Three generations of imbeciles are enough.¹³

This statute follows the main purpose behind the eugenic movement--eliminating the unfit.

Chief Justice Holmes also applied the analogy that if our nation could call men to fight in time of war we could enforce sterilization on the same principle.¹⁴

The Virginia statute was also based on the grounds that mentally handicapped individuals are a drain on our economy, and the statute did not violate the 14th Amendment's equal rights clause because it pertained to all mentally handicapped individuals. The statute also had procedural provisions for a hearing, notice, and right of appeal.¹⁵

For almost a decade from 1927 to 1937, twenty other states passed sterilization statutes all closely resembling the Virginia statute.

However, in 1942 an Oklahoma statute was declared unconstitutional by Skinner v. Oklahoma ex rel. Williamson on the ground that it violated the equal protection clause of the 14th Amendment. This decision probably came about as a result of the Nazi eugenic sterilization program.¹⁶

In 1970 in Cavitt v. Nebraska the court ruled that a state could sterilize a woman as a condition for release from an institution.

In 1972 in Cook v. State, on Oregon Court of Appeal ruled that a state could prescribe sterilization if the parent(s) cannot provide a proper environment for growth for the child.¹⁷

In 1974, Wyatt v. Aderholt declared Alabama's sterilization statute unconstitutional because it lacked the protections guaranteed by the Constitution.¹⁸ Wyatt v. Aderholt also stated that it is necessary for the patient to give consent and that there must be no outside coercion.¹⁹

In 1976 the Supreme Court of North Carolina ruled that involuntary sterilization is permitted if the parents cannot care for their children or if the children may have a serious physical, mental, or nervous disorder.²⁰

Today, sterilization statutes are being criticized on the following grounds: (a) some sterilization laws lack substantive due process. To meet this the state must discriminate fairly among all citizens, not only one class

of citizens, the mentally handicapped; (b) some statutes violate the equal protection clause of the 14th Amendment; (c) some lack procedural due process. The statutes lack provisions for a hearing, notice, counsel, and right of appeal; (d) sterilization may be considered cruel and unusual punishment.²¹

The Model Voluntary Sterilization Act designed by the Association for Voluntary Sterilization is an excellent model to which states could refer in designing their own particular statutes. The act is summarized as follows:

Section 1 of the Model Voluntary Sterilization Act states,

The legislature intends to provide a method through proper hearing whereby mentally retarded persons, who would be diagnosed as capable of consent to sterilization but whose legal competence to consent has been questioned by a licensed physician, may voluntarily consent to sterilization.²²

In this section the term 'consent' is mentioned. It states that a hearing may be used in determining if consent has been given. It does not explain what provisions are needed for a mentally handicapped person to give consent. This section should state that if the three elements of consent are present as required by the American Association of Mental Deficiency, that of the capacity to consent,

properly informed, and voluntariness of consent, then chances are the mentally handicapped individual did give valid consent and her desire should be respected.

The second section mentions that the patient must be informed of the method, nature, consequences, and chance of success of the sterilization operation. Other methods of birth control must also be presented. The section collectively ensures that the mentally handicapped individual must be properly informed of all aspects of the proposed operation. This section fails to mention that the information given to the patient must be on her level of understanding--it should require the committee to question her to ensure that she really understood the nature of the operation.

In the third section the capacity to consent of the individual and the fact that she must be properly informed is reaffirmed. There was no mention that the consent is given voluntarily.

The fourth section suggests the formation of a Review Committee. It specifically states that the committee must be independent from the patient and the institution or person requesting the sterilization operation. The committee is to be composed of a psychiatrist, lawyer, lay member, consulting physician, and a representative of the individual's religious beliefs. This section did not mention that the review committee be accountable to some higher level for additional protection of the mentally deficient individual.

Sections five and six mention the need of an advocate for the mentally handicapped individual to assure that the decision is in the best interest of the patient.

Section seven calls for a hearing in which the mentally handicapped individual must be present. This hearing is to determine that no alternate methods of birth control are available. The hearing is also to review whether the mentally handicapped individual was properly informed, if there was any outside coercion, and to determine if the individual is likely or unlikely to procreate.

Section eight requires the review committee to write its recommendations. It also mentions that the individual has two weeks to appeal the decision from the date of its receipt.²³

This is an excellent model for use today. However, it does not apply to mentally handicapped individuals who are unable to give informed consent. In this latter instance the institution, person, or guardian requesting the sterilization of the mentally handicapped individual should be subject to review by a review committee. The board would determine if the request is really and truly in the best interest of the mentally handicapped. The review board would either approve or deny the substitute's request; however, a provision for appeal must be available.

Criteria for Considering Sterilization

The eugenic movement encouraged sterilization of the mentally handicapped mainly to eliminate the "unfit" from society. The proponents believed mental defects as well as other social degenerates were the result of heredity factors and that the only method to prevent future generations of defects was to sterilize the present mentally handicapped. Their theory was that "Improvement of future generations can be accomplished by increasing the proportion of individuals of the desirable types through decreasing the rate of propagation of the inferior individuals."²⁴

Today, the eugenic theory is subject to skepticism. Not all cases of mental deficiency are due to heredity. The Virginia Planning Report of Mental Retardation states,

Not as many cases of retardation are due to genetic factors as was once believed by earlier investigators. In some individuals organic damage to some part of the nervous system can be detected as a causitive factor in retardation. Prenatal infections, prematurity, birth trauma, childhood diseases, anoxiz . . . are among some of the known causes of this complex program.²⁵

Some forms of retardation are due to diet, e.g., galactosemia, which is the inability of the body to

metabolize mild sugar. Diet in cases of individuals having PKU (phenylketonuria) affects the degree of retardation and could possibly avert the retardation.²⁶

In all circumstances the sterilization of a mentally deficient person should be based on a medical diagnosis and psychological and social maturity evaluation.

In cases where sterilization is requested by a guardian or third party, the request should be examined by a multi-disciplinary team to judge if the request is really in the best interest of the mentally deficient individual. In most cases this request is made as a result of the possible pregnancy of a mentally deficient daughter. Parents fear that they would have the responsibility of caring not only for their own daughter but also their grandchildren. Note that the sterilization will benefit not the mentally deficient person but rather the parents.

Perrin in her article discussed certain cases in which sterilization was approved. One example given was the case of a ten and one-half year old mentally handicapped girl whose IQ was 30. The article mentioned that during her menstrual cycle she became very frightened and withdrawn. She would not eat and would hide under the bed. The girl did not understand the meaning of menstrual cycle and just could not cope with menstrual hygiene.²⁷ In this example it is evident that the sterilization was performed in the child's best interest--both her physical and psychological interest.

Of the twenty mentally handicapped sterilized in the article only three had an IQ greater than 50. All were extremely immature and did not understand the relationship between intercourse and pregnancy. Perrin suggested that if the mentally deficient lack the ability to use contraceptives, and if the IQ is below 55, then sterilization should be recommended and available.²⁸

Another criterion for considering sterilization is that the mentally deficient will not be able to provide an adequate environment for growth for her child especially since she, herself, is limited in language and cognitive skills. A possible solution to this would be to have child rearing classes for the mentally handicapped individual together with supportive services such as Head Start to provide adequate stimulation for the child. Social workers too could be utilized in examining the family situation to check if adequate care is being provided for the child. It is true that a mentally handicapped individual is limited in intelligence; however, it does not necessarily follow that she is handicapped in her ability to give love and affection. "Factors such as the potential parents' emotional maturity, the possible family's stability, and the potential parents' desire to help a child develop may be as important to parenting as the level of intellectual functioning."²⁹ Yet, we must be careful to guarantee that the child is not being neglected.

Another criterion to consider is that of informed consent. Are the mentally handicapped capable of giving this consent? If not, it is questionable if she could be a competent parent. As a parent it is necessary to set long-term goals for the child's best interest. If the parent is not capable of protecting herself and managing her own life affairs, there is little doubt that she could care for a child. Simply stated, if the mentally handicapped parent needs a guardian, how can she be a guardian for a child?

IQ has also been a criterion considered when contemplating sterilization. It has been suggested that a person with an IQ of 55 or lower is unable to care for (rear) children adequately.³⁰ "Sterilization should be recommended and should be easily available for retardates when their IQ is less than 55. This should also be true for retardates with an IQ range of 55 to 70, where significant 'emotional instability' factors are present."³¹

Yet, we must be careful of using the IQ as the sole means for determining whether or not to sterilize an individual. IQ tests do lack precision in certain instances e.g., when an individual is ill; they are subject to cultural biases; and scores could be significantly increased through education. In conjunction with the IQ score I would also suggest observing her adaptive behavior to see if she is capable of functioning independently in society. "Empirical studies

have shown that persons with mild or moderate forms of retardation can fulfill the responsibilities of parenthood."³²

It has also been suggested to use social agencies in supplementing families existing in an inadequate environment. "A number of programs have been developed to help parents, such as counseling services, homemaker and visiting nurse services, day care, developmental achievement programs and infant stimulation programs."³³

Sterilization is to be the last alternative. Perhaps before determining any mentally handicapped individual as being unfit to parent, let the individual have the child or develop a situation (class) in which she would be responsible for the child. If it is noted that adequate care is not being provided, that the child is subject to much abuse, and that the use of supplementing agencies would not be able to supplement the inadequate environment, perhaps, upon review, sterilization would be the best alternative.

Procreation is a fundamental right guaranteed us by the Constitution. Sterilization is to be a last alternative utilized only in the best interest of the individual.

Sterilization was suggested to be permitted if it has been determined that the mentally handicapped individual cannot be a competent person and is sexually active.³⁴

Sterilization should be permissible if it would improve the physical condition, as in the example of the ten and one-half year old girl who could not cope with her menstrual cycle, and/or if it would improve the psychological health of the individual by eliminating the problem of pregnancy and the responsibility of parenting.

In all cases alternative methods of contraception should be attempted. Today, we do have intrauterine devices and the pill.

Improved prenatal care and genetic counseling could be used to decrease the incidence of mental deficiency.

It is most important to remember that sterilization should be the last alternative, all alternate methods of contraception having failed, and it must be in the best interest of the mentally handicapped person.

Voluntary Sterilization

When dealing with the question of voluntary consent to sterilization by a mentally handicapped individual, one will inevitably ask, "Does the mentally handicapped individual possess the capability to give informed consent?" There are some mentally handicapped individuals that are capable of giving this informed consent while others definitely are not.

According to the American Association of Mental Deficiency's handbook on consent, consent consists of three elements: the capacity to consent; information about the subject to which consent is being requested; and voluntariness of the act of consent.³⁵

The capacity to consent usually refers to the mentally handicapped's mental ability to reason. According to the A.A.M.D.'s manual on consent,

A person's mental capacity usually is determined by reference to whether he has the ability to manage his affairs with ordinary or reasonable procedure, is of sound mind, has demonstrated rational understanding or intellectual comprehension, is capable of making a full deliberation of matters presented to him . . . or has substantial capacity to understand and appreciate the nature and the consequences of a specified matter or to give intelligent consent to a specified procedure.³⁶

This capacity should measure both the intelligence of the individual as well as her adaptive behavior.

That the individual be properly informed states that the mentally handicapped individual must be presented all relevant information concerning the treatment on the medical operation to which she is either consenting or

refusing. In the case of sterilization she must be informed of the medical procedure, alternative treatment, and the benefits and hazards of the operation. The Federal Department of Health, Education, and Welfare has issued the following steps to guarantee informed consent:

1. Advice that the individual is free to withhold or withdraw her consent to the procedure at any time prior to the sterilization without affecting her right to future care or treatment, and without loss or withdrawal of any federally-funded program benefits to which the individual might be otherwise entitled.
2. A description of available alternative methods of family planning and birth control.
3. A full description of the benefits or advantages she may expect to gain as a result of the sterilization.
4. Advice that the sterilization procedure is considered to be irreversible.
5. A thorough explanation of the specific sterilization procedure to be performed.
6. A full description of the discomforts and risks which may accompany and follow the performing of the procedure including an explanation of the type and possible effects of any anesthetic to be used.

7. Advice that the sterilization will not be performed for at least thirty days.
8. An opportunity to ask and have answered any questions she may have concerning the sterilization procedure.³⁷

Great concern is needed to make sure the mentally handicapped individual not only receives this information but also that she understands the content.

Regarding voluntariness, it must be determined if the individual is making the decision by herself, and is not being coerced into the operation, e.g., sterilization as a condition for release from the institution.

If the consent is voluntary the mentally handicapped's desire to be sterilized should be respected. "If informed and emotionally balanced decisions regarding sterilization are within the capacities of the candidates; if they are, then the candidates word should be decisive, and if they prefer nonsterilization then society should respect that."³⁸

The A.A.M.D. states, "The person giving or withholding consent must be so situated as to be able to exercise free power of choice without the intervention of any element of force, fraud, deceit" ³⁹

Judge Gerhard Gesell stated, "Threats were made against mentally retarded women to induce them to consent to sterilization The existence of coercion and

force precludes the exercise of the free will necessary for proper consent."⁴⁰

Substitute Consent

In certain cases the mentally handicapped individual does not possess the capability to give valid consent. In these cases substitute consent is sought. It is most important that the person who is designated to give this substitute consent makes the decision of sterilization only in the best interests of the mentally handicapped person.

This writer feels that if substitute consent is utilized that this consent should be examined by a review board to ascertain that the requested sterilization is truly in the best interest of the mentally deficient person. The review committee should examine the medical, social, and psychological information concerning the mentally handicapped individual and examine if alternate methods of birth control could be used effectively, and if the individual is sexually active and risks pregnancy.

A human right as basic as procreation cannot be taken from a person because of another's selfish interests It is recommended that a parent's substituted consent to authorize a sterilization for a mentally retarded child be supplemented by a court

order granted on the basis of committee recommendation following a hearing in which the child is represented by legal counsel.⁴¹

In all cases of sterilization consented to by parents, guardians, and institution superintendents, their consent must be examined to determine their interests for the mentally handicapped individual.

Involuntary Consent

The United Nation's World Population Plan of Action states, "All couples and individuals have the basic right to decide freely and responsibly the number and spacing of their children."⁴² This writer has underlined "all" to emphasize that this is a right of the mentally handicapped too.

Freedom to procreate is guaranteed us and protected by the 14th Amendment.

Yet, we do acknowledge that there have been cases of individuals, in this case mentally handicapped individuals, who have been involuntarily sterilized.

This writer has discussed the eugenic sterilization of mentally defectives in the historical background of sterilization. There it was mentioned how the eugenic movement believed mental deficiency to be hereditary and thus required the mentally handicapped to be sterilized to prevent future generations of mental defectives. In Buck v.

Bell, the Supreme Court upheld the constitutionality of involuntary sterilization of the mentally deficient.

Today, the majority of state statutes give procedures in which the mentally incompetent could be eugenically sterilized with substitute consent.

Eugenicists have made the following statements as grounds for imposing involuntary sterilization,

That according to the law of heredity the subject is the potential parent of socially inadequate children who would be likewise afflicted.

The subject is afflicted with a mental disease which is likely to be inherited.

Sterilization is in the best interest of the mental, moral, and physical improvement of the patient and the public good.

Subject cannot provide care or support for prospective children.⁴³

Only in cases where it will definitely help the mentally handicapped, and is the last alternative may the writer condone involuntary sterilization. In cases where the parents are unfit, sterilization is subject to further examination and is discussed elsewhere in this paper.

In 1960, Dr. Bernard Diamond offered a rebuttal to the eugenicists' argument.

All laws providing for the sterilization of the mentally ill or defective which have as their basis the concept of inheritability of mental illness and mental deficiency are open to serious question as to their scientific validity and their social desirability . . . there has been much learned in recent years of the impact of environment on child development . . . the present state of our scientific knowledge does not justify the widespread use of the sterilization procedures in mentally ill or mentally deficient persons.⁴⁴

Sterilizing only the mentally handicapped for eugenic purposes is under-inclusive. "But even retardation resulting solely from inheritance of defective genes cannot be greatly reduced by sterilizing only the retarded, for 80 to 90% of retarded offspring are born to normal parents."⁴⁵

Unfitness to Parent

Unfitness to parent is a concern about which society is justifiably concerned.. The writer of this paper did refer to this problem in the historical background of sterilization. Again, only sterilizing mentally handicapped

individuals would be under-inclusive for there are many so called "normal" individuals that are unfit parents. Only after having a child can it be determined if the parents are really unfit. It is necessary for society to establish parent classes for prospective parents. It is also necessary for society at large, together with social agencies and the educational system to watch for children that are being deprived of an environment that is conducive to growth.

It is true that intelligence is required in establishing long-range goals for children and that mentally handicapped individuals are deficient in intelligence. Here, concerned teachers and social workers can help provide these long-range goals. Much of the expense will fall on society; yet, each individual has certain rights which are guaranteed her and which must be protected. Only in cases where the child is really abused and that adequate care is lacking would this author suggest adoption for the child and sterilization of the individual.

It is reported that approximately 90% of all mentally handicapped individuals fall in the mild range of retardation. This group with special education can attain some degree of self sufficiency. These 90% are educable and not only deserve, but do have the right to pursue happiness and do have the right to marriage and procreation as guaranteed by the Constitution.

Procedural Issues

Procedural due process means fair process. Its purpose is to provide the opportunity to be heard and to be treated equally and fairly.

Before performing a sterilization operation, there must be a set procedure for approval of the operation. (The procedure is to establish the consent to the operation.)

In cases where consent is given voluntarily by the mentally handicapped individual care must be taken to ensure that it is informed consent, i.e., that she has the capacity of consenting; that she had been properly informed concerning the purpose of such (sterilization) operation; and of the irreversibility of the operation in females; and lastly, that she is consenting to the operation voluntarily.

If the review board has agreed that the consent is informed then the operation should be performed without any further questioning.

In cases where the sterilization is requested by others than the individual herself, there must be a review board to establish why the operation was requested and to determine if it is really in the best interest of the mentally handicapped individual.

In certain states sterilization has been requested from the institution superintendent where the prospective

patient to sterilization resides, together with requests by others, e.g., parents, relatives. Certain states also provide notice to the patient; a medical examination; a hearing; required presence of the patient; Judicial Appeal and the Right to Counsel.⁴⁶

If all these provisions were required in all statutes for involuntary sterilization, this writer would say that the mentally handicapped rights are being respected.

In the Virginia statute the following procedures are employed:

- a) the superintendent made his request to the board, together with his reasons for the sterilization;
- b) the inmate received a notice stating the time and place for the hearing;
- c) the inmate was guaranteed to attend the hearings;
- d) the evidence was to be reduced to writing;
- e) the patient could appeal to the Circuit Court of the County;
- f) the patient can appeal to the Supreme Court of Appeal.⁴⁷

This writer believes that the Model Voluntary Sterilization Act provided an excellent example of procedural guarantees to the mentally handicapped individual.

The guidelines for due process at the Partlow State School is another example of procedural due process. The guidelines stated: "Proposed sterilization is in the best interest of a resident . . . must include a determination that no temporary measure for birth control or contraception will adequately meet the needs of such resident."⁴⁸ This statement said explicitly that sterilization is to be the last alternative, only after other temporary methods of birth control have been tried and proved unsatisfactory.

The guidelines also stated that no resident under 21 is to be sterilized; the resident must give informed consent in writing; the superintendent must explain in writing the steps used to explain sterilization to the resident; he must also state why he believes it would be in the best interest of the mentally handicapped; the information is to be reviewed by a review committee and will be submitted to the court for ultimate approval. A protective step included in the guideline is that no member of Partlow will be on the review committee and further that the committee is subject to check by the court and Human Rights Committee.⁴⁹

One other example of procedural safeguards is that established by the North Carolina Association for Retarded Children v. North Carolina which included:

1. the right to notice;
2. the right to counsel;
3. the right to present evidence;
4. the right to cross-examine;
5. the right of appeal.⁵⁰

The State of North Carolina ruled that procedural due process is lacking if there is no notice nor the opportunity to be heard.

In all cases of sterilization, which is truly an invasion of body integrity, there must be a just cause for this intrusion and this intrusion must be the last resort. All other methods of birth control from the use of intra-uterine devices to the pill must have proved inadequate. The United Association for Retarded Citizens' guidelines to sterilization state, "That the sterilization be a medical necessity or in the best interests of the minor; that all less drastic alternatives have been thoroughly investigated; that less drastic alternatives are unsuitable."⁵¹

CHAPTER III

SUMMARY AND PERSONAL CONCLUSION

From the review of literature written during this decade which deals with the sterilization of the mentally handicapped it seems that statutes collectively lack any unified coherence in their dealing with sterilization of the mentally deficient either voluntary or involuntary.

One of the main factors that must be examined in cases of mentally handicapped individuals requesting sterilization is that of informed consent. Does the individual have the capacity to understand what sterilization is? Has she been properly informed regarding the nature of the operation including alternatives, risks, and benefits? Is she acting freely? Has there been external pressure encouraging her to be sterilized?

In cases of involuntary sterilization review boards must be established to review the evidence and to determine that the person who is requesting the sterilization is requesting it in the best interest of the mentally handicapped individual.

In all cases provisions must be made for a hearing, legal counsel, and right of appeal.

Since sterilization is such a personal invasion on the human body, and since in all cases with females it is irreversible, the decision must be in the best interest of the individual.

The literature has stated that 90% of mentally handicapped are mildly retarded and are educable. This writer feels that the majority of these are capable of understanding (if explained on a level commensurate with their intelligence) the meaning and nature of sterilization.

This writer also feels that since the mentally handicapped are capable of learning to be self-sufficient that classes preparing them for marriage and child-rearing will provide them with the essentials for being good parents. This writer feels that the educational system and social agencies should play an active role in providing supportive services to enable them to enjoy their basic rights.

Many mentally handicapped individuals are capable of being responsible citizens in their community. They possess the ability to care for their own financial and personal needs independently or in certain cases with supportive services. In these cases, they are living so called "normal" lives to the fullest degree of their ability. They are living in society obeying society's laws; shouldn't they also possess the rights of the other citizens? Would not the bearing and rearing of children be one of these rights?

Not being able to reproduce, which is an ultimate expression of love between husband and wife, seems too harsh a treatment. Again the educational system, planned parenthood, and social agencies can help the individuals plan their family and teach the use of other methods of contraception.

Only in certain cases, as in the example of the ten and one-half year old who had great difficulty in adjusting to her menstrual cycle may this writer approve of sterilization. Even in this example, it would only be approved as the last resort.

To ensure the freedom entitled all of us, society must respect the rights of the mentally handicapped. Any action infringing on their basic rights must be in their best interest.

This writer feels that the Model Act for Sterilization is an excellent base from which states could establish their own sterilization statutes.

FOOTNOTES

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¹Charles W. Murdock, "Sterilization of the Retarded: A Problem or a Solution," California Law Review 62 (1974):919.

²Jane C. Ferrin, Carolyn R. Sands, Dorris E. Tinker, Bernatte C. Dominguez, Janet T. Dingle, Mariamma J. Thomas, "A Considered Approach to Sterilization of the Mentally Retarded Youth," American Journal of Disabled Child 130 (March 1976):289.

³American Association on Mental Deficiency, Consent Handbook. Washington, D.C.: American Association on Mental Deficiency, (1977):6-8.

⁴Murdock, "Sterilization of the Retarded," p. 921.

⁵Ibid., p. 922.

⁶Herbert J. Grossman, ed. Manual on Terminology and Classification in Mental Retardation. Washington, D.C.: American Association on Mental Deficiency, Special Publication Series No. 2, (1973):5.

⁷Phillip C. Chinn, Clifford J. Drew, Don R. Logan, Mental Retardation: A Life Cycle Approach. Saint Louis: C. V. Mosby Company, 1975, p. 21.

⁸Curtis H. Krishef, "State Laws on Marriage and Sterilization of the Mentally Retarded," Mental Retardation 10 (June 1972):38.

⁹Elyce Senoff Ferster, "Eliminating the Unfit--Is Sterilization the Answer?" Ohio State Law Journal 27 (1966): 593.

Frank T. Lindman, Donald M. McIntyre, "Eugenic Sterilization," The Mentally Disabled and the Law (1961):184.

¹⁰Lindman, "Eugenic Sterilization," p. 184.

¹¹Matthew W. Durns, "Wyatt v. Aderholt: Constitutional Standards for Statutory and Consensual Sterilization in State Institutions," Law and Psychology Review 1 (1973):81-82.

¹²Lindman, "Eugenic Sterilization," p. 188.

¹³Ferster, "Eliminating the Unfit," p. 595.

¹⁴Lindman, "Eugenic Sterilization," p. 188.

¹⁵Durns, "Wyatt v. Aderholt," pp. 80-81.

¹⁶Lindman, "Eugenic Sterilization," p. 188.

¹⁷Michael Bayles, "The Legal Precedents," Hastings Center Report 8 (1978):38.

¹⁸Elizabeth A. Steinbock, Louis L. Deermann, G. Tom Bellamy, Patrick Di Rocco, Gilbert Foss, Myles Friedland, "Civil Rights of the Mentally Retarded: An Overview," Law and Psychology Review 1 (1973):176.

¹⁹Gloria S. Neuwirth, Phyllis A. Heisler, Kenneth S. Goldrich, "Capacity, Competence, Consent: Voluntary Sterilization of the Mentally Retarded," Columbia Human Rights Law Review 6 (1974):457.

²⁰Bayles, "The Legal Precedents," p. 38.

²¹Steinbock, "Civil Rights of the Mentally Retarded," p. 176.

²²Neuwirth, "Capacity, Competence, Consent," p. 464.

²³Ibid., pp. 464-468.

²⁴Lindman, "Eugenic Sterilization," p. 183.

²⁵Ferster, "Eliminating the Unfit," p. 615.

²⁶Murdock, "Sterilization of the Retarded," p. 925.

²⁷Ferrin, "A Considered Approach to Sterilization," p. 289.

²⁸Charles W. Smiley, "Sterilization and Therapeutic Abortion Counselling for the Mentally Retarded," International Journal of Nursing Studies 10 (1973):138.

Perrin, "A Considered Approach to Sterilization," p. 289.

²⁹Governmental Affairs Committee, When Parents Consider Sterilization for Their Sons and Daughters Who are Mentally Retarded. (Minneapolis, Minnesota: Association for Retarded Citizens, 1978), p. 5.

³⁰Bayles, "The Legal Precedents," p. 41.

³¹Smiley, "Sterilization and Therapeutic Abortion Counselling," p. 138.

³²Murdock, "Sterilization of the Retarded," p. 930.

³³A Governmental Affairs Committee, p. 5.

³⁴Bayles, "The Legal Precedents," p. 41.

³⁵American Association on Mental Deficiency, Consent Handbook, p. 6.

³⁶Ibid., p. 7.

³⁷Governmental Affairs Committee, p. 4.

³⁸Robert Nevill, "The Philosophical Arguments," Hastings Center Report 8 (1978):37.

³⁹American Association on Mental Deficiency, Consent Handbook, p. 10.

⁴⁰Neuwirth, "Capacity, Competence, Consent," pp. 451-452.

⁴¹Ibid., p. 455.

⁴²Bayles, "The Legal Precedents," p. 38.

⁴³Neuwirth, "Capacity, Competence, Consent," pp. 459-460.

⁴⁴Ferster, "Eliminating the Unfit," pp. 603-604.

⁴⁵Murdock, "Sterilization of the Retarded," p. 926

⁴⁶Ferster, "Eliminating the Unfit," pp. 628-629.

⁴⁷Lindman, "Eugenic Sterilization," p. 189.

⁴⁸Eurns, "Wyatt v. Aderholt," p. 99.

⁴⁹Ibid., pp. 99-100.

⁵⁰S. John Vitello, "Involuntary Sterilization: Recent Developments," Mental Retardation 16 (December 1978): 405.

⁵¹United Association of Retarded Citizens, Policy on Sterilization, 1975, p. 1.

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