

5-1-1978

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### Recommended Citation

*Sterilization, Retardation, and Parental Authority*, 1978 BYU L. Rev. 380 (1978).

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# Sterilization, Retardation, and Parental Authority

## I. INTRODUCTION

Sterilization is a multifaceted, extremely complex topic embracing a variety of issues and concerns ranging from morality and propriety to constitutionality. Very few, if any, of the issues surrounding the sterilization controversy can be said to be matters of settled doctrine. This Comment will explore in detail only one aspect of the controversy—the power of a parent to consent to the sexual sterilization<sup>1</sup> of his mentally retarded<sup>2</sup> minor child absent any specific statutory authorization to do so.

Sterilization of mentally retarded minors upon the request and consent of their parents involves many basic interests and values. Parental discretion in directing the upbringing and care of children is one such value. A sometimes contrasting interest is the basic right of every person to choose for himself whether or not he will bear or beget children, absent compelling considerations which dictate that this right should be limited. In pursuit of a resolution of the potential conflicts between parent and child in this area, this Comment will first briefly survey the current law and attitudes concerning sterilization and then examine the common law parent-child relationship in an attempt to discover whether or not that relationship endows a parent with the authority to have his retarded child sterilized. This inquiry will lead to a discussion of the policy considerations relevant to determining whether a parent *should* have this authority. Finally, recommen-

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1. "Sterilization," as it is used throughout this Comment, refers to any of a number of surgical procedures by means of which a male or female is rendered permanently incapable of bearing or begetting children. The more common sexual sterilization procedures are vasectomy for the male and hysterectomy and tubal ligation for the female. See 21 AM. JUR. PROOF OF FACTS, *Sexual Sterilization* §§ 3, 5, 6, 11, 12 (1968).

A sterilization operation might be sought for eugenic purposes (to prevent hereditary transmission of genetic defects), contraceptive purposes (to terminate the capacity to procreate for any of a variety of possible reasons), or therapeutic purposes (to preserve the life or health of the patient). This Comment deals only with sterilization performed for eugenic or contraceptive purposes. Therapeutic sterilization can be independently justified on health grounds and is not within the scope of this paper.

2. The term "mentally retarded" is a vague term, with a myriad of possible meanings. The concept was defined by the American Association on Mental Deficiency (1973): "Mental Retardation refers to significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and manifested during the developmental period." PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *MENTAL RETARDATION PAST AND PRESENT* 143 (1977). In common parlance, it is generally thought to refer to any person with an IQ that is below average. The difficulties and inconsistencies involved in labeling mental retardation are discussed in the text accompanying notes 114-32 *infra*.

dations will be made for the basic components of a comprehensive sterilization statute.

## II. RELATED ISSUES

### A. Voluntary Sterilization<sup>3</sup>

Many states, either by statute<sup>4</sup> or court decision,<sup>5</sup> expressly allow a legally competent adult to be sterilized at his own volition, and the remaining states would probably not take any action to prevent such a voluntary sterilization. Although the United States Supreme Court has not yet found it necessary to address the precise question, it is likely that the right of a competent person to voluntarily subject himself to sterilization falls within the constitutional right of privacy espoused in *Griswold v. Connecticut*<sup>6</sup> and subsequent cases. In *Griswold*, the Supreme Court declared that there is a right of privacy protected by several constitutional guarantees and the penumbras emanating from them.<sup>7</sup> In *Roe v. Wade*,<sup>8</sup> the Court elaborated this concept by explaining that the right of privacy protects activities relating to marriage, procreation, contraception, family relationships, child rearing, and education.<sup>9</sup> Then, in *Carey v. Population Services International*,<sup>10</sup> the Court emphasized that "[t]he decision whether or not to beget or bear a child is at the very heart of . . . constitutionally protected choices."<sup>11</sup> This broad area of constitutionally protected privacy will almost certainly be interpreted as extending to decisions regarding sterilization of oneself. At least one state court has suggested that this is so.<sup>12</sup>

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3. Voluntary sterilization refers to any sterilization performed pursuant to the voluntary, informed consent of a competent person. Although a voluntary sterilization can be performed for eugenic or therapeutic reasons, the term normally refers to contraceptive sterilization. See note 1 *supra*.

4. E.g., OR. REV. STAT. § 435.305 (1977); VA. CODE § 32-423 (Supp. 1977).

5. E.g., *Jessin v. County of Shasta*, 274 Cal. App. 2d 737, 79 Cal. Rptr. 359 (1969); *Parker v. Rampton*, 28 Utah 2d 36, 497 P.2d 848 (1972).

6. 381 U.S. 479 (1965). In *Griswold*, the Court held that a statute forbidding the use of contraceptives violated the constitutionally protected right of privacy. *Id.* at 483-86.

7. *Id.* at 484-85.

8. 410 U.S. 113 (1973). The Court in *Roe* held that the right of privacy is broad enough to cover the decision of a pregnant woman to obtain an abortion. It determined, however, that this right is not absolute and that compelling state interests such as protection of health, medical standards, and prenatal life become dominant at certain points during pregnancy. *Id.* at 153-54.

9. *Id.* at 152-53.

10. 431 U.S. 678 (1977). *Carey* invalidated a New York statute which proscribed the sale or distribution of contraceptives to minors under the age of 16 and prohibited anyone other than a licensed pharmacist from distributing contraceptives to persons over age 16.

11. *Id.* at 685. See also *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

12. *Jessin v. County of Shasta*, 274 Cal. App. 2d 737, 748, 79 Cal. Rptr. 359, 366

### B. Compulsory Sterilization Statutes

The statutes of twenty-four states still retain provisions for the compulsory sterilization of mentally defective persons.<sup>13</sup> Although most of these statutes have not yet been tested in court, their constitutionality rests on Supreme Court precedent. Ever since Mr. Justice Holmes' now-famous 1927 declaration in *Buck v. Bell*<sup>14</sup> that "[t]hree generations of imbeciles are enough,"<sup>15</sup> involuntary sterilization statutes have generally been upheld as a valid exercise of the police power of the state.<sup>16</sup> Although the legal authority for these statutes remains viable, however, it by no means remains unchallenged. The decision in *Buck*, upholding Virginia's compulsory sterilization statute, was premised on the supposed hereditary nature of feeble-mindedness, a pervasive belief of that day.<sup>17</sup> Most of today's authorities, however, doubt that most types of mental retardation are hereditary,<sup>18</sup> and many scholars surmise that the holding of *Buck v. Bell* would be reversed if the Court were to reconsider it today.<sup>19</sup> Additionally, some involuntary sterilization statutes have been invalidated on the grounds that they failed to satisfy the constitutional guarantees of procedural due process<sup>20</sup> or equal protection.<sup>21</sup> Also, as

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(1969). See also *Ferro v. Lavine*, 46 A.D.2d 313, 362 N.Y.S.2d 591 (1974); Casey & Robbins, *Patients' Rights*, 1974-1975 ANN. SURVEY AM. L. 303, 319-20; Comment, *A Constitutional Evaluation of Statutory and Administrative Impediments to Voluntary Sterilization*, 14 J. FAM. L. 67, 74-77 (1975).

13. Comment, *Eugenic Sterilization Statutes: A Constitutional Re-evaluation*, 14 J. FAM. L. 280, 280 n.2 (1975).

14. 274 U.S. 200 (1927).

15. *Id.* at 207.

16. *E.g.*, *Buck v. Bell*, 274 U.S. 200 (1927); *In re Sterilization of Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976); *Cook v. State*, 9 Or. App. 224, 495 P.2d 768 (1972). But see *Osborne v. Thompson*, 103 Misc. 23, 169 N.Y.S. 638 (Sup. Ct.), *aff'd mem.*, 185 A.D. 902, 171 N.Y.S. 1094 (1918).

17. See Comment, *Sexual Sterilization: A New Rationale?*, 26 ARK. L. REV. 353, 353-56 (1972) [hereinafter cited as *New Rationale*].

18. Notes 133-42 and accompanying text *infra*.

19. *E.g.*, Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591, 596 (1966); Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 CALIF. L. REV. 917, 921-24 (1974).

20. *E.g.*, *Wyatt v. Aderholt*, 368 F. Supp. 1382 (M.D. Ala. 1973); *In re Opinion of Justices*, 230 Ala. 543, 162 So. 123 (1935); *Williams v. Smith*, 190 Ind. 526, 131 N.E. 2 (1921); *In re Hendrickson*, 12 Wash. 2d 600, 123 P.2d 322 (1942). The minimum due process safeguards that would seem to be required by *Buck* and these decisions are (1) a finding that the operation is in the best interests of the person to be sterilized or of society; (2) reasonable notice, including notice to the parents or guardian of a minor or incompetent; (3) a hearing; (4) representation; (5) opportunity for confrontation and cross-examination; and (6) the availability of appellate review.

21. *E.g.*, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Haynes v. Lapeer Circuit Judge*, 201 Mich. 138, 166 N.W. 938 (1918); *Smith v. Board of Examiners of Feeble-Minded*, 85

applied to criminals, a few such statutes have been invalidated as a form of cruel and unusual punishment.<sup>22</sup>

Although most sterilization statutes were passed under the same questionable presumption relied on by the Supreme Court in *Buck*, today they are defended on other grounds, such as the state's interest in preventing the birth of children to unfit parents;<sup>23</sup> and it is possible that the Supreme Court would uphold these statutes on such a ground. These justifications, however, have been criticized by some who feel that most of the existing statutes could still not satisfy the required "compelling state interest test."<sup>24</sup> The criticisms of compulsory sterilization statutes may be regarded as further evidence of the growing sentiment that procreation is a fundamental right that should not be infringed by the state, either by prohibiting voluntary or by compelling involuntary sterilization.

### C. Court Ordered Sterilization Absent Statutory Authorization

Many courts have been presented with petitions to order or authorize the sterilization of mentally retarded persons when no state statute specifically authorized the court to grant the requests. Such petitions have been filed by parents, guardians, and public officers<sup>25</sup> seeking to have a minor<sup>26</sup> or adult<sup>27</sup> child or ward sterilized. These cases have not generally wrestled with the power of a parent to consent to the operation, but rather with the power

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N.J.L. 46, 88 A. 963 (1913); *Osborne v. Thompson*, 103 Misc. 23, 169 N.Y.S. 638 (Sup. Ct.), *aff'd mem.*, 185 A.D. 902, 171 N.Y.S. 1094 (1918).

22. *E.g.*, *Mickle v. Henrichs*, 262 F. 687 (D. Nev. 1918) (statute allowing sterilization of criminal convicted of rape); *Davis v. Berry*, 216 F. 413 (S.D. Iowa 1914) (statute requiring vasectomy upon any man twice convicted of a felony), *rev'd on other grounds*, 242 U.S. 468 (1917).

23. *See, e.g.*, *North Carolina Ass'n for Retarded Children v. North Carolina*, 420 F. Supp. 451, 458 (M.D.N.C. 1976); *In re Sterilization of Moore*, 289 N.C. 95, 102-03, 221 S.E.2d 307, 312-13 (1976); *Cook v. State*, 9 Or. App. 224, 230, 495 P.2d 768, 771-72 (1972); *Ferster, supra* note 19, at 601-02; Comment, *Sexual Sterilization—Constitutional Validity of Involuntary Sterilization and Consent Determinative of Voluntariness*, 40 Mo. L. Rev. 509, 515-20 (1975) [hereinafter cited as *Sexual Sterilization*].

24. *See, e.g.*, *Murdock, supra* note 19, at 921-32; Comment, *Sterilization of Mental Defectives: Compulsion and Consent*, 27 BAYLOR L. REV. 174, 179-86 (1975).

State regulation of certain fundamental rights can be justified only by a compelling state interest. *Roe v. Wade*, 410 U.S. 113, 155 (1973). Procreation has been recognized as such a right. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685-86 (1977).

25. *E.g.*, *Holmes v. Powers*, 439 S.W.2d 579 (Ky. 1968) (action by county health officer and local medical society).

26. *E.g.*, *In re M.K.R.*, 515 S.W.2d 467 (Mo. 1974) (parents sought sterilization of 13-year-old retarded girl).

27. *E.g.*, *Guardianship of Kemp*, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974) (petitioner was the father and legal guardian of adult incompetent).

of a court, in the absence of specific statutory authorization, to order it.<sup>28</sup>

A few courts have found sufficient authority to grant such petitions. In the 1976 case of *In re Sallmaier*,<sup>29</sup> the court relied on its *parens patriae* powers to authorize the sterilization of a mentally retarded woman, although no state statute authorized such an order. In approving the sterilization requested by the mother of the twenty-three-year-old incompetent, the court explained that the rationale of *parens patriae* is that "the state must intervene in order to protect an individual who is not able to make decisions in his own best interest."<sup>30</sup> Finding the proposed sterilization to be in the best interest of the incompetent, the court authorized the operation.<sup>31</sup>

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28. In *Stump v. Sparkman*, 98 S. Ct. 1099 (1978), the United States Supreme Court held that an Indiana judge acted within his jurisdiction in entertaining a petition by a mother to authorize the sterilization of her minor child. Because the judge could properly consider such a petition, the judge was protected from civil liability for any order made in disposing of the petition by an absolute judicial immunity. The Court did not consider whether the decision to order the sterilization was a proper exercise of jurisdiction, however, nor did it discuss the propriety of the order in light of the consent of the child's mother.

29. 85 Misc. 2d 295, 378 N.Y.S.2d 989 (Sup. Ct. 1976).

30. *Id.* at 297, 378 N.Y.S.2d at 991 (quoting *In re Weberlist*, 79 Misc. 2d 753, 756, 360 N.Y.S.2d 783, 786 (Sup. Ct. 1974)).

31. 85 Misc. 2d at 297-98, 378 N.Y.S.2d at 991.

The conclusion reached by the *Sallmaier* court is open to criticism on the ground that the court based its decision on questionable authority. The court found its jurisdiction to order the sterilization in the "common law jurisdiction of the Supreme Court to act as *parens patriae* with respect to incompetents." *Id.* at 297, 378 N.Y.S.2d at 991. The court explained the rationale of *parens patriae* by citing *In re Weberlist*, 79 Misc. 2d 753, 360 N.Y.S.2d 783 (Sup. Ct. 1974):

[T]he State must intervene in order to protect an individual who is not able to make decisions in his own best interest. The decision to exercise the power of *parens patriae* must reflect the welfare of society, as a whole, but mainly it must balance the individual's right to be free from interference against the individual's need to be treated, if treatment would in fact be in his best interest.

*Id.* at 756, 360 N.Y.S.2d at 786.

The court in *Weberlist* wrestled with the scope of the state's *parens patriae* powers. It concluded that its responsibility was to decide what the incompetent ward would choose if he were in a position to make a sound judgment. Accordingly, the court authorized dental work, hand surgery, surgery for the cleft palate and jaw, and intracranial surgery for facial restoration for the retarded ward. The court heard evidence that these operations would provide the ward's only chance to live a life outside of an institution. Because no person with a close family relationship could be located to consent to the surgery, the court felt that its *parens patriae* position in relation to the 22-year-old retarded man allowed it to consent for him.

The *Weberlist* court was not faced with an operation of the same magnitude as a sterilization operation. Rather, it was dealing with an operation which could only be beneficial, and of the type which courts have traditionally allowed parents to have performed on their children. Extracting from this case the principle that a court may author-

In *In re Simpson*,<sup>32</sup> probably the only other reported case wherein general equitable powers were invoked to order the sterilization of a feeble-minded girl, the court relied on both statutory and general equitable powers.<sup>33</sup> The precedential value of this decision has been clouded, however, by subsequent federal court decisions. Nearly ten years after *Simpson* a federal court ruled in *Wade v. Bethesda Hospital*<sup>34</sup> that the *Simpson* judge was civilly liable to another feeble-minded girl who had been sterilized pursuant to court order under circumstances similar to *Simpson*. The court held that a statutory grant of "plenary power at law and in equity fully to dispose of any matter properly before the court" was not sufficient to confer jurisdiction on the judge to order the sterilization of a feeble-minded 17-year-old girl.<sup>35</sup> Finding that the judge acted "wholly without jurisdiction," the court ruled that he was not protected by judicial immunity and could, therefore, be held liable for having ordered the sterilization.<sup>36</sup> This decision minimized the precedential value of *Simpson*. But, the *Wade* holding has since been called into serious question by a recent Supreme Court ruling.

In *Stump v. Sparkman*<sup>37</sup> the United States Supreme Court overturned a decision of the Seventh Circuit which had applied the logic of *Wade* to deny judicial immunity to a judge who had authorized the sterilization of a 15-year-old allegedly retarded girl upon the petition of her mother.<sup>38</sup> In reversing the Seventh Circuit, the Supreme Court ruled that a statutory conferral of "original exclusive jurisdiction in all cases at law and in equity whatsoever" was sufficiently broad to clothe the judge with absolute judicial immunity in ruling on a petition for sterilization.<sup>39</sup> Although this decision indicates that the denial of judicial immunity in *Wade* may have been erroneous, it does not address the question of whether a court may properly order the sterilization of any person without specific statutory authorization. Rather, it holds that a broad conferral of statutory jurisdiction assures that

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ize the sterilization of a retarded ward solely on the basis of its *parens patriae* power is questionable at best.

32. 180 N.E.2d 206 (Ohio P. Ct. 1962).

33. *Id.* at 207-08.

34. 337 F. Supp. 671 (S.D. Ohio 1971).

35. *Id.* at 673-74.

36. *Id.* at 674.

37. 98 S. Ct. 1099 (1978).

38. *Sparkman v. McFarlin*, 552 F.2d 172 (7th Cir. 1977), *rev'd sub nom.* *Stump v. Sparkman*, 98 S. Ct. 1099 (1978).

39. *Stump v. Sparkman*, 98 S. Ct. 1099, 1105 (1978).

a court may properly *consider* a petition requesting sterilization, so as to relieve a judge from liability for any order he might make in acting upon the petition. But while a judge may not be held liable for ordering sterilization in such circumstances, the Court did not indicate whether it was a *proper* exercise of the general equitable powers of a court to make such an order.

Implicit support for the theory advanced in *Sallmaier* and *Simpson* can arguably be found in *Wyatt v. Aderholt*.<sup>40</sup> In that case a federal district court judge set up standards and procedural due process safeguards to be followed by Alabama authorities in having retarded inmates of public institutions sterilized. The standards were promulgated and sterilizations implicitly condoned even though Alabama's compulsory sterilization statute had been declared unconstitutional.<sup>41</sup> It is not likely, however, that the court intended to assert that the inherent, nonstatutory power of a court includes the power to order the sterilization of a mentally retarded person; the problem created by the absence of valid statutory authorization was not addressed by the court.<sup>42</sup>

The weight of authority is to the effect that courts do not possess inherent or equitable nonstatutory power to authorize involuntary sterilization of any person.<sup>43</sup> The Missouri Supreme Court, for example, stated that the "awesome power" to deny a child the right of procreation may not be inferred from the general

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40. 368 F. Supp. 1383 (M.D. Ala. 1974).

41. *Wyatt v. Aderholt*, 368 F. Supp. 1382 (M.D. Ala. 1973).

42. In the first of the two *Aderholt* cases, 368 F. Supp. 1382 (M.D. Ala. 1973), a three-judge district court held unconstitutional an Alabama statute which permitted the sterilization of mentally retarded inmates of public institutions at the unfettered discretion of the officials of such institutions, because the statute contained no requirements of notice, hearing, or other procedural safeguards. In the second case, less than three weeks later, the single-judge district court found it necessary to establish standards and safeguards to be followed in future sterilizations because, as the court put it, "it appears that sterilization continues to be performed in certain instances by the state health authorities." 368 F. Supp. at 1384. The court did not address the problem created by the fact that the declaration of unconstitutionality left the state with no valid authority to perform any sterilization. Rather, it was concerned with establishing standards so that no future sterilizations would be performed without adequate procedural safeguards. The court did not explain why it simply failed to enjoin the state authorities from performing all sterilizations until the legislature could enact a new statute with adequate safeguards. Instead, the court performed the legislative function of establishing standards to be followed. The court did, however, have the benefit of knowing that the authorized representatives of the state approved of the sterilization of mentally retarded inmates. It was the *procedure* of the statute that was found inadequate, not the desired result.

43. *E.g.*, *Wade v. Bethesda Hosp.*, 337 F. Supp. 671 (S.D. Ohio 1971); *Guardianship of Kemp*, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974); *Holmes v. Powers*, 439 S.W.2d 579 (Ky. 1968); *In re M.K.R.*, 515 S.W.2d 467 (Mo. 1974); *In re D.D.*, 90 Misc. 2d 236, 394 N.Y.S.2d 139 (Sur. Ct. 1977); *Frazier v. Levi*, 440 S.W.2d 393 (Tex. Civ. App. 1969).



language of the Missouri juvenile code, even though the child's parents might desire the operation.<sup>44</sup> A California appellate court likewise refused to find in the "chancery power" of a state probate court the power to order the sterilization of an adult incompetent.<sup>45</sup>

The issues dealt with above, however, are not dispositive of the main concern of this Comment—the power of parents to have their retarded minor children sterilized. The consent of a parent to the sterilization of his child cannot render the operation "voluntary." Furthermore, the fact that involuntary sterilization statutes are generally upheld does not speak to the power of a parent, absent statutory authorization, to have a child sterilized. Similarly, cases debating the inherent power of a court to sanction a nonconsensual sterilization do not resolve the question of a parent's inherent power to sanction the procedure. Consequently, attention will now turn specifically to the common law power and control of parents over their children.

### III. COMMON LAW PARENT-CHILD RELATIONSHIP

#### A. Parental Authority Generally

The rights and duties of parents to protect, care for, maintain, preserve, and educate their children have deep roots in both our legal and sociological heritage.<sup>46</sup> Furthermore, these natural rights are of constitutional dimensions.<sup>47</sup> The United States Supreme Court recognized the sanctity of the parent-child relationship when it declared,

It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.<sup>48</sup>

44. *In re M.K.R.*, 515 S.W.2d 467, 470-71 (Mo. 1974).

45. *Guardianship of Kemp*, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974).

46. See *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972); *People v. Strasser*, 303 N.Y. 539, 542, 104 N.E.2d 895, 896 (1952); *In re Hudson*, 13 Wash. 2d 673, 685, 126 P.2d 765, 771 (1942); Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. REV. 605, 615-29; Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW. 133, 137 (1972); Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383, 1384 n.7 (1974) [hereinafter cited as *State Intrusion*].

47. See *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976), and United States Supreme Court cases cited therein.

48. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citation omitted).

Another court has said, "A fundamental premise on which our society is based is that courts will zealously guard the integrity of the parent-child relationship. . . . A parent's right to the custody and control of his or her minor child will not be abridged except for the most powerful reasons."<sup>49</sup> The California Supreme Court explained that the right to the custody and control of a child "embraces the sum of parental rights with respect to the rearing of a child, including its care. It includes . . . the right to direct his activities and make decisions regarding his care and control, education, health, and religion."<sup>50</sup>

### B. Medical Treatment

Consistent with the common law attitude toward parental authority, decisions regarding the care of a young child and the medical and surgical treatment he receives have traditionally been made by the parents.<sup>51</sup> Consequently, to avoid civil liability, parental consent must normally be obtained by medical personnel before a child is treated,<sup>52</sup> and the parental consent will not normally be challenged.<sup>53</sup> However, although parental discretion is broad, it is not absolute. The state as *parens patriae*, for example, has the duty to protect those who cannot protect themselves.<sup>54</sup> Thus, the state may interfere with parental authority when parents have unreasonably refused or neglected to provide medical treatment essential to the protection of their child's life or health.<sup>55</sup> Furthermore, the police power of the state enables it to safeguard the public health and safety and therefore to compel submission to preventive measures such as compulsory vaccina-

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49. *In re Welfare of May*, 14 Wash. App. 765, 767, 545 P.2d 25, 26 (1976) (citation omitted).

50. *Burge v. City of San Francisco*, 41 Cal. 2d 608, 617, 262 P.2d 6, 12 (1953).

51. See *Weston's Adm'x v. Hospital of St. Vincent of Paul*, 131 Va. 586, 107 S.E. 785 (1921). See also *Burge v. City of San Francisco*, 41 Cal. 2d 608, 617, 262 P.2d 6, 12 (1953); *Hafen*, *supra* note 46, at 648-49.

52. *Zoski v. Gaines*, 271 Mich. 1, 260 N.W. 99 (1935); *In re Hudson*, 13 Wash. 2d 673, 126 P.2d 765 (1942); *Sexual Sterilization*, *supra* note 23, at 521.

In emergency situations, however, parental consent is not required. See *Tabor v. Scobee*, 254 S.W.2d 474, 475-76 (Ky. 1952); *Luka v. Lowrie*, 171 Mich. 122, 134-35, 136 N.W. 1106, 1110-11 (1912). See also KAN. STAT. § 65-2891 (Supp. 1976); MASS. GEN. LAWS ANN. ch. 112, § 12F (West Supp. 1977-78).

53. See *In re Green*, 448 Pa. 338, 292 A.2d 387 (1972); *In re Hudson*, 13 Wash. 2d 673, 126 P.2d 765 (1942).

54. *Johnson v. State*, 18 N.J. 422, 430, 114 A.2d 1, 5, *cert. denied*, 350 U.S. 942 (1955).

55. *In re Vasko*, 238 A.D. 128, 263 N.Y.S. 552 (1933); *In re Carstairs*, 115 N.Y.S.2d 314, 316 (Dom. Rel. Ct. 1952); *Mitchell v. Davis*, 205 S.W.2d 812, 814-15 (Tex. Civ. App. 1947). See *State Intrusion*, *supra* note 46, at 1399-1401.

tion<sup>56</sup> or sterilization,<sup>57</sup> even in the face of parental opposition.

A parent's power and control over his child's medical treatment may also be limited by the age and situation of the child himself. A minor who is emancipated<sup>58</sup> or mature enough to make a competent decision<sup>59</sup> is sometimes recognized as having the capacity and right to consent to medical treatment for himself,<sup>60</sup> even though the parent may not approve.<sup>61</sup> The decision to obtain an abortion, for example, is a constitutionally protected choice even for a minor.<sup>62</sup> Thus, in *Planned Parenthood v. Danforth*,<sup>63</sup> probably the first Supreme Court decision to deal squarely with conflicting constitutional rights of parents and children in the context of medical treatment, the Court invalidated the portion of a Missouri abortion statute which required the consent of the parents before an abortion could be performed on an unmarried minor. The Court determined that it was constitutionally impermissible for a state to endow the parents with an "absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy."<sup>64</sup> The Court felt that "[a]ny independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant."<sup>65</sup> Presumably, a mentally retarded minor who could satisfy the competency requirement would be accorded the same rights.

It is not clear to what extent this principle is applicable in other contexts, nor by what criteria competency is to be measured.<sup>66</sup> Nevertheless, it shows the sensitivity of the Supreme

56. See *Zucht v. King*, 260 U.S. 174 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); Dunn, *The Availability of Abortion, Sterilization, and Other Medical Treatment for Minor Patients*, 44 U.M.K.C. L. Rev. 1, 4 (1975). Cf. *Dowell v. City of Tulsa*, 273 P.2d 859 (Okla. 1954) (fluoridation of city water supply), *cert. denied*, 348 U.S. 912 (1955).

57. Note 16 and accompanying text *supra*.

58. For a discussion of emancipation statutes, see Dunn, *supra* note 56, at 5-7.

59. For a discussion of the "mature minor" concept, see Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOOD HALL L.J. 115, 117-20 (1973).

60. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Younts v. St. Francis Hosp. & School of Nursing*, 205 Kan. 292, 300-02, 469 P.2d 330, 337 (1970); *Bakker v. Welsh*, 144 Mich. 632, 108 N.W. 94 (1906); *Sullivan v. Montgomery*, 155 Misc. 448, 279 N.Y.S. 575 (N.Y. City Ct. 1935); *Smith v. Seibly*, 72 Wash. 2d 16, 21-22, 431 P.2d 719, 723 (1967).

61. See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52, 72-75 (1976); *In re Green*, 448 Pa. 338, 292 A.2d 387 (1972).

62. *Planned Parenthood v. Danforth*, 428 U.S. 52, 74-75 (1976).

63. 428 U.S. 52 (1976).

64. *Id.* at 74.

65. *Id.* at 75.

66. The implications of the competency standard used in *Danforth* are far from clear.

Court to the rights of competent minor children to participate in decisions regarding their own medical treatment, and at the same time emphasizes that parents do not have absolute control over their children in all situations.

### C. *Sterilization of Retarded Children*

A parent's attempt to have a retarded child sterilized arises in a different context than the situations considered thus far. When parental discretion regarding medical treatment for children is formally challenged in court, the allegation is usually that the parents have failed to provide or have refused to allow certain medical treatment for their children deemed appropriate or necessary by a third party. Much less common are cases challenging the adequacy of parental consent when parents have sought to obtain or have consented to surgical treatment for their children. Presumably this is because the parents' decision seldom comes to the attention of many other people; there are seldom external indications that something is amiss, as there are when a parent refuses to *provide* necessary treatment.

Most cases dealing with the adequacy of parental consent to medical treatment of minor children arise when a doctor refuses to provide requested services and the parents petition the court to authorize or order the treatment. As noted above, these decisions have usually turned on the *court's* authority or jurisdiction to order the treatment and not on the capacity of the parents to consent. Nevertheless, despite the infrequency of decisions dealing directly with the capacity of parents to authorize surgical treatment which is not clearly in the child's best interests, some cases have dealt with this question, although often by implication only. The decisions are not uniform, however, either in the sterilization context or as to other surgical measures.<sup>67</sup>

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The Court speaks in terms of the "right of privacy of the competent minor mature enough to have become pregnant," *id.*, but it is unlikely that the Court meant to establish a puberty standard of competence. This becomes evident in light of the Court's subsequent emphasis of the fact that the holding "does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy." *Id.*

67. In *In re Richardson*, 284 So. 2d 185 (La. Ct. App.), *cert. denied*, 284 So. 2d 338 (La. 1973), the court held that neither the parents nor the court could authorize the surgical removal of a kidney from a 17-year-old retarded boy for the purpose of donating it to his sister. In *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. 1969), however, the inherent chancery powers of the court were found sufficient upon the petition of the mother to authorize a kidney transplant for a 27-year-old incompetent to his brother who was dying of a fatal kidney disease. Although the incompetent's committee, who was his mother, was found to lack the statutory power to authorize the operation, weight was given to the

### 1. Cases implying that a parent may consent

Although no reported case has ever directly held that parents possess the power to authorize the sterilization of their retarded children, some courts have implied that such a power exists. In *Holmes v. Powers*,<sup>68</sup> for example, the Kentucky Court of Appeals held that no statutory or common law authority permitted the sterilization of a 35-year-old mentally retarded woman upon the petition of a county health officer and a local medical society. The court said, "If, as alleged and proved, the appellee is in fact mentally incompetent, she does not have legal capacity to consent to anything. Nor, at her age, does the law give her parents any control of her person or property."<sup>69</sup> This language has been interpreted as implying that a parent *could* legally consent to the sterilization of a mentally retarded *minor* child.<sup>70</sup>

A federal district court for Ohio likewise implied that a parent's consent might be sufficient to relieve those involved in the sterilization of a retarded child from liability. In *Wade v. Bethesda Hospital*,<sup>71</sup> a feeble-minded girl, who had been sterilized pursuant to a court order upon petition by the state welfare board, brought an action against the judge who had ordered the sterilization and seven others who had been involved in the operation. The defendants contended that the plaintiff-child had consented to the operation. The court responded to this contention by saying "there is . . . no signed document before this Court which demonstrates that either the plaintiff or her parents consented to the operation."<sup>72</sup> This language suggests that the written consent of the child's parents could have relieved the defendants from liability,<sup>73</sup> thus implying that the parents could properly have had such an operation performed.

In a 1974 Missouri case, *In re M.K.R.*,<sup>74</sup> the mother of a 13-year-old retarded girl had petitioned the juvenile division of a

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fact that all the members of the incompetent's immediate family recommended the transplant. In *Bonner v. Moran*, 126 F.2d 121 (D.C. Cir. 1941), the court implied that the parents of a 15-year-old boy could have authorized skin grafts from their son for the benefit of his cousin. Likewise, in *Zaman v. Schultz*, 19 Pa. D. & C. 309 (1933), the court implied that the parents of a minor girl could consent to blood transfusions from their daughter for the benefit of another person.

68. 439 S.W.2d 579 (Ky. 1968).

69. *Id.* at 580 (emphasis added).

70. Neuwirth, *Capacity, Competence, Consent: Voluntary Sterilization of the Mentally Retarded*, 6 COLUM. HUMAN RIGHTS L. REV. 447, 454 (1974-75).

71. 356 F. Supp. 380 (S.D. Ohio 1973).

72. *Id.* at 383 (emphasis added).

73. See text accompanying notes 29-39 *supra*.

74. 515 S.W.2d 467 (Mo. 1974).

state circuit court to approve the sterilization of the young girl. The father of the child also filed his written consent to the operation. The juvenile court, concluding that the sterilization "would be conducive to the child's welfare and to the best interests of the state," approved the operation.<sup>75</sup> The Missouri Supreme Court, however, reversed upon a determination that no court in the state had the statutory or constitutional authority to sanction such an operation.<sup>76</sup> Before reaching this decision, however, the court considered and briefly responded to a contention which the girl's mother considered to be a "hard-core" question. In the words of the mother:

Is this . . . court prepared to single out sterilization from . . . the . . . other medical and surgical procedures . . . which parents daily consent [to] and obtain for the benefit of their minor children . . . [and thereby presume] to second guess the best judgment of the child's own mother, a judgment . . . based upon sound medical evidence . . . ?<sup>77</sup>

The court's answer to this "hard-core question" was a simple "no." The court explained that "[i]t is the petitioner who has singled out sterilization from those other surgical procedures and asked the courts to 'authorize,' or put what petitioner deems to be a necessary stamp of approval on her 'best judgment' as to what is necessary for her child."<sup>78</sup>

This dictum has been interpreted by at least one writer as an indication that the court would not have excluded sterilization from the operations to which parents can consent on behalf of their minor children, so that parents could properly have a child sterilized without resort to the court.<sup>79</sup>

It is not clear, however, that the court intended to imply support for such a position. In a subsequent paragraph, the court said:

The courts are not faced in this case with a prayer for a judgment authorizing ordinary medical treatment, or radical surgery necessary to preserve the life of a child; we are faced with a request for sanction by the state of what no doubt is a routine

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75. *Id.* at 469.

76. *Id.* at 470.

77. *Id.* at 469.

78. *Id.*

79. *Sexual Sterilization*, *supra* note 23, at 521. It is interesting, however, that the comment supports the position that sterilization should not be one of the operations for which parental consent alone is adequate.

operation which would irreversibly deny to a human being a fundamental right, the right to bear or beget a child.<sup>80</sup>

The court was not called upon to decide, nor did it decide, whether a parent could properly authorize the sterilization of a child without resort to the judiciary. It does appear, however, that the court would have given its "stamp of approval" had the mother been seeking authorization for ordinary medical treatment or for radical surgery necessary for the preservation of the child's life. It refused, however, to authorize sterilization of a retarded child even with the consent of both parents, thereby recognizing a distinct difference between sterilization, an operation which would permanently terminate a fundamental right, and other types of ordinary or necessary medical treatment.

## 2. *Cases holding or implying that a parent may not consent*

In the only reported case to expressly discuss the power of a parent to subject a minor child to sexual sterilization, *A. L. v. G.R.H.*,<sup>81</sup> an Indiana court held that parents do *not* have the common law power to authorize the sterilization of a child for reasons other than medical necessity. In that case, the mother of a 15-year-old boy of less than normal intelligence sought a declaratory judgment to the effect that the common law attributes of the parent-child relationship endowed her with the right to have her son sterilized. The trial court denied the mother the right to secure the operation and the court of appeals affirmed.<sup>82</sup>

The boy involved in this case had an intelligence quotient (IQ) of eighty-seven, described as being in the "dull" or "borderline" area, only seven points below the normal range. Witnesses testified that he had benefitted substantially from special education programs and would be capable of earning his own livelihood. Furthermore, evidence showed that his mental disability would not be transmittable to offspring and that he was intelligent enough to participate in a decision about sterilization.<sup>83</sup> The court, no doubt influenced somewhat by these factors, expressly held that parents do not have the inherent power to authorize the sterilization of their retarded minor children.

In the course of its decision, the appellate court pointed out that: (1) there was no legislative enactment which would permit

80. 515 S.W.2d at 470.

81. 325 N.E.2d 501 (Ind. App. 1975), *cert. denied*, 425 U.S. 936 (1976).

82. 325 N.E.2d at 502.

83. *Id.* at 501-02.

sterilization under the circumstances of the case; (2) the facts did not bring the case within the framework of the decisions recognizing that a parent may consent to necessary medical services on behalf of the child; and (3) the case did not present a situation where the state may intervene over the parent's wishes to rescue a child from parental neglect or to save its life.<sup>84</sup> The court recognized that the desirability of the proposed operation did not emanate from any lifesaving necessity, but rather that the sole purpose of the operation was to prevent the boy's capability of fathering children.<sup>85</sup> The court concluded, "We believe the common law does not invest parents with such power over their children even though they sincerely believe the child's adulthood would benefit therefrom."<sup>86</sup>

Implicit support for this conclusion can be found in a variety of cases. In *In re D.D.*,<sup>87</sup> for example, a New York Surrogate Court denied the application of a mother seeking to have her 16-year-old mentally retarded daughter sterilized. The girl, although attractive and well developed, functioned below the level of a 5-year-old because of severe mental retardation.<sup>88</sup> Although the application was denied because the court found no statutory power to authorize such an operation, the case is noteworthy because the court gave little deference to the fact that the petitioner was the mother of the minor girl. The court did not even suggest that her position as a parent endowed her with the inherent authority to consent to the procedure.

In *Relf v. Weinberger*,<sup>89</sup> a federal district court declared that federal funds could not be used to provide for the sterilization of any person who is incompetent to consent to such an operation because of minority or mental deficiency. The court explained that the decision was based on statutory interpretation. The family planning sections of the federal statutes in question required a voluntary consent to such an operation.<sup>90</sup> The court felt that no incompetent person could provide such a consent, and that the consent of a representative could not impute voluntariness to the person being sterilized.<sup>91</sup> Under this rationale, parental consent to

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84. *Id.* at 502.

85. *Id.*

86. *Id.*

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

88. *Id.* at 236, 394 N.Y.S.2d at 140.

89. 372 F. Supp. 1196 (D.D.C. 1974).

90. Public Health Service Act § 1007, 42 U.S.C. § 300a-5 (1970); Social Security Act §§ 402(2)(15), 508(a), 1905 (a)(4), 42 U.S.C. §§ 602(a)(15), 708(a), 1396d(a)(4) (1970).

91. 372 F. Supp. at 1202.



the sterilization of a child would not make it a voluntary sterilization.

Another federal district court invalidated a portion of the North Carolina sterilization statute because it provided that sterilization proceedings *must* be instituted whenever the next of kin or legal guardian of a retarded person so requested.<sup>92</sup> The court invalidated this provision because "it grants to the retarded person's next of kin or legal guardian the power of a tyrant: for any reason, or for no reason at all, he may *require* an otherwise responsible public servant to initiate the procedure."<sup>93</sup> The provision was declared unconstitutional as an "arbitrary and capricious delegation of unbridled power."<sup>94</sup> Although a retarded child's next of kin will normally be his parents, the court refused to allow them to have the power to require the initiation of sterilization proceedings.<sup>95</sup>

Another court, in establishing standards to be followed by Alabama state health authorities whenever a resident of a state retardation facility was to be sterilized, totally banned the sterilization of any resident who had not obtained the chronological age of 21 years except in cases of medical necessity.<sup>96</sup> No exception was made for the sterilization of any such person upon the parents' request or consent.

These cases suggest that parental consent alone is not sufficient to authorize the sterilization of a retarded child, at least when governmental agencies are involved. However, with only one case expressly declaring that parents *do not* possess the power to have their children sterilized, and other cases containing implications both ways, one would be bold, if not presumptuous, to assert a definitive common law doctrine on the precise issue. Nevertheless, *A.L. v. G.R.H.* and the other more recent cases seem to show the modern trend. In light of the continually expanding recognition of the constitutional rights of children and the mentally retarded, it appears to be a reasonable assumption that most courts would not recognize parental authority to the extent of allowing a parent to have any retarded child sterilized at will.

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92. *North Carolina Ass'n for Retarded Children v. North Carolina*, 420 F. Supp. 451, 455-56 (M.D.N.C. 1976).

93. *Id.* at 456 (emphasis in original).

94. *Id.*

95. It should be noted, however, that the court implied that the breadth of the delegation was the major infirmity. "We think such confidence in *all* next of kin and *all* legal guardians is misplaced . . ." *Id.* (emphasis in original).

96. *Wyatt v. Aderholt*, 368 F. Supp. 1383, 1384 (M.D. Ala. 1974).

## IV. POLICY CONSIDERATIONS

Although the power of a parent to have his mentally retarded minor child sterilized appears never to have been fully recognized by the courts, and the current trend is away from recognizing such power, inquiry as to whether parents *should* have such power is still relevant. Many courts may still have to pass on the question and legislatures may also have to decide whether to grant such power by statute. In addition, although corroborating statistics are difficult to obtain, it appears that many retarded children are still being sterilized upon the consent of their parents without resort to the courts and without statutory authorization.<sup>97</sup> Tacitly recognizing parental power to this extent may jeopardize the basic right of a retarded child to procreate. On the other hand, denying the power may interfere with parental discretion and the right of the child to have his parents act in his best interests in all situations. It is with these facts in mind that attention will now be turned to a discussion of the more relevant policy considerations.

A. *Policy Considerations Favoring Parental Authority*

As discussed above, parents have a constitutional right to the custody, care, and control of their minor children.<sup>98</sup> Although this right is not absolute, parental discretion as to the proper medical treatment for any child should not be interfered with in the absence of compelling reasons. In addition to the parental rights involved, the rights of a retarded child would also be impaired if his parents were denied the power to have a necessary or beneficial sterilization performed. And sterilization may indeed be beneficial for a retarded child in some situations.<sup>99</sup> Under such circumstances, the inability of parents to obtain a sterilization for their child would frustrate the rights and best interests of everyone involved.

Additionally, even if a statutory procedure were designed to provide for the sterilization of retarded children, it would necessarily entail state interference with parental discretion and family privacy. And state interference with familial affairs oftentimes produces worse results than no intervention at all.<sup>100</sup> One court

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97. See Ferster, *supra* note 19, at 605; Murdock, *supra* note 19, at 918-19, 932.

98. Notes 46-53 and accompanying text *supra*.

99. North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451, 454-55 (1976); *Sexual Sterilization*, *supra* note 23, at 515-20.

100. See Green & Paul, *Parenthood and the Mentally Retarded*, 24 U. TORONTO L.J. 117, 123-24 (1974); Hafén, *supra* note 46, at 655-56.

recently explained, "Modern theories of child welfare . . . offer persuasive support to parental rights, and suggest that the legal system should generally defer to the wishes of a child's parents, obliging the state to bear a serious burden of justification before intervention."<sup>101</sup> Sterilization is an operation with far-reaching consequences and parents certainly should be in the best position to evaluate these consequences in terms of their children's best interests.<sup>102</sup>

Furthermore, it would be in keeping with the common beliefs and assumptions of the general populace to recognize parents as possessing the power and ability to have a retarded child sterilized when they feel it is desirable and beneficial for the child.<sup>103</sup> Many parents would likely be offended at the suggestion that unless the state gives them the power they may not have a retarded child sterilized even when they and their doctor feel it would be desirable.

The requirement of parental consent for medical treatment of a minor is based largely on the assumption that a child lacks the knowledge, maturity, and intelligence necessary to reach a decision concerning his own best interests.<sup>104</sup> Because sterilization involves a fundamentally important right and because most children will be able to decide for themselves at a later date whether or not they wish to be sterilized, most would agree that the decision should be left for the children to make when they are competent to make it. Some retarded children, however, will never be able to make a competent decision regarding sterilization. It seems natural, therefore, to conclude that in such a situation the parents, who are presumed to be acting in the best interests of the child, should be able to make the decision for the child.

Viewing only the above policies, the ideal solution would seem to be a legislative enactment granting parents the authority to consent to the sterilization of a retarded child when they feel it would be in the child's best interests, with no further state involvement at all—provide statutory authorization and leave the decision with the parents. The validity of such legislation, however, would certainly be questionable in light of recent Supreme Court declarations that blanket parental consent require-

101. *Wiley v. Spratlan*, 543 S.W.2d 349, 352 (Tex. 1976) (quoting *State Intrusion*, *supra* note 46, at 1385).

102. See *In re Sterilization of Moore*, 289 N.C. 95, 109, 221 S.E.2d 307, 316 (1976).

103. See *State Intrusion*, *supra* note 46, at 1384 n.7.

104. See *Dunn*, *supra* note 56, at 2.

ments are impermissible in statutes dealing with procreation.<sup>105</sup> Moreover, there are several countervailing considerations suggesting that parents should not possess unfettered discretion to have a retarded child sterilized, whether it is statutorily authorized or not. Attention will now be turned to a discussion of several such considerations.

### *B. Policy Considerations Against Parental Authority*

#### *1. Procreation as a fundamental right*

Many have argued that an operation which would permanently terminate the ability of a child to reproduce should not be among the medical procedures that a parent can routinely authorize for a mentally retarded child.<sup>106</sup> Most people would certainly agree that a parent should not have the right to withhold medical treatment which would save the life of his child or authorize treatment which would unreasonably endanger it. The child's fundamental right to life itself surely outweighs any conflicting parental interest. Although of a different magnitude than the right to life itself, sterilization likewise threatens a fundamental right, the right to procreate.<sup>107</sup> The right of privacy as it pertains to matters concerning procreation is a right protected against unwarranted state infringement for all, whether minors or adults.<sup>108</sup> The sterilization of a child, be he retarded nor not, irreversibly denies him this fundamental right to bear or beget children.

Although a parent's discretion as to medical treatment for a retarded child should be broad, the child's fundamental right to procreate is arguably superior. To deny a parent the unfettered

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105. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693-94 (1977) (opinion of Brennan, J., with three Justices concurring in the opinion, six Justices concurring in the result); *Planned Parenthood v. Danforth*, 428 U.S. 52, 72-75 (1976).

A statutory provision giving parents an absolute veto power over a competent minor's decision to be sterilized would likely be invalidated under the *Danforth* test. However, a sterilization statute containing a parental consent element which also provides a check against unfettered parental discretion would likely withstand judicial scrutiny. See note 150 *infra*.

106. Green & Paul, *supra* note 100, at 122-24; Neuwirth, *supra* note 70, at 455; *Sexual Sterilization*, *supra* note 23, at 521-22. Attorney General opinions of at least two states have concluded that a mentally deficient person may not normally be sterilized upon the application or consent of the parents. See 1943 ATT'Y GEN. REP. 336 (N.Y.); Ferster, *supra* note 19, at 605.

107. See *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *In re M.K.R.*, 515 S.W.2d 467, 470 (Mo. 1974).

108. *Carey v. Population Servs. Int'l*, 431 U.S. 678, 692-93 (1977) (Brennan, J., with three Justices concurring); *Planned Parenthood v. Danforth*, 428 U.S. 52, 74-75 (1976).

right to have a child sterilized is to infringe on his discretion somewhat. To deny a child the power of procreation is to destroy the possibility of his ever exercising and enjoying the rights and duties of parenthood. Although the interests of the parents in seeking the sterilization of their retarded child need not always conflict with the best interests of the child, it is apparent that these interests can and do conflict in many circumstances. Common sense would seem to dictate the conclusion that if the rights and interests of the parents conflict with those of the child in this area, the child's right to procreate should prevail.

The presumption that a parent will look to and protect the best interests of his children is implicit in the theory that a parent has the right to authorize surgical treatment for them.<sup>109</sup> As to a mentally retarded child, however, this presumption may not always be justified. Although one should not be quick to decry the motives of a parent who seeks to have his retarded child sterilized, there are many possible concerns and situations which could lead the interests of the parents into conflict with the best interests of the child.<sup>110</sup> The social stigma attached to reproduction by retarded persons, for example, could lead a parent to seek to have his retarded child sterilized, as could the desire to prevent the possible future birth of retarded grandchildren. Economic concerns could likewise be the motivation behind a desired sterilization. The parent would very likely have to finance the prenatal expenses as well as the medical and hospital expenses of the actual birth. Furthermore, the retarded child could prove to be an unfit parent and lack adequate economic means to properly provide for the child, causing the burden of raising and providing for the child to fall on the grandparents.

Hygienic concerns might also make sterilization an attractive alternative to the parents. Sterilization can certainly help solve some menstrual problems and it has been claimed that sterilization can also help with problems such as excessive masturbation and excessive body hair and acne.<sup>111</sup> A parent seeking to sterilize a retarded child might simply be acting out of overprotectiveness common among many parents of retarded children, or at the other extreme, out of hostility or frustration stemming from the added pressures of having to care for a retarded child.

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109. See *In re Sterilization of Moore*, 289 N.C. 95, 109, 221 S.E.2d 307, 316 (1976); Murdock, *supra* note 19, at 932.

110. Murdock, *supra* note 19, at 932-33; Neuwirth, *supra* note 70, at 455; *Sexual Sterilization*, *supra* note 23, at 522.

111. See Ferster, *supra* note 19, at 605.

The "true" motivation behind a parent's decision to sterilize a retarded child, of course, would likely be a combination of many factors and concerns. It is not contended that each of the possible motivations described above is an improper motive or that every one of them would tend to be in derogation of the child's best interests. It is contended, however, that in view of the fundamental nature of the right to procreate, some such motivations are improper. Adequate safeguards should, therefore, be required to ensure that before any person is sterilized all relevant factors have been properly considered so that the operation does in fact tend to reflect the best interests and welfare of the person to be sterilized,<sup>112</sup> or is pursuant to a voluntary, competent consent of such person, or is justified on some other acceptable ground.<sup>113</sup> The fundamental nature of the right involved requires at least this much protection.

## 2. *Problems in labeling*

Even if it was conceded, *arguendo*, that a parent should possess the power to have a retarded child sterilized, a major problem persists in determining when a child is so "retarded" as to justify sterilization. It is not an easy task to distinguish between a "normal" child and a "retarded" child or between competency and incompetency. In fact, the term "mentally retarded" has very little meaning.<sup>114</sup> It describes a very broad class of people and does not distinguish between differing causes of retardation, degrees of intellectual, mental and social capabilities, or prospects

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112. This Comment does not purport to define precisely what is involved in a determination of the "best interests of the child." It would seem, however, that in reaching a decision as to the child's best interests in the context of sexual sterilization, at least the following factors should be taken into consideration: (1) the desires of the child's parents and the reasons for such desires; (2) the child's ability to understand the nature and consequences of the operation; (3) the child's desires; (4) the child's potentiality of developing into a fit parent; (5) the physical and psychological impact the proposed operation could have on the child; and (6) the availability of a less drastic alternative which would accomplish the desired result. Unless these factors are given proper weight and unless the operation would tend to genuinely promote the child's best welfare, sterilization would be improper and unjustifiable.

113. Various interests have been recognized by courts and commentators as legitimate state interests which would justify the sterilization of mental incompetents under certain circumstances. *E.g.*, North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451, 457-58 (M.D.N.C. 1976) (to prevent the birth of a defective child or the birth of a nondefective child to unfit parents); *In re Sterilization of Moore*, 289 N.C. 95, 103, 221 S.E.2d 307, 312 (1976) (interest of the unborn child, and the interest in preventing the procreation of children who will become a burden on the state). See also notes 13-24 and accompanying text *supra*.

114. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *NEW NEIGHBORS* 27 (1974).

for future improvement.<sup>115</sup> An Illinois court correctly surmised, "[t]here is no clear dividing line between competency and incompetency, and each case must be judged by its own peculiar facts."<sup>116</sup>

Disenchantment with the use of the IQ as the main criterion for determining whether or not a person is retarded has brought the labeling and diagnosis of retardation under increasing scrutiny.<sup>117</sup> IQ is considered by many to be an inept indicator of a person's potential and an inaccurate measure of a person's present functional ability.<sup>118</sup> Indeed, many children labeled in their youth as retarded are in adult life indistinguishable from the unretarded and display increased and even normal intellectual competence.<sup>119</sup> Furthermore, studies have disclosed that there is a pronounced "cultural bias" in the standard IQ tests.<sup>120</sup>

Another critical consideration is that "retardation" is not necessarily co-extensive with inadequacy as a parent.<sup>121</sup> Nearly ninety percent of the mentally retarded persons in the United States are only "mildly" retarded<sup>122</sup> and are referred to as "educable" mentally retarded.<sup>123</sup> Many may have normal children and function as adequate parents, especially after education and training to that end.<sup>124</sup> As one court explained, "It is a matter of common knowledge that many married men or women continue in a satisfactory marital status although they may not possess high grade mentality or be successful in the conduct of business ventures . . . ."<sup>125</sup>

115. *North Carolina Ass'n for Retarded Children v. North Carolina*, 420 F. Supp. 451, 454 (M.D.N.C. 1976). See also PRESIDENT'S COMMITTEE ON MENTAL RETARDATION: CENTURY OF DECISION 6 (1976).

116. *Ertel v. Ertel*, 313 Ill. App. 326, 332, 40 N.E.2d 85, 88 (1942).

117. See R. WOODY, *LEGAL ASPECTS OF MENTAL RETARDATION* 10-19 (1974); Roos, *Mentally Retarded Citizens: Challenge for the 1970's*, 23 SYRACUSE L. REV. 1059, 1070-71 (1972).

118. See PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *supra* note 2, at 137; Murdock, *supra* note 19, at 928-29 n.67; Roos, *supra* note 117, at 1070-71.

119. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *supra* note 2, at 138; Green & Paul, *supra* note 100, at 123; 19 U. TORONTO L.J. 424 (1969).

120. *P. v. Riles*, 343 F. Supp. 1306, 1313 (N.D. Cal. 1972), *aff'd per curiam*, 502 F.2d 963 (9th Cir. 1974); *Hobson v. Hansen*, 269 F. Supp. 401, 484-85 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969); S. SARASON & J. DORIS, *PSYCHOLOGICAL PROBLEMS IN MENTAL DEFICIENCY* 289-311 (4th ed. 1969).

121. See Ferster, *supra* note 19, at 624; Murdock, *supra* note 19, at 929-30, 933.

122. E. OGG, *SECURING THE LEGAL RIGHTS OF RETARDED PERSONS* 2 (Public Affairs Pamphlet No. 492, 1973); Murdock, *supra* note 19, at 928.

123. *MENTAL RETARDATION: A BASIC GUIDE* 151-55 (H. Love ed. 1968) [hereinafter cited as *MENTAL RETARDATION*]; E. OGG, *supra* note 122, at 3.

124. See Murdock, *supra* note 19, at 928-32. See also *In re Welfare of May*, 14 Wash. App. 765, 768-69, 545 P.2d 25, 27 (1976); *MENTAL RETARDATION*, *supra* note 123, at 151-55.

125. *Ertel v. Ertel*, 313 Ill. App. 326, 335, 40 N.E.2d 85, 89 (1942).

Furthermore, retardation does not preclude the capacity to give an informed consent.<sup>126</sup> Courts have found persons with limited mental capacity able to give a legally binding consent to such things as marriage,<sup>127</sup> sexual intercourse,<sup>128</sup> and adoption.<sup>129</sup> The oft used test for determining the ability of a mentally handicapped person to enter into a legal relationship or otherwise give a binding consent is whether the person possesses "sufficient mental capacity to understand the nature, effect, duties and obligations" of the relationship.<sup>130</sup> Many mentally retarded persons can understand and appreciate the responsibilities of parenthood, as well as the implications of sterilization.<sup>131</sup> In fact, one author has asserted that "the state may rarely confront a retarded individual who should be sterilized, but who lacks the capacity to consent."<sup>132</sup>

If the legal capacity to consent to sterilization exists, or if it could possibly develop as the child matures, the retarded person should be on a par with any other person. That is, he should have the right to be sterilized if he so desires, but he should not be subject to sterilization against his will unless it is pursuant to a valid compulsory sterilization statute. The unsatisfactory, unreliable, and biased tests used in labeling retardation, the fact that the overwhelming majority of mentally retarded persons are only mildly retarded and many can be adequate parents, and the fact that many persons, although retarded, can nonetheless meet the requirements of legal competency to consent to sterilization, makes the unfettered power to terminate a child's right of procreation simply because he falls into the unfortunate group of persons who have been labeled "retarded" seem awesome indeed.

### 3. *Changing theories of genetics*

The eugenic sterilization movement<sup>133</sup> reached its zenith during the latter part of the nineteenth and the early part of the

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126. Murdock, *supra* note 19, at 933; Neuwirth, *supra* note 70, at 452.

127. *Ertel v. Ertel*, 313 Ill. App. 326, 40 N.E.2d 85 (1942).

128. *Hacker v. State*, 73 Okla. Crim. 119, 118 P.2d 408 (1941).

129. *In re Surrender of Minor Children*, 344 Mass. 230, 181 N.E.2d 836 (1962).

130. *Ertel v. Ertel*, 313 Ill. App. 326, 334, 40 N.E.2d 85, 89 (1942); *Hacker v. State*, 73 Okla. Crim. 119, 118 P.2d 408 (1941).

131. See Murdock, *supra* note 19, at 933; Neuwirth, *supra* note 70, at 452.

132. Murdock, *supra* note 19, at 934.

133. "Eugenics" involves the concept of improving human stock through regulation of heredity. The term was coined by Sir Francis Galton in the 19th century from the Greek word, *eugenes*, meaning "well-born." Note, *Eugenic Sterilization—A Scientific Analysis*, 46 DEN. L.J. 631, 631 (1969).



twentieth centuries.<sup>134</sup> The main impetus for the eugenics movement began with Sir Francis Galton and involved the principles of social Darwinism and Mendelian genetics.<sup>135</sup> The sharp decline in recent years of the use of eugenic sterilization laws, however, plus the recent reluctance of courts to claim hereditary justifications for such statutes, signals the rejection of the view that mental retardation is hereditary.<sup>136</sup> In other words, the basic premise upon which the sterilization of mental defectives has been traditionally justified—the belief that heredity is primarily responsible for mental retardation—is no longer accepted by the general scientific community as to most instances of mental retardation.<sup>137</sup> Statistics show that eighty-nine percent of feeble-minded persons are born to normal parents.<sup>138</sup> Likewise, the President's Committee on Mental Retardation concluded that "[a]bnormal genes or chromosomes which generate [the] more severe [mental] disorders account for 5% or less of the total incidence of retardation."<sup>139</sup>

A federal district court, in recently invalidating parts of a North Carolina sterilization statute, explained: "Most competent geneticists now reject Social Darwinism and doubt the premise implicit in Holmes' incantation that '. . . three generations of imbeciles is enough.'"<sup>140</sup> The court then summarized, "In short, the medical and genetical experts are no longer sold on sterilization to benefit either retarded patients or the future of the Republic."<sup>141</sup> These changes in genetic theory cast doubt on the validity of compulsory sterilization statutes which were passed and justified on the assumed genetic inheritability of mental retardation.<sup>142</sup> Furthermore, the fact that traditional justifications for sterilization statutes are breaking down casts doubt on the acceptability of any type of involuntary sterilization, reinforcing the

134. Bligh, *Sterilization and Mental Retardation*, 51 A.B.A.J. 1059 (1965).

135. *Id.* at 1060.

136. See Ferster, *supra* note 19, at 599; Shaw, *Procreation and the Population Problem*, 55 N.C.L. Rev. 1165, 1183 (1977).

137. See *North Carolina Ass'n for Retarded Children v. North Carolina*, 420 F. Supp. 451, 454 (M.D.N.C. 1976); Bligh, *supra* note 134, at 1062; Ferster, *supra* note 19, at 596, 602-04; *New Rationale*, *supra* note 17, at 353-56.

"[R]esearch has uncovered some 200 causes of retardation, only a fraction of them genetic." E. OGG, *supra* note 122, at 9.

138. *New Rationale*, *supra* note 17, at 353-56.

139. PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *supra* note 2, at 137.

140. *North Carolina Ass'n for Retarded Children v. North Carolina*, 420 F. Supp. 451, 454 (M.D.N.C. 1976).

141. *Id.*

142. See notes 13-24 and accompanying text *supra*.

argument that an attempt to have any person sterilized at the request of another person should be carefully scrutinized and not allowed unless the desired operation is completely justified.

## V. CONCLUSION AND RECOMMENDATIONS

The fundamental nature of the right of procreation, the inadequacies of the methods of labeling retardation, the relative lack of reliable indicators of potential for adequate parenthood, the noninheritability of most forms of mental retardation, and the potential conflicts of interest between a parent and a retarded child compel the conclusion that parents should not have the unfettered discretion to sterilize their retarded children.

On the other hand, there are certainly some situations in which the sterilization of a retarded child can be justified. Some forms of retardation are passed genetically.<sup>143</sup> Some retarded people will never make adequate parents.<sup>144</sup> Furthermore, sterilization will sometimes be in the best interests of the retarded child.<sup>145</sup> As one federal court noted, "however doubtful . . . the efficacy of sterilization to improve the quality of the human race, there is substantial medical opinion that it may be occasionally desirable and indicated."<sup>146</sup> In any such situation, the total unavailability of sterilization for retarded children would breed some of the same evils as does its overavailability—the best interests and welfare of the child would be frustrated and the parents' right to secure beneficial medical treatment for their child unreasonably denied.

Appropriate legislation could be enacted which would resolve these problems. Statutory procedures could be drafted which would tend to ensure that a child's fundamental right of procreation is not unjustifiably denied, yet provide a means whereby desirable and justifiable sterilizations could be performed. Such a statutory enactment should be upheld as a reasonable exercise of the police power of a state as a means of protecting the fundamental rights of minors and the mentally retarded and as a vehicle through which a parent can exercise his parental discretion by utilizing the statutory machinery whenever he feels sterilization would be in the best interests of his child. It is with this in mind

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143. North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451, 454 (M.D.N.C. 1976).

144. *Id.* at 454-55.

145. *Id.* at 455; *Sexual Sterilization*, *supra* note 23, at 519-20.

146. North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. at 454.

that the following recommendations are made. No attempt has been made to draft a proposed statute in its entirety. The following suggestions, however, represent what are thought to be the essentials of a comprehensive statute dealing with this difficult area.<sup>147</sup>

#### A. Review Committee

Before any sterilization is performed the person to be sterilized should appear before either a court of competent jurisdiction or a special committee appointed to review such requests.<sup>148</sup> The parents (of a minor) and/or legal guardian, if appropriate, should also appear.

#### B. Initial Determinations

When the person to be sterilized initially appears before the committee or court, the following determinations should be made:

1. Whether the person to be sterilized is competent to give a knowing, voluntary consent to the operation.<sup>149</sup>
2. If he is found to be competent, whether he knowingly and voluntarily consents to the operation.
3. If the person to be sterilized is a minor, whether the parents knowingly and voluntarily consent to the operation.

#### C. Voluntary Sterilization

The sterilization of a person may be considered voluntary and thus subject to no further procedural requirements if:

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147. Although this Comment has focused on the sterilization of mentally retarded minors, the basic principles and safeguards recommended in the text would seem appropriate for sterilization in any context.

148. An example of such a review committee can be found in *Wyatt v. Aderholt*, 368 F. Supp. 1383 (M.D. Ala. 1974), wherein a federal district court set up procedures to be followed before any mentally retarded patient of Alabama retardation facilities could be sterilized. The procedures provided that no sterilization of an institutionalized patient could be performed without the prior approval of the review committee. The committee was to consist of five members to be selected by a human rights committee and approved by the court. The committee was to include at least one licensed physician, one licensed attorney, two women, two minority group members, and one resident of the state retardation facility. The categories, of course, are not mutually exclusive. *Id.* at 1384-85. For other similar proposals, see *Relf v. Weinberger*, 372 F. Supp. 1196, 1200 (D.D.C. 1974); *Neuwirth*, *supra* note 70, at 465.

149. Standards would need to be adopted to assist in making such a determination. Relevant considerations include the person's age, IQ, education, ability to understand the nature and consequences of sterilization, ability to communicate, ability to understand marriage and parenthood, etc. The traditional presumption of the sanity and competence of adults should also apply in this initial hearing.

1. The person to be sterilized is competent to consent to the operation and does so knowingly and voluntarily, *and*
2. Where the person to be sterilized is a minor, his parents or guardians also consent.<sup>150</sup>

#### D. Involuntary Sterilization

The sterilization of a person should be considered involuntary and thus subject to the procedural requirements set forth below if:

1. The person to be sterilized is not competent to give a knowing, voluntary consent, or
2. The person to be sterilized is competent to give such a consent, but does not voluntarily consent thereto, or
3. The parents or legal guardian do not consent to the sterilization of a minor child or ward.<sup>151</sup>

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150. A parental consent provision such as this could be considered suspect in light of *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976), which held the parental consent requirement of an abortion statute unconstitutional. It is believed, however, that the provision here would pass judicial scrutiny. As explained in *Danforth*, the primary infirmity of the parental consent requirement invalidated therein was its conferral of an *absolute* veto power over the decision of the minor. *Id.* at 74. Justice Stewart filed a concurring opinion, joined by Justice Powell, to clarify his stand on certain portions of the opinion. These two Justices were necessary for the 5-4 majority in this part of the opinion. Justice Stewart explained:

With respect to the state law's requirement of parental consent, § 3(4), I think it clear that its primary constitutional deficiency lies in its imposition of an absolute limitation on the minor's right to obtain an abortion. The Court's opinion today in *Bellotti v. Baird*, [428 U.S. 132, 147-48 (1976)], suggests that a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child.

428 U.S. at 90-91 (Stewart, J., concurring). *See also* *Bellotti v. Baird*, 428 U.S. 132, 143-51 (1976).

The parental consent provision proposed here does not impose an absolute veto power over a competent minor's decision to be sterilized. Rather, it provides that unless the parents are consulted and freely consent to the operation, other procedures are available whereby the child's desires may be realized if they are found to be in the child's best interest. This procedure would help ensure consultation with parents over this vitally important decision to seek sterilization. Such a goal is clearly a constitutionally permissible one. *See* *Planned Parenthood v. Danforth*, 428 U.S. 52, 91 (1976) (Stewart, J., concurring); *Id.* at 102-05 (Stevens, J., concurring in part, dissenting in part); *Planned Parenthood v. Fitzpatrick*, 401 F. Supp. 554, 567 (E.D. Penn. 1975). Consequently, the provision in the proposed statute would likely withstand constitutional attack in light of the clarification provided by Mr. Justice Stewart in *Danforth* and the opinion in *Bellotti v. Baird*, 428 U.S. 132 (1976).

151. *See* note 150 *supra*.

### E. Requirements for Involuntary Sterilization

The following requirements should be satisfied before any involuntary sterilization may be performed:<sup>152</sup>

1. The person to be sterilized must be given a full hearing before the court or committee.
2. Adequate notice of such hearing must be given to the person to be sterilized and to the parents of such person if he is a minor, and to the guardian, if any.
3. The person to be sterilized must be represented by counsel at such hearing, either appointed or approved by the court or committee.
4. The person to be sterilized shall have the right to cross-examination, to compulsory process for obtaining witnesses, and to testify for himself.
5. Evidence, including medical and psychological testimony, must be received by the court or committee regarding (a) the likely impact of the proposed sterilization on the person to be sterilized, (b) relevant factors indicating the desirability or undesirability of the operation, and (c) the reasons why less drastic alternative procedures would not be adequate.
6. The court or committee must find that the proposed operation would be in the best interests of the person to be sterilized or of society.
7. The determination of the court or committee must be appealable to the state appellate courts.

A statute incorporating these basic elements would adequately protect the important interests of all parties concerned. A competent adult could obtain a sterilization almost summarily. A minor would be encouraged to consult his parents and obtain their consent before undergoing an irreversible sterilization, but he would be able to obtain the operation without their consent under appropriate circumstances. The parents of a retarded child could secure the sterilization of their child upon a showing that it was justifiable and desirable. A retarded child would be protected, however, against sterilization at the whim of his parents or other persons. Such a procedure, by paying due deference to the important interests involved, would protect one of the most basic and cherished rights of mankind: the right to bear or beget children.

Gary A. Dodge

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<sup>152</sup>. These requirements represent the basic due process safeguards necessary in such a proceeding. See note 20 *supra*.