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Sterilization of the Mentally Disabled in Pennsylvania: Three Generations Without Legislative Guidance are Enough

Richard A. Estacio

COMMENTS

Sterilization of the Mentally Disabled in Pennsylvania: Three Generations Without Legislative Guidance are Enough

They did not die out, for they are the past masters of the survival arts. But do not look for them floating loose in the sea; they gave up that cavalier freedom long ago. Now they swarm in huge colonies, safe inside gigantic lumbering robots, sealed off from the outside world, communicating with it by torturous indirect routes, manipulating it by remote control. They are in you and me; they created us, body and mind; and their preservation is the ultimate rationale for our existence. They have come a long way, those replicators. Now they go by the name of genes, and we are their survival machines.[1]

I. Introduction

Dawkins' dark depiction of genes as the controllers and humans as the controlled[2] at once reveals man's need and justification for exerting control over his environment whenever possible. Perhaps nowhere in the law has this need to control found a more neurotic expression than in the eugenic statutes of the early 1900's.[3] Many of

1. R. DAWKINS, THE SELFISH GENE (1976).

2. Dawkins' book was not written to comment on eugenic sterilization but instead to propound the theory that human evolution could be explained by merely acting as if genes were controlling human development and behavior.

3. Act of April 26, 1909, 1909 Cal. Stats. ch. 720 (first California sterilization statute); Act of June 13, 1913, 1913 Cal. Stats. ch. 363 (second California statute); Act of August 12, 1909, 1909 Conn. Pub. Acts ch. 209; Act of April 28, 1923, 1923 Del. Laws ch. 62; Act of March 13, 1925, 1925 Idaho Sess. Laws ch. 194; Act of March 9, 1907 Ind. Acts ch. 215; Act of April 10, 1911, 1911 Iowa Acts ch. 129 (first Iowa sterilization statute); Act of April 19, 1913, 1913 Iowa Acts ch. 187 (second Iowa statute); Act of April 16, 1915, 1915 Iowa Act ch. 202 (third Iowa statute); Act of March 14, 1913, 1913 Kan. Sess. Laws ch. 305 (first Kansas sterilization statute); Act of March 13, 1917, 1917 Kan Sess. Laws ch. 299 (second Kansas statute); Act of April 11, 19125, 1925 Me. Acts ch. 208; Act of April 1, 1913, 1913 Mich. Pub. Acts No. 34 (first Michigan sterilization statute); Act of May 25, 1923, 1923 Mich. Pub. Acts No. 285 (second Michigan sterilization statute); Act of April 8, 1925, 1925 Minn. Laws ch. 154; Act of March 15, 1923, 1923 Mont. Laws ch. 164; Act of July 8, 1915, 1915 Neb. Laws ch. 237; Act of March 17, 1911, 1911 Nev. Stats. s.28; Act of April 18, 1917, 1917 N.H. Laws ch. 181; Act of April 21, 1911, 1911 N.J. Laws ch. 190; Act of April 16, 1912,

these statutes provided that the state could order the sterilization of the "generally unfit," ranging from those persons with low IQs[4] to those whose only "genetic defect" was that they were poor, deaf or blind.[5]

Current law on the sterilization of the mentally disabled[6] is a mixed assortment of antiquated statutes,[7] a growing minority of well-planned and even enlightened statutes,[8] and varying judicial standards.[9] A number of states, Pennsylvania among them, have

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1912 N.Y. Laws ch. 445; Act of March 13, 1913, 1913 N.D. Sess. Laws ch. 56; Act of Feb. 191, 1917, 1917 Or. Laws ch. 279 (first Oregon sterilization statute); Act of Feb. 24, 1923, 1923 Or. Laws ch. 194 (second Oregon statute); Act of March 8, 1917, 1917 S.D. Sess. Laws ch. 236; Act of March 16, 1925, 1925 Utah Laws ch. 82; Act of March 20, 1924, 1924 Va. Acts ch. 394; Act of March 22, 1909, 1909 Wash. Laws ch. 249, s.35 (first Washington sterilization statute); Act of March 8, 1921, 1921 Wash. Laws ch. 53 (second Washington statute); Act of July 30, 1913, 1913 Wis. Laws ch. 693, *as cited in* Cynkar, *Felt Necessities v. Fundamental Values?* 81 COLUM. L. REV. 1418, 1433 n.76 (1981).

4. Under the Stanford Revision of the Binet-Simon intelligence test the scale for classifying one's intelligence quotient (I.Q.) is as follows:

140 and above	GENIUS
120-139	VERY SUPERIOR
110-119	SUPERIOR
90-109	AVERAGE
80-89	DULL NORMAL
70-79	BORDERLINE DEFECTIVE
50-69	MORON
25-49	IMBECILE
24 or less	IDIOT

See A. ANASTASI, PSYCHOLOGICAL TESTING 208 (1962).

5. At the height of the eugenics movement, its advocates released periodic reports listing those persons they considered to be "fit for sterilization." One report included the following:

> *The socially inadequate classes*, regardless of etiology or prognosis, are the following: 1) feeble-minded; 2) insane (including the psychopathic); 3) criminalist (including the delinquent and wayward); 4) epileptic; 5) inebriate (including drug-habitues); 6) diseased (including the tuberculous, the syphilitic, the leprous, and others with chronic, infectious and legally segregable diseases); 7) blind (including those with seriously impaired vision); 8) deaf (including those with seriously impaired hearing); 9) deformed (including the crippled); and 10) dependent (including orphans, ne'er-do-wells, the homeless, tramps and paupers).

H. LAUGHLIN, THE LEGAL STATUS OF EUGENICAL STERILIZATION 65 (1929).

6. The author prefers to use the terms "mentally handicapped" or "mentally disabled" instead of the terms "retarded" or "mentally incompetent" for the following reasons: 1) the former terms do not carry the same connotation of inferiority as do the others; and 2) the terms are no less descriptive or accurate than the others. To this extent, they will be used to the exclusion of others except where use of another term is necessary for citation, quotation or stylistic purposes.

7. *See* WASH. REV. CODE ANN. §§ 9.92-100 (1977).

8. *See* OR. REV. STAT. §§ 436.010 to .150 (1973).

9. *See generally* R.K. Sherlock and R.D. Sherlock, *Sterilizing the Retarded: Constitutional, Statutory and Policy Alternatives*, 60 N.C.L. REV. 943, 963-73 (1981-82) [hereinafter Sherlock]; *compare In re* Terwilliger, 304 Pa. Super. 553, 450 A.2d 1376 (1982) (court stated that there must be "clear and convincing" evidence that sterilization would be in the best interests of the incompetent) with *In re* D.D., 64 A.D. 2d 898, 408 N.Y.S. 104 (1978) (court has no jurisdiction to order sterilization absent specific statutory authority).

never had a statute prescribing the circumstances under which a mentally handicapped person could be involuntarily sterilized, thereby leaving the determination entirely to the courts.[10]

This Comment addresses the inherent inadequacies of leaving the sterilization decision solely to the judiciary. It also traces the rise and eventual decline of eugenics as a rationale for sterilization of the mentally disabled. Further, this Comment explores the constitutional considerations that attend any compulsory sterilization decision. Finally, it suggests that Pennsylvania, with a view toward protecting the rights of the mentally handicapped, adopt the proposed statute set forth at the end of this Comment.

II. Historical Analysis

A. Philosophical and Scientific Origins

The idea of bettering the human race through selective breeding[11] is not a new one. Plato was the first important historical figure to advocate the theory of improving mankind by choosing the correct mate.[12] This approach, known as positive eugenics,[13] sought to improve mankind by promoting the reproduction of "socially desirable" genes. Eugenic sterilization statutes, however, are based on negative eugenics. Negative eugenics[14] attempts to improve society by severely limiting or totally eliminating the reproduction of "socially undesirable" genes.

Derived from the Greek word meaning "well born," the term eugenics was coined by Sir Francis Galton[15] in 1883 who defined it as "the study of agencies under social control that may improve or

10. Florida, Illinois, Maryland, Massachusetts, New Mexico and Wyoming have never had a compulsory sterilization statute.

11. The aim of selective breeding is to maximize the number of "good genes" that might occur in any potential future offspring with the immediate result being a stronger, healthier, more intelligent human being and the ultimate result being a stronger, healthier, more intelligent human race.

12. *See* PLATO, THE REPUBLIC, (Universal Classics ed. 1901) (n.p.n.d.).

13. *See* E. Ferster, *Eliminating the Unfit: Is Sterilization the Answer?* 27 OHIO ST. L.J. 591 (1966) [hereinafter Ferster].

14. *Id.*

15. Before beginning the eugenics movement, Galton conducted research on the family trees of famous English individuals and subsequently, he changed his focus to the "nature v. nurture" controversy, specifically concentrating on the concordance rates of twins. Concordance studies attempt to measure the extent to which the environment alters the emotional and mental development of identical twins. Galton's work, in addition to that of Charles Darwin and Gregor Mendel, led him to conclude that virtually all physical and psychological traits were inherited, and thus provided the moral and scientific underpinnings of the eugenics movement. *See infra* note 16 and accompanying text.

impair . . . future generations either physically or mentally."[16] Simply stated, if mental disability was inherited, then sterilizing mentally disabled people was the solution. Galton and his followers, convinced that the best way to improve society was to keep mentally disabled people from reproducing, searched for a scientific basis for their cause. They eventually seized upon both Darwin's theory of evolution[17] and Mendel's recently re-discovered work on genetics[18] to provide the scientific validation their theory needed in order to gain both popular and legislative acceptance.

In Pennsylvania this acceptance took the form of a statute for the "prevention of idiocy."[19] Pennsylvania was the first state to gain legislative approval of a eugenic sterilization statute,[20] although it was later vetoed and never succeeded in becoming law.[21] A similar

16. DEUTSCH, THE MENTALLY ILL IN AMERICA 357-58 (2d ed. 1949).

17. Charles Darwin, who happened to be Galton's cousin, pioneered work on the origin of species that not only revolutionized the course of scientific thought in the latter part of the nineteenth century, but also greatly influenced social thought. Darwin's notions of "natural selection" and "survival of the fittest" exposed the significant interplay that exists between scientific reasoning and social paradigms.

The concept of natural selection, today accepted as biological fact, contends that the rigors of the environment determine which genes will be passed on to future generations and which ones will eventually be purged from the gene pool. One manifestation of this process is the different body types that predominate in the various climates throughout the world. For example, Eskimos are generally shorter and have more compact bodies than do the inhabitants of tropical climates. Natural selection proposes that this has occurred because a more compact body type has less surface area per unit volume than does a thin lanky body type. Thus, the former body type is more heat efficient and persons with that body type in cold climates will tend to, over time (as measured in tens of thousands of years), survive longer and more often. This will result in more individuals of that particular body type reaching reproductive age, thereby providing the opportunity for the passage of these genes to successive generations. In this way, nature has selected who will live and who will die, with only the "fittest surviving." *See generally* C. DARWIN, THE ORIGIN OF THE SPECIES (1897) *reprinted in* P. APPELMAN, DARWIN (2d ed. 1979).

18. At about the same time Galton was researching the family trees of famous English individuals in the 1860's, an Austrian monk named Gregor Mendel was studying genetics by crossbreeding peas. Mendel's work was entirely forgotten until the turn of the century, but apparently emerged just in time to convince Galton of the veracity of the scientific basis for his eugenics movement. Based on his classification of genes (then called "determiners") as either dominant or recessive, Mendel developed a system of ratios for predicting the probability that a particular trait would appear in any future generation of pea plants. He then postulated that this system would also work for physical traits in humans. Galton took this extrapolation one step further by saying that psychological, mental and emotional traits were similarly determined. It was this ill-conceived gap of logic that ultimately eroded the scientific basis for eugenic sterilization. ILTIS, GENETICS IN THE TWENTIETH CENTURY 25-34 (1951).

19. This act required that "each and every institution . . . entrusted . . . with the care of idiots . . . [should] appoint a neurologist and a surgeon . . . to examine the mental and physical condition of the inmates . . . [and if in their opinion sterilization was warranted, should] perform such operation for the prevention of procreation . . . ." Chellener, *The Law of Sexual Sterilization in Pennsylvania*, 57 DICK. L. REV. 298 (1953).

20. *Id.*

21. Governor Pennypacker's veto was returned with the following terse letter:

> This bill has what may be called with propriety an attractive title. If idiocy could be prevented by an Act of Assembly, we may be quite sure that such an

statute did succeed in becoming law two years later in Indiana,[22] paving the way for twenty-one other states to follow suit within the next 20 years.[23] Yet judicial acceptance of eugenic sterilization law was slow to emerge. Prior to 1925, the courts invalidated all sterilization laws they encountered, claiming that the laws violated equal protection.[24]

This trend came to an abrupt end in 1927 when the United States Supreme Court in *Buck v. Bell*[25] held that a Virginia eugenic sterilization statute was not violative of equal protection. A close analysis of Justice Holmes' reasoning in that case will provide a useful framework for considering current sterilization law.

B. Buck v. Bell

Carrie Buck was an eighteen-year-old woman who had been committed to the Virginia State Colony for Epileptics and Feebleminded.[26] Her mother and daughter were both mentally retarded. The Virginia Supreme Court of Appeals upheld a petition for sterilization of Carrie, and in doing so, gave credence to the Virginia compulsory sterilization statute.[27] The Virginia legislature in enacting

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act would have been passed and approved in this state. What is the nature of the operation is not described, but it is such an operation as they shall decide to be 'safest and most effective.' It is plain that the safest and most effective method of preventing procreation would be to cut the heads off the inmates, and such authority is given by the bill to this staff of scientific experts . . . . The bill is, furthermore, illogical in its thought . . . . A great objection is that the bill . . . would be the beginning of experimentation upon living human beings, leading logically to results which can be readily forecasted. The chief physician . . . has candidly told us . . . that 'Studies in heredity tend to emphasize the wisdom of those ancient people who taught that the healthful development of the individual and the elimination of the weakling was the truest patriotism—springing from an abiding sense of the fulfillment of a duty to the state . . . .

See Ferster *supra* note 13, at 593.

22. *Id.* at 593 n.10.

23. Those states were California, Connecticut, Delaware, Idaho, Iowa, Kansas, Maine, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Oregon, South Dakota, Utah, Virginia, Washington and Wisconsin.

24. Haynes v. Lapeer, 201 Mich. 138, 166 N.W. 938 (1918); Smith v. Bd. of Examiners, 85 N.J.L. 46, 88 A. 963 (Sup. Ct. 1913); Osborn v. Thomson, 103 Misc. 23, 169 N.Y.S. 638 *aff'd mem.*, 185 App. Div. 902, 171 N.Y.S. 1094 (1918).

25. 274 U.S. 200 (1927).

26. This institution was one of five named under the Virginia Act. *See infra* note 27.

27. The Virginia Sterilization Act, 1924 Va. Acts 569-71 (repealed 1968), provided:

Whereas, both the health of the individual patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives under careful safeguard and by competent and conscientious authority, and

Whereas, such sterilization may be effected by the operation of vasectomy in males and in females by the operation of salpingectomy, both of which said operations may be performed without serious pain or substantial danger to the life of the patient, and

Whereas, the Commonwealth has in custodial care and is supporting in va-

this statute, asserted that both the health of the patient and the welfare of society would be promoted by sterilization performed pursuant to this statute. The patient would benefit by avoiding pregnancies that she did not want nor was capable of understanding,[28] while society would benefit by the decrease in the number of

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rious state institutions many defective persons who if now discharged or paroled would likely become by the propagation of their kind a menace to society but who if incapable of procreating might properly and safely be discharged or paroled and become self-supporting with benefit both to themselves and to society, and

Whereas, human experience has demonstrated that heredity plays an important part in the transmission of insanity, idiocy, imbecility, epilepsy and crime, now, therefore

1. Be it enacted by the General Assembly of Virginia, That whenever the Superintendent of the Western State Hospital, or of the Eastern State Hospital, or of the Southwestern State Hospital, or of the Central State Hospital, or of the State Colony for Epileptics and Feeble-minded, be of the opinion that it would be in the best interest of the patients and of society that any inmate of the institution under his care should be sexually sterilized, such superintendent should perform, or cause to be performed by some capable physician or surgeon, the operation of sterilization on any such patient in any such institution afflicted with hereditary forms of insanity that are recurrent, idiocy, imbecility, feeble-mindedness or epilepsy; provided that such superintendent shall have first complied with the requirements of this Act.

2. Such superintendent shall first present to the special board of directors a petition stating the facts of the case and the grounds of his opinion, verified by his affidavit to the best of his belief, and praying that an order may be entered by said board requiring him to perform or have performed by some competent physician to be designated by him in his said petition or by said board in its orders upon the inmate of his institution named in such petition, the operation of vasectomy if upon a male and of salpingectomy if upon a female.

. . .

The said board may deny the prayer of the said petition or if the said special board shall find that the said inmate is insane, idiotic, imbecilic, feeble-minded or epileptic and by the laws of heredity is the probable potential parent of socially inadequate offspring likewise afflicted, that the said inmate may be sexually sterilized without detriment to his or her general health, and that the welfare of said inmate and of society will be promoted by such sterilization, the said special board may order the said superintendent to perform or to have performed by some competent physician to be named in such order upon the said inmate, after not less than thirty days from the date of such order, the operation of vasectomy if a male or of salpingectomy if female; provided that nothing in this Act shall be construed to authorize the operation of castration not the removal of sound organs from the body.

L. Burgdorf and P. Burgdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped People*, 50 TEMP. L.Q. 995, 1001 n.51 (1976-77) [hereinafter Burgdorf].

28. In the author's opinion, there are valid reasons for providing for the sterilization of certain mentally disabled persons when circumstances dictate that it would be in the best interests of that person. Consider the following example reported in the medical literature:

A "14 year old" girl, the youngest of ten children, was a premature baby with trisomy 21 Downs Syndrome complicated by pneumococcal meningitis when she was five months old, and severe myopia. She was known to the Comprehensive Care Unit from birth, and serial psychological testing showed an IQ of 30 with minimal speech development. At age 7 ½, goiter was observed with hyperthyroidism, at age ten thelarche, at 10 ½, menarche with heavy flow. During men-

mental defectives that it would have to accommodate.

Writing for the Court, Justice Holmes enunciated the various procedures that must be followed in order to safeguard the interests of the patient.[29] These procedural safeguards, however, did not remedy the substantive defect of eugenic sterilization law. This fundamental defect lies in the erroneous assumption that heredity is the primary cause of mental retardation.[30] Holmes further reasoned that Carrie Buck is the "probable potential parent of socially inadequate offspring"[31] and thus, the Court could not say that as a matter of law the decision to sterilize her was an irrational one. Stating that "[t]he principle which sustains compulsory vaccinations is broad enough to cover cutting the fallopian tubes,"[32] Holmes' approach was one of "better now than later." This approach is best revealed by the following passage in which Holmes declared that:

> We have seen more than once that the public welfare may call upon its best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for their lesser sacrifices, often not felt to be such by those concerned, in order to prevent our society from being swamped with incompetence. 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 who are manifestly unfit from continuing their kind . . . three genera-

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> ses she became frightened and withdrawn, refusing to eat and going to bed or hiding under the bed. She did not understand repeated explanation of menses by her mother, could not cope with menstrual hygiene, and had to be kept home from school during menstrual periods. The patient had a total abdominal hysterectomy under general anesthesia at age 11 . . . . In the three years after surgery, she was reported to have a happier personality at home with no episodes of withdrawal, and she did not miss school. There was no history of sexual activity or molestation.

Sherlock, *supra* note 9, at 952 n.53.

29. These procedures allowed a superintendent to bring a sterilization petition to the special board of the hospital or colony where the patient was committed. The petition had to be verified by affidavit. Both the patient and the patient's guardian were to receive notice of the petition and of the time and place of the hearing. If there was no guardian, then the superintendent was to apply to the circuit court of the county to appoint one. If the patient was a minor, then notice had to also be served on the patient's parents. Ultimately, the board was required to rule either for or against the operation. The Virginia statute also allowed for appeal to the circuit court of the county, and finally to the supreme court of appeals. 274 U.S. at 206-07.

30. Many studies were conducted in the years following *Buck* which revealed that there was no scientific or statistical evidence to support the belief that the mental deficiencies the sterilization statutes were attempting to eradicate were inherited. *See* DEUTSCH, THE MENTALLY ILL IN AMERICA, 354-86 (2d ed. 1949).

31. 274 U.S. at 207.

32. *Id.*

tions of imbeciles are enough.[33]

In disposing of the equal protection claim, Holmes asserted that "the law does all that is needed when it does all that it can,"[34] indicating that as long as there was a constant flow of patients going through the asylum, all mentally retarded persons were potentially within the ambit of the sterilization law. Thus, all mentally impaired persons within the state were equally protected.[35]

Although *Buck* has never been expressly overruled, it has been the subject of widespread and severe criticism.[36] One commentator stated that "the opinion is noteworthy for the boldness with which Justice Holmes dispenses with logic and in short, pithy sentences agrees to the subordination of human rights to the supposed expediency of a long-range racial improvement."[37] While this sentiment aptly characterizes the prevailing view of eugenic sterilization, eugenics as a basis for sterilization of mentally handicapped persons still pervades much of the current legislation on the issue.[38]

Although states with compulsory sterilization statutes are in the minority,[39] those states holding that a court can not rule on a sterilization petition absent specific statutory authority are in the majority.[40] A review of the current status of compulsory sterilization law

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33. *Id.*

34. *Id.* at 208.

35. *Id.*

36. Robert L. Burgdorf, Jr., Director of Training and Technical Assistance of the Developmental Disabilities Law Project at the University of Maryland, together with Marcia Pearce Burgdorf, co-director of the Developmental Disabilities Law Project and Assistant Professor of Law at the University of Maryland, co-wrote a scathing review of the *Buck* decision, making an overt analogy to the sterilization practices under Hitler's Third Reich. The Burgdorfs note that as recently as 1969 the following law was on the books in Connecticut:

> Every man who shall carnally know any female under the age of fourty-five years who is epileptic, imbecile, feeble-minded or a pauper, shall be imprisoned in the state prison not less than three years. Every man who is epileptic who shall carnally know any female under the age of fourty-five years, and every female under the age of fourty-five years who shall consent to be carnally known by any man who is epileptic, imbecilic or feeble-minded, shall be imprisoned in the State prison not less than three years.

1895 Conn. Pub. Acts 667 (repealed 1969). *See* Burgdorf *supra* note 27, at 998 n.24. *See, e.g.*, W. WOLFENSBERGER, THE ORIGIN AND NATURE OF OUR INSTITUTIONAL MODELS, 33-39 (1975).

37. Gest, *Eugenic Sterilization: Justice Holmes v. Natural Law*, 23 TEMP. L.Q. 306 (1950).

38. *See* DEL. CODE ANN. tit. 16, §§ 5701-05 (1974); MISS. CODE ANN. 41-45-1 to 19 (1972). The approach of many current statutes is virtually unchanged since the time of Justice Holmes in Buck v. Bell. South Carolina's sexual sterilization statute provides for the compulsory sterilization of "any inmate of an institution who is inflicted with any hereditary form of insanity that is recurrent, idiocy, imbecility, feeble-mindedness or epilepsy . . . ." S.C. CODE ANN. §§ 44-47-10 to 74-100 (Law. Co-op. 1977).

39. *See infra* note 41.

40. *See* Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977), *rev'd sub. nom.* Stump v.

throughout the United States places Pennsylvania's position on compulsory sterilization in its proper perspective.

III. Current Sterilization Law

A. States with Sterilization Statutes — Various Statutory Rationales

Currently, there are thirteen states that have compulsory sterilization statutes.[41] This total is significantly less than it was twenty years ago when half of the states had such statutes.[42] Among the states that have retained their sterilization laws, there remains great variance among the different rationales that underlie the statutes, the procedures the statutes employ, and the classes of persons to whom the statutes apply. For example, both Washington[43] and Delaware[44] sanction sterilization of "habitual criminals" under certain circumstances, while South Carolina[45] has come the closest to addressing both criminals and mentally disabled persons under one law. The South Carolina statute provides that the superintendent of

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Sparkman, 435 U.S. 349 (1978) (the specific issue at the Supreme Court level concerned judicial immunity); Wade v. Bethesda, 337 F. Supp. 671 (S.D. Ohio 1971); Anonymous v. Anonymous, 469 So.2d 588 (Alabama 1985); Hudson v. Hudson, 373 So.2d 310 (Alabama 1979); *In re* Kemp, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1964); Maxon v. Superior Court, 135 Cal. App. 3d 626, 185 Cal. Rptr. 516 (1982); *In re* Tulley, 83 Cal. App. 3d 698, 146 Cal. Rptr. 266 (1978); *In re* S.C.E., 378 A.2d 144 (Del. Ch. 1977); A.L. v. G.R.H., 163 Ind. App. 636, 325 N.E.2d 501 (1975); Holmes v. Powers, 439 S.W.2d 579 (Ky. 1968); Smith v. Command, 231 Mich. 409, 204 N.W. 140 (1925); *In re* M.K.R., 515 S.W.2d 467 (Mo. 1974); *In re* Matter of D.D., 64 A.D.2d 898, 408 N.Y.S.2d 14 (1978); Application of A.D., 90 Misc.2d 236, 394 N.Y.S.2d 139 (1977); Frazier v. Levi, 440 S.W.2d 393 (Tex. Civ. App. 1969). *See also In re* Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

41. *See* ALA. CODE §§ 22-8-1 to -8 (1971); ARK. STAT. ANN. 59-501 (1972); DEL. CODE ANN. tit. 16, §§ 5701-5705 (1974); GA. CODE ANN. §§ 84-931 to -936 (1975); IDAHO CODE §§ 39-3901 to -3910 (1977); MISS. CODE ANN. §§ 41-45-1 to -19 (1972); N.C. STAT. §§ 35-36 to -50. (1976); OR. REV. STAT. §§ 436.010 to .150 (1973); S.C. CODE ANN. §§ 44-47-10 to 47-100 (Law Co-op. 1977); UTAH CODE ANN. §§ 64-10-1 to -10-13 (Supp. 1975); VT. STAT. ANN. tit. 18, §§ 8701-8704 (1977); VA. CODE §§ 54-352.9-.15 (1981); WASH. REV. CODE ANN. §§ 9.92-100 (1961).

42. Those states were Alaska, Arizona, California, Connecticut, Delaware, Georgia, Idaho, Indiana, Iowa, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, Oklahoma, Oregon, South Carolina, Utah, Vermont, Virginia, West Virginia and Wisconsin. Ferster, *supra* note 13, at 596 n.30.

43. WASH. REV. CODE ANN. §§ 9.92-100 (1961) provides that "[w]henever any person shall be adjudged guilty of carnal abuse of a female person under the age of ten years, or of rape, or shall be adjudged to be a habitual criminal, the court may, in addition to such other punishment or confinement as may be imposed, direct an operation to be performed on such person, for the prevention of procreation."

44. DEL. CODE ANN. tit. 16, §§ 5701-5705 (1974) provides that "[a]ll habitual criminals or confined criminals who have been convicted of at least three felonies . . ." are candidates for sterilization.

45. S.C. CODE ANN. §§ 44-47-10 to -47-100 (Law Co-op. 1977).

any "penal or charitable"[46] institution is to be the judge of a particular person's "competency" when deciding whether to bring a sterilization petition.[47]

The eugenic rationale having fallen into disfavor, those states which felt the need to retain their compulsory sterilization statutes sought different grounds upon which to base the laws. Today, the two most prevalent rationales are the punitive and the therapeutic. Many of these statutes, however, still cling to their eugenic origins.

1. The Punitive Rationale.—As previously mentioned, both Washington and Delaware have punitive rationales for their sterilization statutes,[48] yet both of these laws still apply to mentally handicapped persons to the extent that there is an overlapping between mentally impaired persons and criminals. The punitive rationale for compulsory sterilization is predicated on the assumption that violent propensities in criminals are genetically determined.[49] This assumption extends the eugenic basis for sterilization to include convicted criminals. It follows that the arguments which undercut eugenics as a rationale for the compulsory sterilization of mentally disabled persons would fare equally well against statutes aimed at sterilizing criminals. To a large degree, this is true and accounts for the fact that only two states still have punitive sterilization statutes.[50]

In the early 1960's, scientific research on the genetically abnormal "XYY" male[51] provided an empirical basis for the punitive ra-

46. *Id.* South Carolina was the first state to expressly combine punitive and eugenic rationales for sexual sterilization. *See infra* note 47 and accompanying text.

47. S.C. CODE ANN. §§ 44-47-10 to -47-100 (Law Co-op. 1977). Many eugenic sterilization statutes permitted the superintendent of the hospital or colony where the mentally handicapped person was committed to order the sterilization. *See, e.g.*, MISS. CODE ANN. §§ 41-45-1 to -19 (1972).

48. *See supra* notes 43 and 44 and accompanying text.

49. For an excellent discussion of this proposition and its relevance to the criminal justice system, see L. Taylor, *Genetically-Influenced Antisocial Conduct and the Criminal Justice System* 31 CLEV. ST. L. REV. 31 (1982) [hereinafter Taylor].

50. *See supra* notes 43-4 and accompanying text.

51. Lawrence E. Taylor, Associate Professor at the Gonzaga University School of Law describes the creation of an XYY male as follows:

> The XYY studies test for variations in the number and/or sexual characteristics of the chromosomes. Every person normally carries fourty-six chromosomes in every cell of his body, arranged in twenty-three pairs. Of these twenty-three pairs, twenty-two are "autosomes" or genes, which contain most of the individual's biological characteristics. The remaining pair of genes are called "gonosomes" which determine such remaining traits as primary sexual characteristics. In women, these paired sex chromosomes are called "X" chromosomes; in men, the gonosomes are represented by one of the X chromosomes paired with a much smaller "Y" chromosome. These are referred to by geneticists as the XX or XY gonosomes respectively, and their presence in a fetus determines, among other things, whether the child will be a male or a female. On a rare occasion,

tionale that pure eugenic statutes no longer had. An XYY male is a male born with an extra Y chromosome. According to numerous studies, XYY males were believed to commit many more violent crimes, on the average, than the typical XY male. Results of this research revealed that persons with an XYY chromosome structure were as much as 240 times more likely to be found among prison populations as they were among the general populace.[52] Subsequent studies,[53] however, have refuted these findings and left the empirical data for punitive sterilization statutes as sparse as it is for eugenic sterilization statutes.

The judiciary's response to sterilization cases that have involved punitive sterilization statutes has been cyclical, rather than evincing a definite trend. For instance, in the seminal case of *Skinner v. Oklahoma*,[54] the United States Supreme Court invalidated Oklahoma's sterilization statute which provided for the sterilization by "vasectomy"[55] or "salpingectomy"[56] of "habitual criminals."[57]

> however, the process of fertilization by the male sperm of the female ovum misfunctions and a fetus is created which contains chromosomal abnormalities. If the male gonosomes receive an additional Y chromosome (i.e. an extra "male" chromosome) the XYY or so-called "super male" is created. Such individuals tend to be much taller than average, and often have an acne condition of the skin. Statistically, it is believed that a "super male" occurs approximately once in every 1000 male births. Recent studies seem to indicate that such individuals tend to be more aggressive than most, and an unusually high percentage of criminal conduct has been observed. Perhaps the most well-known modern carrier of the XYY deviation was Richard Speck, convicted of murdering eight nurses in Chicago in 1966.

Taylor, *supra* note 49, at 62-63.

52. Numerous studies conducted in the sixties in both England and the United States have conclusively shown that there is a much higher incidence rate of XYY males among prison populations than among the general population. One group of researchers conducted a study at Rampton and Moss Side maximum security institutions in England. The incidence rate for XXY males at both institutions was 24%, 240 times higher than that which would be statistically expected. *Id.* at 64.

53. A 1976 study on the relationship between genetic abnormality in males and aggression concluded that XYY males are not more likely to commit violent crimes than genetically normal XY males. The study concluded that although there may be a correlation between XYY males and criminal behavior, there is no demonstrated causal relationship. The definitive study on XYY aggression has yet to be done. *See* Witkin, Mednick, Schulsinger, Bakkestrom, Christiansen, Goodenough, Hirshhorn, Lundsteen, Owen, Philip, Rubin and Stocking, *Criminality in XYY and XXY Men*, 193 SCI. 547, 550 (1976) *as cited in* Taylor, *supra* note 49.

54. 316 U.S. 535 (1942).

55. "Vasectomy" involves cutting the vas deferens in males. This operation, which can be performed on an outpatient basis, requires about fifteen minutes to perform, and can be done under local anesthesia. Despite there being almost a 20-30% chance of reversing the operation, it is still considered irreversible.

56. "Salpingectomy" involves cutting the fallopian tubes in females. This procedure is sometimes referred to as "tubal ligation" and it is considered irreversible, although there exists an extremely remote chance that it can be reversed.

57. The Oklahoma legislature defined "habitual criminal" as "any person who has been convicted two or more times, in Oklahoma or any other state, of felonies involving moral turpi-

This invalidation occurred because the statute expressly excluded certain offenses, such as embezzlement, from its scope and, therefore, the court ruled that it violated the equal protection clause of the fourteenth amendment.[58]

Less than thirty years later, a similar statute in *In re Cavitt*,[59] which was applicable to habitual criminals committed to the Beatrice Home for the Feeble-minded, was found to comport with the equal protection clause. The feature which distinguished this statute from the one in *Skinner* was that it did not mandate sterilization, but instead only made sterilization a condition to being released from the institution.[60]

Despite the cyclical nature of these decisions, the judiciary has exhibited an increased sensitivity to individual rights. This increased sensitivity, coupled with the lack of social acceptance of either eugenic or punitive sterilization, has culminated in what has been termed the therapeutic rationale for compulsory sterilization of mentally handicapped persons.

2. The Therapeutic Rationale.—Allegedly concerned with the "best interests"[61] of the patient, therapeutic sterilization statutes are the first important development in the legal system's attempt to adequately protect the constitutional rights[62] of a mentally handicapped person facing the threat of compulsory sterilization. Many of these statutes also provide that the best interests of society shall be considered when determining if sterilization is warranted. Unfortunately, those statutes which exhibit a concern for societal interests tend to subordinate the rights of the mentally disabled individual whenever the interests of the person and the interests of society appear to be at odds.[63]

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tude. Curiously, the statute did not characterize embezzlement as a felony involving moral turpitude, but did include "stealing chickens." OKLA. STAT. ANN. tit. 57, § 173 (1935).

58. U.S. CONST. amend. XIV provides that "[No] State shall deprive . . . any person within its jurisdiction the equal protection of the laws."

59. 157 N.W.2d 171 (Neb. 1968). The court in *Cavitt* spread a wide protective net over the Nebraska sterilization statute, NEB. REV. STAT. §§ 83-501 to 83-508 (1943), ruling that the statute: 1) was a valid exercise of the police power; 2) did not deny equal protection of the law as class legislation; 3) did not unlawfully delegate quasi-judicial powers to the board of examiners of mentally disabled persons; and 4) afforded procedural due process. Moreover, the court held that the term "mentally deficient" as used in the statute was not unconstitutionally vague and indefinite, and that the operations sanctioned by the state, were not cruel and unusual punishment. 157 N.W.2d 171, 174-78 (Neb. 1968).

60. *Id.* at 171.

61. *See infra* note 67 and accompanying text.

62. *See infra* note 112.

63. *See* MISS. CODE ANN. §§ 41-45-1 to 19 (1972) (uses best interests of patient and society); *cf.* N.C. GEN. STAT. 35-36 to -50 (1976) (protects the "public good"). *See also* IDAHO

The most heralded argument put forth in support of incorporating the best interests of society into a sterilization statute is that mentally disabled persons are unfit to parent their offspring.[64] This would presumably result in not only an increased number of charges to the welfare rolls, but also present hazards to the health and safety of the offspring if permitted to stay with the mentally disabled parent. This concern figured prominently in the North Carolina sterilization statute.[65] This statute requires only that there be a probability that the mentally handicapped person could not care for his or her children, asserting that there is no need to demonstrate this deficiency before sterilization can be ordered.

This cavalier attitude in evaluating the best interests of society can arguably be regarded as also representing the best interests of the mentally impaired person.[66] Yet some jurisdictions take a more structured stance with regard to therapeutic sterilization, holding that in order for compulsory sterilization to be in the best interests of the mentally handicapped person certain requirements must be met. Oregon's sterilization statute[67] requires that:

CODE §§ 39-3901 to -3910 (1977) (can order sterilization if patient unfit to raise children). *But see* OR. REV. STAT. §§ 436.205 to .335 (1983) (only considers the best interests of the patient).

64. This concern is supported by various United States Supreme Court decisions which have held that parents have a fundamental right to direct the care and activities of their children. Quillion v. Walcott, 434 U.S. 246, 255 (1977); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974); Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

65. N.C. GEN. STAT. § 35-39(3) (1976) provides for the sterilization of a mentally disabled person if, in the opinion of the person(s) bringing the sterilization petition (parent, guardian, county director of social services, or other public official), a "resident of an institution, or non-institutional individual would be likely, unless sterilized, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency which is not likely to materially improve, the person would be unable to care for a child or children." The statute does not list any guidelines that should be considered in ascertaining the mentally handicapped person's best interests, but instead leaves that determination solely to the discretion of the petitioner.

66. This dubious assertion is apparently based on the circular argument that the mentally disabled person would benefit indirectly by living in a society with less social problems, rather than a society filled with children who have mentally deficient, presumably unfit parents.

67. The Utah legislature has mandated that a court considering the sterilization of a mentally handicapped person must consider the following factors in ascertaining the best interests of the individual:

> a) the nature and degree of mental impairment of the person and the likelihood that the condition is permanent;
>
> b) the level of understanding of the person regarding the concepts of reproduction and contraception and whether the ability of the person to understand such concepts is likely to improve;
>
> c) the capability of the person for procreation and reproduction. It is a rebuttable presumption that the ability to procreate and reproduce exists in a person of normal physical development;
>
> d) the potentially injurious physical and psychological effects from steriliza-

1) the individual is physically capable of procreating;

2) the individual is likely to engage in sexual activity at the present time or in the near future under circumstances likely to result in pregnancy;

3) all less drastic contraceptive measures, including supervision, education and training, have proved unworkable or inapplicable, or are medically counter-indicated;

4) the proposed method of sterilization conforms with standard medical practice, is the least intrusive method available and appropriate, and can be carried out without reasonable risk to the health and life of the individual; and

5) the nature and extent of the individual disability, as determined by empirical evidence and not solely on the basis of standardized tests, renders the individual permanently incapable of caring for and raising a child, even with reasonable assistance.[68]

Clearly, Oregon has gone much further in safeguarding the interests of the individual than has North Carolina, by requiring that those seeking to have a particular individual sterilized meet a significantly higher burden of proof that such sterilization is warranted. These five factors are deliberately directed toward viewing sterilization as a last resort, only to be used if all other alternatives would leave the mentally handicapped person in a worse position than he would have been in had he been sterilized.

The great variance among the statutory standards used in determining when compulsory sterilization is appropriate is surpassed only by the variance among the judicial standards used in states without sterilization statutes.[69] This fact exemplifies the need for leg-

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tion, pregnancy, childbirth and parenthood;

e) the alternative methods of birth control presently available including, but not limited to, drugs, intrauterine devices, education and training, and the feasibility of one or more of these methods as an alternative to sterilization;

f) the likelihood that the person will engage in sexual activity or could be sexually abused or exploited;

g) the method of sterilization which is medically advisable and the least intrusive and destructive of the person's rights to bodily and psychological integrity;

h) the advisability of postponing the procedure of sterilization until a later date; and

i) the likelihood that the person could adequately care and provide for a child.

UTAH CODE ANN. § 64-10-8 (Supp. 1975).

68. OR. REV. STAT. § 436.208 (1983).

69. *Compare In re* Moe, 385 Mass. 555, 432 N.E.2d 712 (1982) (parens patriae power enabled court to hear sterilization case absent specific statutory authority) *with* Anonymous v. Anonymous, 469 So.2d 588 (Ala. 1985) (court can not hear sterilization case without specific statutory authority).

islative guidance to assure that the constitutional rights of mentally handicapped persons in compulsory sterilization cases are protected.

B. States without Sterilization Statutes — Various Jurisdictional Bases

The majority of states do not have sterilization statutes,[70] thereby leaving the decision of whether to sterilize a particular individual entirely to the judiciary. Although many courts promulgate standards to which they must adhere in order to grant a sterilization petition,[71] these standards vary from state to state,[72] and even within the states.[73] As a result, the constitutional rights of a mentally handicapped person could very well be decided on the happenstance of

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70. These states are Alaska, Arizona, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Wisconsin and Wyoming.

71. *See In re* C.D.M., 627 P.2d 607 (Alaska 1981); *Cf. In re* Hayes, 93 Wash. 228, 608 P.2d 635 (1980); *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981). *Accord* Wentzel v. Montgomery Gen. Hosp., Inc., 293 Md. 685, 447 A.2d 1244 (1982). In *Wentzel*, the court agreed with the C.D.M. court in requiring that courts ruling on sterilization cases must consider the following factors:

> 1) Those advocating sterilization bear the heavy burden of proving by clear and convincing evidence that sterilization is in the best interests of the incompetent;
> 2) The incompetent must be afforded a full judicial hearing at which medical testimony is presented and the incompetent, through a guardian ad litem, is allowed to present proof and cross-examine witnesses;
> 3) The trial judge must be assured that a comprehensive medical, psychological and social evaluation is made of the incompetent;
> 4) The trial judge must determine that the individual is legally incompetent to make a decision whether to be sterilized and that this incapacity is in all likelihood permanent;
> 5) The incompetent must be capable of reproduction and unable to care for the offspring;
> 6) Sterilization must be the only practicable means of contraception;
> 7) The proposed operation must be the least restrictive alternative available;
> 8) To the extent possible, the trial court must hear testimony from the incompetent concerning his or her understanding and desire, if any, for the proposed operation and its consequences; and finally,
> 9) The court must examine the motivation behind the petition.

293 Md. 685, 692-93, 447 A.2d 1244, 1248-49 (1982).

72. *Compare In re* C.D.M., 627 P.2d 607 (Alaska 1981) (court promulgated standards listed in *supra* note 71) *with In re* Hayes, 93 Wash.2d 228, 608 P.2d 635 (1980) (court required additional standard that it be shown by clear, cogent and convincing evidence that the current state of medical and scientific knowledge does not suggest either; a) that a reversible procedure or other less drastic contraceptive method will shortly be available; or b) that science is on the threshold of an advance in the treatment of the individual's disability).

73. *Compare In re* Johnson, 45 N.C. App. 649, 263 S.E.2d 805 (1980) (court reasoned that it had equity power to hear sterilization cases) *with In re* Moore, 289 N.C. 95, 221 S.E.2d 307 (1976) (court held that it had no inherent power to order sterilization).

which court is chosen to consider the sterilization petition.

The question of which standards control in a given sterilization case is, however, often rendered moot since the overwhelming majority of courts in states without sterilization statutes hold that the court has no jurisdiction to hear sterilization cases absent specific statutory authority.[74] Even in states that have sterilization statutes,[75] it is not uncommon for a court to rule that a particular statute does not apply to a given set of circumstances. Thus, courts are often confronted with the issue of whether the court has jurisdiction to rule on a sterilization petition in the absence of a controlling statute.[76] The leading Pennsylvania case addressing the sterilization of the mentally disabled, *In re Terwilliger*,[77] is among the minority of decisions which hold that a court does have jurisdiction absent specific legislation.[78] This jurisdiction has been found to reside in various places, among them the common law doctrine of parens patriae,[79] and the court's inherent power as an equity court.[80]

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74. Maxon v. Superior Court, 135 Cal. App. 3d 626, 185 Cal. Rptr. 516 (1982). *See also supra* note 40.

75. *See supra* note 41.

76. Delaware has a sterilization statute, DEL. CODE ANN. tit. 16, §§ 5701-05, yet the Delaware Chancery Court in *In re* S.C.E., 378 A.2d 144 (Del. Ch. 1977) chose to ignore it, declaring that the statute was inapplicable to the particular facts of the case.

77. 304 Pa. Super. 553, 450 A.2d 1376 (1982).

78. *See* Stump v. Sparkman, 435 U.S. 349 (1978); Wyatt v. Aderholt, 368 F. Supp. 1383 (M.D. Ala. 1974); *In re* C.D.M., 627 P.2d 607 (Alaska 1981); Wentzel v. Montgomery Gen. Hosp., 293 Md. 685, 447 A.2d 1244 (1982); *In re* Moe, 385 Mass. App. 555, 432 N.E.2d 712 (1982); *In re* Penny, 120 N.H. 269, 414 A.2d 541 (1980); *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981); *In re* Sallmaier, 85 Misc. 2d 295, 378 N.Y.S.2d 989 (1976); *In re* Hayes, 93 Wash. 228, 608 P.2d 635 (1980); *In re* Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881 (1981).

79. Parens Patriae literally means "parent of the country," and it has numerous applications in the law beyond the bounds of courts' jurisdiction to hear sterilization cases. For a discussion of the parens patriae doctrine as it applies to the area of medical decision-making for children, *see* D. Kearney, *Parental Failure to Provide Child with Medical Assistance Based on Religious Beliefs Causing Child's Death — Involuntary Manslaughter in Pennsylvania*, 90 DICK. L. REV. 861 (1986).

80. The courts' power as an equity court to hear sterilization cases is derived from jurisdictional statutes granting them general authority. It is commendable that the judiciary has extended its jurisdictional limits in an effort to provide the mentally handicapped with a forum through which they can pursue their right to choose sterilization, yet, such an extension is unnecessary when the legislature could provide jurisdiction through a comprehensive sterilization statute. *See generally* B. Burnett, *Voluntary Sterilization for Persons with Mental Disabilities: The Need for Legislation*, 32 SYRACUSE L. REV. 913 (1981). For an example of a statute providing general authority to a court, *see* OHIO REV. CODE ANN. § 2101.24 (Balwin 1960). *See, e.g.*, In re Simpson, 180 N.E.2d 206 (Ohio Ct. App. 1962) (construed OHIO REV. CODE ANN. § 2102.24 in recognizing jurisdiction to order sterilization). *Contra In re* Eberhardy, 97 Wis.2d 654, 294 N.W.2d 540 (1980) *aff'd* 102 Wis. 2d 539, 307 N.W.2d 881 (1981) (refused to construe statute as granting authority to hear sterilization case). The Wisconsin Court of Appeals in *Eberhardy* urged that if it authorized jurisdiction to hear sterilization cases absent a specific sterilization statute, it would have to operate in a "standard-less [sic] vaccuum . . . or create standards [for sterilization cases] without the benefit of legislative guidance." 97 Wis. at 665, 294 N.W.2d at 547.

1. Parens Patriae.—The common law doctrine of "parens patriae" provides that courts are vested with the inherent equitable authority of the sovereign to protect those persons within the state who can not protect themselves due to a legal disability. In the case of a mentally handicapped person, the court would be protecting the individual from either his parents or his legal guardian.[81] It is alleged that such protection is needed since the parents or guardian do not necessarily have the best interests of the individual in mind, but may instead be seeking to sterilize the individual for their own selfish reasons.[82] This assertion further advances the claim that specific sterilization legislation is needed in Pennsylvania, because a court can choose not to invoke jurisdiction under any legal theory.[83] This would leave the mentally disabled person without any mechanism through which to choose sterilization.[84] The lack of specific legislation also allows for conflicting decisions within states, thereby subjecting the mentally disabled person's constitutional rights to the caprice of inconsistent case law.

Such inconsistency was the precise result in New York in the mid-seventies. The New York Supreme Court in *In re Sallmaier*[85] held that a court could exercise its parens patriae power to order a sterilization where the mentally handicapped person is unable to give informed consent, and conversely, unable to withhold it.[86] This ruling stands in sharp contrast to the New York Surrogate Court decision in *In re D.D.*,[87] rendered only a year after *Sallmaier*. The *D.D.* court expressly rejected the parens patriae doctrine as a basis for authorizing sterilizations, holding that it could not rule on a compul-

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81. This statement may appear counter-intuitive, but many courts have recognized that the sterilization decision belongs to the mentally handicapped individual, not the individual's parents or guardian. *See* Anonymous v. Anonymous, 469 So.2d 588 (Alaska 1985); *see also infra* note 82.

82. The Washington Supreme Court noted that "unlike the situation of a normal and necessary medical procedure, in the question of sterilization the interests of the parents of the retarded person can not be presumed to be identical to those of the child." *In re* Hayes, 93 Wash. 2d 228, 236, 608 P.2d 635, 460 (1980).

83. *See* cases cited *supra* note 40.

84. *See generally* Note, *In re Guardianship of Eberhardy, The Sterilization of the Mentally Retarded*, 1982 WIS. L. REV. 1199.

85. 85 Misc. 2d 295, 378 N.Y.S.2d 989 (1976). The mentally handicapped woman in *Sallmaier* had suffered brain damage as a child, resulting in her having an IQ of 62. Despite this limitation, she had a job and was surprisingly articulate. The court granted the sterilization, however, apparently motivated by a desire to lessen her parents' burden.

86. *Id.* at 297. The *Sallmaier* court opined that the parens patriae power must primarily "balance the individual's right to be free from interference against the individual's need to be treated."

87. 90 Misc. 2d 236, 394 N.Y.S.2d 139 (Sur. Ct. 1977).

sory sterilization case absent specific authority.[88]

Other courts, not completely satisfied with the parens patriae doctrine as the sole basis for authorizing sterilizations,[89] have occasionally invoked their general equity power through the liberal interpretation of a general grant of authority to the court.

2. General Equitable Powers of the Court.—The only case considered by the United States Supreme Court that addresses the question of whether a court has jurisdiction to hear sterilization cases pursuant to a broad statutory grant of authority was the seminal case of *Stump v. Sparkman.*[90] The precise issue in *Sparkman* was whether a judge was protected by judicial immunity when he acted in excess of his judicial authority in ordering the sterilization of a mentally handicapped person.[91] Judge Stump had approved a petition for sterilization of a "somewhat retarded" fifteen-year old girl. This order took place in an *ex parte* proceeding and without a hearing. The girl received no notice of the proceeding nor was a guardian appointed for her. The sterilization took place shortly thereafter under the guise of an appendectomy.[92]

In deciding the *Sparkman* case, Justice White relied on the early common law case of *Bradley v. Fisher*[93] and urged that a judge should not be deprived of immunity simply because he was in error, or because he acted maliciously, or even because he acted in excess of his authority.[94] Indeed, the Court held that the only circumstance which justifies stripping a judge of immunity would be where he has acted in the "clear absence of all jurisdiction."[95] Finding that the Indiana court had jurisdiction to consider sterilization petitions under the Indiana statute granting it broad general jurisdiction,[96] the Court in effect sanctioned Judge Stump's actions and granted the

88. *Id.* at 277, 394 N.Y.S.2d at 140.

89. *See* Wyatt v. Aderholt, 369 F. Supp. 1383 (M.D. Ala. 1974). *See also* In re Terwilliger, 304 Pa. Super. 553, 450 A.2d 1376 (1982) (court used both parens patriae power and general equitable power of court to authorize sterilization).

90. 435 U.S. 349 (1978).

91. *Id.* at 355.

92. *Id.* at 351-54. About two years after the operation, the girl (Linda Spitler) was married to Leo Sparkman. After numerous attempts to have a child, the Sparkman's discovered that Linda had been sterilized.

93. 13 Wall. 335 (1872) (seminal case establishing exception to judicial immunity).

94. 435 U.S. 349, 355-57 (1978).

95. *Id.* at 357.

96. IND. CODE § 33-4-4-3 (1975) provides in pertinent part that the "[circuit] court shall have original exclusive jurisdiction in all cases at law and equity whatsoever, . . except where exclusive or concurrent jurisdiction is, or may be conferred by law on the Justice of the Peace. It shall also have exclusive jurisdiction of . . . guardianships."

immunity.

The judicial abuse of the rights of mentally disabled persons as evidenced in *Sparkman*,[97] in addition to the vagaries of inconsistent treatment of those same rights as revealed by *Sallmaier*[98] and *In re D.D.*,[99] jointly pose a compelling argument for legislative guidance in Pennsylvania regarding the sterilization of the mentally handicapped. This argument is further buttressed by Pennsylvania's judicial response in *In re Terwilliger*,[100] which combined the parens patriae power and the general equitable powers of the court to authorize jurisdiction over compulsory sterilization cases.

3. Pennsylvania's Judicial Response: In re Terwilliger.—The issue in *Terwilliger* of whether the orphans' court had jurisdiction to hear sterilization cases absent specific statutory authority was one of first impression in the Commonwealth. Judge Popovich, relying on a tenuous construction of the court's guardianship powers[101] and its general grant of authority,[102] maintained that the orphans' division of the court of common pleas was the proper forum in which a guardian could bring a petition for the sterilization of a mentally handicapped person.[103]

Having settled this preliminary issue, the *Terwilliger* court authorized jurisdiction under the parens patriae power as derived from its general equitable powers.[104] This "hybrid" approach[105] displays

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97. *See supra* note 92 and accompanying text.

98. *See supra* notes 85-6 and accompanying text.

99. *See supra* note 87 and accompanying text.

100. 304 Pa. Super. 553, 450 A.2d 1376 (1982).

101. 20 PA. CONS. STAT. ANN. § 712 (Purdon 1974) provides that "[t]he jurisdiction of the court of common pleas over the following may be exercised through the orphans' court division: . . . (2) Guardian of Person. The appointment, control and removal of the guardian of the person of any incompetent."

102. 42 PA. CONS. STAT. ANN. § 323 (Purdon 1978) provides that:

> Every court shall have the power to issue, under its judicial seal, every lawful writ and process necessary or suitable for the exercise of its jurisdiction and for the enforcement of any order which it may make and all legal and equitable powers required for or incidental to the exercise of its jurisdiction, and, except as otherwise prescribed by general rules, every court shall have the power to make such rules and order of the court as the interest of justice or the business of the court may require.

103. 304 Pa. Super. 553, 563, 450 A.2d 1376, 1383 (1982).

104. The *Terwilliger* court observed that the courts' parens patriae power has been described as "plenary and potent to afford whatever relief may be necessary to protect [the mentally handicapped person's] interests." *Id.* at 561, 450 A.2d at 1381 *quoting* 27 AM. JUR. 2d *Equity* 69 at 592 (1969). Judge Popovich, having noted that the parens patriae doctrine empowered the court to hear the case, "acknowledged the existence of a statutory scheme . . . delineating the scope of authority and power vested in our unified court system to address and remedy such an issue as [sterilizing the mentally handicapped]. 304 Pa. Super. at 563, 450 A.2d at 1381-82.

Pennsylvania's concern for providing mentally disabled persons with a method for exercising their constitutional right to choose sterilization. This legitimate concern should be supported by a comprehensive sterilization statute, instead of forcing the courts to perform legal gymnastics in order to hear sterilization cases.

IV. Constitutional Considerations

The decline of eugenics as a rationale for compulsory sterilization of the mentally handicapped has been paralleled by a dramatic increase in the level of scrutiny that must be given to compulsory sterilization statutes. When *Buck v. Bell*[106] was decided, the state was only required to prove that the Virginia Sterilization Act was rationally related to a legitimate state interest.[107] At that time, however, the right to procreate was not considered a fundamental right.[108] This changed in 1942 when the United States Supreme Court decided the case of *Skinner v. Oklahoma*,[109] and in doing so established the right to procreate as a fundamental right.[110] Following the decision in *Skinner*, the level of constitutional scrutiny also changed from the easily met "rational basis"[111] test to the significantly more rigorous standard of "strict scrutiny."[112] Under the aegis of strict scrutiny, any compulsory sterilization statute that purports to have a significant impact on a specific class of persons, must now be supported by a showing that the classification is necessary in order to advance a compelling state interest.[113]

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105. This hybrid approach also reveals the court's uncertainty in reposing jurisdiction to hear sterilization cases on either the parens patriae doctrine or the court's general grant of authority alone. Such uncertainty could be eliminated by the enactment of a comprehensive sterilization statute that incorporates the constitutional rights of the mentally handicapped person.

106. 274 U.S. 200 (1927).

107. *Id.* at 207.

108. Fundamental rights have been characterized as "basic civil rights of man." Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). The protection of fundamental rights was paramount at the time of the *Skinner* decision, due in large part to America's awareness of the Nazi atrocities during World War II. This was especially true of the rights of marriage and procreation which the *Skinner* court wisely recognized as "fundamental to the very existence and survival of the race." *Id.* at 541.

109. *Id.* at 535.

110. *Id.* at 541.

111. 274 U.S. 200, 207 (1927). Justice Holmes urged that the rational basis test had been met since "the general declarations of the legislature" (i.e., that mental incompetence was inherited) and the "specific findings of the court" (i.e., that Carrie Buck was mentally incompetent and would have similarly afflicted children) "justify the result" (i.e., that Carrie should be sterilized).

112. For cases using the strict scrutiny/compelling state interest test, *see, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Shapiro v. Thompson, 394 U.S. 618 (1969).

113. *See, e.g.*, Brode v. Brode, 278 S.C. 457, 298 S.E.2d 443 (1982).

The right to choose sterilization would appear to be a corollary to the right to procreate,[114] since the right to do something (i.e., to procreate) only has meaning if it also implies the right not to do the particular act (i.e., to choose sterilization). Yet, the United States Supreme Court has not addressed the issue of whether the right to choose sterilization is indeed a fundamental right, although numerous state and federal courts have ruled that it is.[115] When the United States Supreme Court does address the issue, there is ample reason to believe that it will be considered a fundamental right which is derived from the right to privacy.

A. The Right to Choose Sterilization as Derived from the Right to Privacy

The right to privacy is not one of the enumerated rights granted by the Constitution.[116] It arises instead from the very nature and purpose of the Constitution, an abiding sense of "liberty" as that term is used in the due process clause of the fourteenth amendment,[117] and from the penumbras[118] of the fifth[119] and ninth amendments.[120] Justice Blackmun, writing for the Court in *Doe v. Bolton*,[121] observed that the right to privacy also arises from the privileges and immunities clause of article IV.[122] Numerous other fundamental rights are derived from the right to privacy, such as the right to have an abortion,[123] and the right of married[124] and unmar-

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114. *See supra* note 84.

115. *See* Hathaway v. Worchester City Hosp., 475 F.2d 701 (1st Cir. 1973); Ruby v. Massey, 452 F. Supp. 361 (D. Conn. 1978); North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451 (M.D.N.C. 1976); Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974); *In re* Tulley, 83 Cal. App. 3d 698, 146 Cal. Rptr. 266 (1978), *cert. denied sub. nom.* Tulley v. Tulley, 440 U.S. 967 (1979); *In re* M.K.R., 515 S.W.2d 467 (Mo. 1974); *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981); Ponter v. Ponter, 135 N.J. Super. 50, 342 A.2d 574 (1975); *In re* Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980).

116. Examples of enumerated rights are the right to free speech (first amendment), the right to be free from unreasonable searches and seizures (fourth amendment), and the right to a jury trial (seventh amendment).

117. "No State shall . . . deprive any person of life, liberty or property, without due process of law. U.S. CONST. amend XIV, § 2.

118. Penumbra literally means a "margin or partial shadow." NEW STANDARD DICTIONARY 1831 (16th ed. 1947). The concept of penumbras is used to characterize the origin of rights that are implicit in the Constitution.

119. "No person shall be . . . deprived of life, liberty or property without due process of law." U.S. CONST. amend. V.

120. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

121. 410 U.S. 179 (1973).

122. "The Citizens of each state shall be entitled to all Privileges and Immunities of the several states." U.S. CONST. art. VI, § 2, cl. 1.

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

124. Griswold v. Connecticut, 381 U.S. 479 (1965).

ried persons,[125] and even minors,[126] to use contraceptives. These rights are closely associated with the right to choose sterilization since they all concern an individual's freedom to exercise control over his or her body.[127]

In the landmark case of *Roe v. Wade*,[128] Justice Blackmun extended the right to privacy to include the right to have an abortion. The Court, recognizing that a woman's right to terminate her pregnancy is fundamental, devised a system for measuring the level of state interest that accompanies each successive stage of pregnancy.[129] The Court asserted that at the point of fetal viability,[130] the state's interest in regulating the mother's right to terminate her pregnancy becomes compelling. Thus, at this stage an abortion can be performed only if it is necessary to save the mother's life or preserve her health. It would be more difficult to locate a compelling state interest in the decision to choose sterilization than in the decision to terminate a pregnancy because in the former no "life in being"[131] enters into the equation.

Unlike the right to have an abortion, the right to use contraceptives deals with preventing a woman from becoming pregnant, and thus is more analogous to the right to choose sterilization. The Court in *Griswold v. Connecticut*[132] held that a statute prohibiting the use of contraceptives by married persons violated the right of marital privacy as guaranteed in the penumbras of the Bill of Rights.[133] Given the decisions in both *Roe v. Wade* and *Griswold*, the various state and federal decisions holding that the right to choose sterilization is a fundamental right, appear to be on firm ground.[134]

The right to choose sterilization extends to both mentally handicapped and non-mentally handicapped persons under the equal pro-

125. Eisenstadt v. Baird, 405 U.S. 438 (1972) (court extended right to use contraceptives to unmarried persons on equal protection grounds).

126. Carey v. Population Serv. Int'l., 431 U.S. 678 (1977).

127. *See supra* note 84.

128. 410 U.S. 113 (1973).

129. In Roe v. Wade, 410 U.S. 113, (1973), the court engineered a "sliding scale" for pinpointing the level of state interest that corresponds to a particular event in a pregnant woman's gestation period. The court noted that "[w]ith respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in light of present medical knowledge, is at approximately the end of the first trimester." *Id.* at 163. However, "[w]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability." *Id.* Thus, the state may not regulate the abortion decision within the first three months of a woman's pregnancy.

130. "Viability" means that the fetus is capable of living outside the womb. *Id.* at 164.

131. "Life in being" is used in the sense that it concerns life during the gestation period.

132. 381 U.S. 479 (1965).

133. *Id.* at 481-86.

134. *See supra* note 115.

tection clause of the fourteenth amendment.[135] Yet the majority of compulsory sterilization statutes that have been found to be constitutionally infirm have been invalidated for failure to provide equal protection.[136]

B. Equal Protection

Equal protection problems in sterilization statutes arise under two distinct scenarios: 1) between institutionalized and non-institutionalized persons; and 2) between mentally handicapped, potentially unfit parents and non-mentally handicapped, potentially unfit parents.[137] Just as the states must show a compelling state interest in denying a mentally handicapped person the right to choose sterilization, the state must also show a compelling state interest in order to sterilize that individual. Historically, this interest was found in the eugenic rationale for sterilizing the mentally handicapped, although at the time of *Buck v. Bell* the state interest only needed to be legitimate, not compelling.

Current advocates of the sterilization of the mentally handicapped identify the compelling state interest as being the need to secure the welfare of minor children.[138] This is a valid state concern, and because it addresses the health and safety of children, it would not be exceedingly difficult to categorize it as compelling. The problem with this rationale arises, however, because a number of compulsory sterilization statutes only apply to institutionalized mentally handicapped persons.[139] Thus, not only must the statute show that sterilizing mentally handicapped persons would further a compelling state interest, but it must further prove that applying the law only to institutionalized persons serves a compelling state interest.[140]

As noted, Justice Holmes summarily disposed of the equal protection claim in *Buck v. Bell*[141] by asserting that so long as there is an ongoing effort to channel all of the state's mentally handicapped persons through the institution, then the law applies equally to all

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135. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, 1.

136. *See supra* note 24.

137. Sherlock, *supra* note 9, at 959.

138. The North Carolina legislature targeted the welfare of children as the justification for sterilizing mentally handicapped "unfit parents." N.C. GEN. STAT. § 35-39(3) (1976); GA. CODE ANN. § 84-931-36 (1975); IDAHO CODE § 39-3901-10 (1977).

139. *See, e.g.*, S.C. CODE ANN. §§ 44-47-10 to -47-100 (Law Co-op. 1977).

140. Sherlock, *supra* note 9, at 953-63.

141. 274 U.S. 200, 208 (1927).

mentally handicapped persons within the state.[142] As weak an argument as it was then, it is even weaker now since states no longer endeavor to "process" all their mentally disabled persons through their institutions, but instead encourage them to live in the community and become self-reliant.[143]

Struggling with the same issue in *Ruby v. Massey*,[144] the court maintained that "[i]f the state may rationally decide to sterilize some individuals to avoid incomprehensible pregnancy, it makes shamefully limited sense that the same right should be denied to others in the same situation."[145] It is clear that any compulsory sterilization statute, if it is to survive an equal protection attack, must apply to both institutionalized and non-institutionalized persons.

The second distinction that raises equal protection problems is that not all unfit parents are mentally handicapped. This invites equal protection attacks on the basis of underinclusiveness,[146] since there is no state interest in promoting a sterilization statute which would permit the sterilization of potentially unfit mentally handicapped parents, while excluding potentially unfit non-mentally handicapped parents. This is especially true if the entire basis for finding a compelling state interest is to protect the welfare of minor children.[147]

C. *Due Process*

In addition to withstanding an equal protection claim, a compulsory sterilization statute must also provide substantive and procedural due process. This requirement can easily be met by mandating that the decision of whether to sterilize a particular mentally handicapped person be left for the courts to decide. Yet, there are statutes that do not require judicial intervention,[148] but instead allow a non-judicial panel comprised of medical experts and sometimes hospital superintendents to decide whether to recommend sterilization. These panels have full power to decide the sterilization issue on the merits, and only after the decision is made is the ruling subjected to judicial

142. *Id.*

143. Sherlock, *supra* note 9, at 961.

144. 452 F. Supp. 361 (D. Conn. 1978).

145. *Id.* at 368.

146. "Underinclusiveness" means that the class of persons to whom a given statute applies is identical in all relevant respects to another class of persons to whom the statute does not apply.

147. *See supra* note 138.

148. *See, e.g.*, MISS. CODE ANN. §§ 41-45-1 to -19 (1972).

appellate review.[149] Some state statutes actually permit the panel to order sterilization without any judicial intervention whatsoever.[150] Those statutes that do not permit judicial review in the first instance run the risk of violating the modern constitutional standard that "deprivation of a fundamental right is not a power delegable to a non-judicial review board in the first instance."[151] Therefore, any compulsory sterilization statute that has a respect for the due process rights of mentally handicapped persons should provide for judicial review in the first instance.

The ultimate purpose behind this Comment is to suggest guidelines that can be used when considering the sterilization of mentally handicapped persons to ensure their constitutional rights. The proposed act is based on viable social theories founded on sound empirical data, and also avoids the attendant problems of leaving the sterilization decision entirely to the judiciary.

V. Proposed Sterilization Act for Pennsylvania

A. Legislative Purpose

The purpose of this Act is to provide mentally handicapped persons existing in the Commonwealth a lawful method through which they can exercise their constitutional right of procreative choice and avoid the abuses of unregulated sterilization practices. This Act also seeks to ensure that no sterilization will be performed on any mentally handicapped person:

> a) against the individual's expressed wishes;
>
> b) against the individual's implied wishes; or
>
> c) in the absence of the ability on the part of the mentally handicapped person to communicate his wishes regarding sterilization, either expressly or implied, then the sterilization will be performed only if it would be in the "best interests" of the mentally handicapped person as that term is defined under sec. B(1).

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149. The Mississippi statute provides in part that "[a]fter the notice required . . . shall have been so given, the board of trustees of mental institutions . . . shall proceed to hear and consider the sterilization petition and the evidence offered in support of and against the same." *Id.* at § 41-45-7.

150. DEL. CODE ANN. tit. 16, 5701 (1974).

151. *See, e.g.*, Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 724, 370 N.E.2d 417 (1977).

B. Definitions

All terms defined in this section shall be so defined for purposes of this Act unless the context clearly indicates otherwise.

1. "*Best interests*"[152] means that:

(a) the individual is physically capable of procreating;

(b) the individual is likely to engage in sexual activity at the present time or in the near future under circumstances likely to result in pregnancy;

(c) all less drastic contraceptive methods, including supervision, education and training, have proved unworkable or inapplicable, or are medically counter-indicated;

(d) the proposed method of sterilization conforms with standard medical practice, is the least intrusive method available and appropriate, and can be carried out without unreasonable risk to the life and health of the individual; and

(e) the nature and extent of the individual's disability, as determined by empirical evidence and not solely on the basis of standardized tests, renders the individual permanently incapable of caring for and raising a child, even with reasonable assistance.

2. "*Mentally handicapped*" means that the individual has been determined to be mentally handicapped by a licensed physician qualified to make such determinations, provided that the physician:

(a) is not related to the individual under determination;

(b) has no real or colorable interest in whether the individual is found to be mentally handicapped; and

(c) has no real or colorable interest in whether the individual is sterilized.

3. "*Existing in the Commonwealth*" shall be the appropriate characterization of any mentally handicapped person as defined under sec. B(2) of the Act who:

(a) resides in the state; or

(b) would be physically within the state during the proposed time for the sterilization.

4. "*Express wishes*" means any expression that reasonably communicates the mentally handicapped person's intention to not have the sterilization performed that is expressed:

152. The author has incorporated Oregon's definition of "best interests" into the proposed statute. *See* OR. REV. STAT. § 436.205(1) (1983).

(a) verbally; or
(b) in writing.

5. "*Implied wishes*" means any expression made by the handicapped person that reasonably communicates his intention to not have the sterilization performed that is not listed under sec. B(4), including but not limited to:

(a) physical behavior, such as hostility; or
(b) an abrupt change in the individual's typical behavior pattern that can be reasonably attributed to having been informed of the potential sterilization.

6. "*Sterilization*"[153] means any medical procedure, treatment or operation for the purpose of rendering an individual permanently incapable of procreating.

C. Subject Classes

This statute shall apply to both institutionalized and non-institutionalized mentally handicapped persons provided they qualify as a mentally handicapped person under sec. B(2) & (3).

D. Procedures for Judicial Approval

1. In order to sterilize a mentally handicapped person under this Act, the person(s) seeking such sterilization shall bring a sterilization petition in a court of competent jurisdiction.

2. After D(1) has been complied with, the court shall appoint a guardian *ad litem* who shall then be the only person eligible to pursue the sterilization petition throughout the remainder of the judicial process, including all subsequent appellate proceedings, if any.

E. Notice Requirement

Those persons seeking to have a particular mentally handicapped person sterilized must provide notice to that individual or his legal guardian. This must take place before the court is empowered to hear the merits of the case.

F. Hearing Requirement

A hearing shall take place to evaluate the merits of the case to ascertain whether there is a "strong likelihood" that the guardian

153. The author has adopted Oregon's definition of "sterilization." *See* OR. REV. STAT. § 436.205(4) (1983).

will be able to present clear and convincing evidence that such sterilization would be in the best interests of the mentally handicapped person.

G. Appellate Review

The losing party shall have the right to appeal an adverse decision through all appropriate levels of the Pennsylvania court system, including the Pennsylvania Supreme Court, and shall also have the right to apply for certiorari to the United States Supreme Court.

H. Annual Review Board

This Act shall commission an annual review board to review and update the policies and procedures established pursuant to this Act. The Board shall meet on the first Monday in October of each year, and consist of members appointed by the Legislative Assembly. The Board's report shall be sent to the Legislative Assembly no later than November 15 of the year in which the report was generated, and shall suggest changes to the standards and procedures outlined in this Act after a complete analysis of all the sterilization cases that have been decided pursuant to this Act within the preceding year.

VI. Conclusion

Mentally handicapped persons in Pennsylvania occupy an unenviable position. Like other disenfranchised minorities, they must constantly struggle for assurance of their constitutional rights, yet unlike other minorities their disability often renders them incapable of realizing when these rights are being jeopardized. This exceptional vulnerability places a duty on Pennsylvania to provide a lawful mechanism through which mentally handicapped persons can exercise their right to choose sterilization. The experience of New York and other states demonstrates the inconsistent treatment that can result from leaving the entire issue of sterilization solely to the judiciary. Pennsylvania needs a comprehensive sterilization statute that adequately assures mentally handicapped persons their constitutional rights while simultaneously avoiding the problems that attend unregulated sterilization practices.

Richard A. Estacio