

Involuntary Sterilization of Mentally Disabled Women

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I. INTRODUCTION

In 1927, Justice Holmes wrote "three generations of imbeciles are enough," as he held in *Buck v. Bell* that a state could sterilize an involuntarily institutionalized eighteen-year-old woman.¹ Within ten years, twenty states enacted eugenic sterilization statutes,² enabling the sterilization of as many as 60,000 females before 1950.³ In 1942, the Supreme Court decided *Skinner v. Oklahoma*, its only other case concerning sterilization, and held that the Oklahoma Habitual Criminal Sterilization Act violated the Equal Protection Clause because no rational basis existed for distinguishing between the classes of criminals to be sterilized by vasectomy.⁴ However, *Skinner* did not overrule *Buck*; rather, the *Skinner* Court distinguished *Buck* as involving a statute which did not violate equal protection.⁵ Thus, not only does *Buck* remain good law today but, in recent opinions, courts cite *Buck* as authority for the constitutionality of sterilization statutes directed at mentally incompetent persons.⁶ Since *Buck*, the number of states with sterilization statutes has reached thirty-two. However, many of these statutes have since been repealed or have been declared unconstitutional by state courts.⁷

In a culture with a creed of equality but a history of gender discrimination, the most obvious point of concern raised by sterilization statutes is that the application of sterilization laws is overwhelmingly directed at women. Only a few of the dozens of cases regarding involuntary sterilizations involve the sterilization of males.⁸ Therefore, sterilization prac-

¹ *Buck v. Bell*, 274 U.S. 200, 207 (1927).

² SAMUEL J. BRAKEL ET AL., *THE MENTALLY DISABLED AND THE LAW* 523 (3d ed. 1975).

³ Susan Stefan, *Whose Egg is it Anyway? Reproductive Rights of Incarcerated, Institutionalized and Incompetent Women*, 13 *NOVA L.REV.* 405, 413 (1989) (footnote omitted).

⁴ 316 U.S. 535, 542 (1942).

⁵ *Id.*

⁶ See, e.g., *In re Moore*, 221 S.E.2d 307, 309 (N.C. 1976).

⁷ BRAKEL, *supra* note 2, at 523.

⁸ *In re Moore*, 221 S.E.2d 307 (N.C. 1976); *A.L. v. G.R.H.*, 325 N.E.2d 501 (Ind. Ct. App. 1975) (sterilization authorization denied). Many of the cases involve adult women; see, e.g., *In*

tice is interwoven with the issue of control of female reproductive rights and, to some extent, of female sexual expression.

Many themes concerning reproductive rights arise throughout the constitutional jurisprudence in this area. For example, some courts have reasoned that refusing to grant a sterilization petition would constitute a denial of procreative choice or exercise of a right to privacy.⁹ Similarly, some courts have rationalized that sterilization should be granted because the woman's fertility burdens her liberty interests.¹⁰ Many courts have overemphasized the state's interest in preventing unwanted pregnancies and have distorted traditional fundamental rights analysis. Moreover, courts have avoided exploring the least restrictive means to prevent conception, and have failed to examine the interests of the individual in retaining bodily integrity and privacy free of state intrusion.¹¹ In states where institutionalized persons may be legally sterilized, courts have held that access to sterilization would provide equal protection rights for noninstitutionalized women.¹² Another common theme is the responsibility of state legislatures or courts, or both, to authorize sterilizations in order to protect the taxpayers from supporting future neglected children.¹³ Finally, a rare but more positive theme in the case law is the principle that courts should protect people with mental disabilities from sterilization imposed by persons with conflicting interests.¹⁴

The case law is also instructive with respect to which arguments have not been advanced. Although fundamental rights have frequently been litigated in these cases, advocates have not used the argument that sterilization laws have a disproportionate impact on women. In addition, case law fails to address the impact of sterilizations on both marriage

re Eberhardy, 307 N.W.2d 881 (Wis. 1981) (22-year old); *In re Truesdell*, 329 S.E.2d 630 (N.C. Ct. App. 1985); *C.D.M. v. State*, 627 P.2d 607 (Alaska 1981) (19-year old); *In re Grady*, 426 A.2d 467 (N.J. 1981) (19-year old); *In re Moe*, 432 N.E.2d 712 (Mass. 1982) (24-year old); *In re Terwilliger*, 450 A.2d 1376 (Pa. Super. Ct. 1982) (25-year old); *In re Debra B.*, 495 A.2d 781 (Me. 1985) (26-year old); *In re Matejski*, 419 N.W.2d 576 (Iowa 1988); *In re Sallmaier*, 378 N.Y.S.2d 989 (Sup. Ct. 1976) (24-year old); *Holmes v. Powers*, 439 S.W.2d 579 (Ky. 1968) (35-year old); *Frazier v. Levi*, 440 S.W.2d 393 (Tex. Civ. App. 1969) (34-year old); *In re Valerie N.*, 707 P.2d 760 (Cal. 1985) (30-year old).

Several cases involve potential sterilizations of minors; *see, e.g., In re M.K.R.*, 515 S.W.2d 467 (Mo. 1974) (13-year old); *In re S.C.E.*, 378 A.2d 144 (Del. Ch. 1977) (13-year old); *Wentzel v. Montgomery Gen. Hosp.*, 447 A.2d 1244 (Md. Ct. App. 1982) (13-year old); *In re Nilsson*, 471 N.Y.S.2d 439 (Sup. Ct. 1983) (hyterectomy on 14-year old girl allowed by court); *Ruby v. Massey*, 452 F. Supp. 361 (D.Conn. 1978) (three girls aged 12, 13, and 15); *In re Penny N.*, 414 A.2d 541 (N.H. 1980) (14-year old); *In re Hayes*, 608 P.2d 635 (Wash. 1980) (en banc) (16-year old); *Cook v. State*, 495 P.2d 768 (Or. Ct. App. 1972) (sterilization of 17-year old allowed by court); *Hudson v. Hudson*, 373 So.2d 310 (Ala. 1979) (15-year old); *In re A.W.*, 637 P.2d 366 (Colo. 1981) (en banc) (12-year old) remanded with guidelines); *In re P.S.*, 452 N.E.2d 969 (Ind. 1983) (sterilization of 12-year old allowed by court).

⁹ *In re Valerie N.*, 707 P.2d 760; *In re Moe*, 432 N.E.2d 712.

¹⁰ *See, e.g., In re Grady*, 426 A.2d 467.

¹¹ *In re Moore*, 221 S.E.2d 307 (N.C. 1976); North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451 (M.D.N.C. 1976).

¹² *See, e.g., Ruby v. Massey*, 452 F. Supp. 361 (D.Conn. 1978).

¹³ North Carolina Ass'n, *supra* note 11; *see also infra* note 265.

¹⁴ *In re Eberhardy*, 307 N.W.2d 881 (Wis. 1981).

possibilities and relationships of sterilized individuals who marry after coerced sterilization.

A thread running through the fabric of virtually all of the decisions is the cultural preoccupation with women's fertility. This obsession diminishes women's privacy and reproductive autonomy and reflects a disturbing comfort among strangers in debating the question of whether a woman should be permitted to procreate.

Judicial participation in sterilization decisions also warrants concern. A disturbing trend in the case law is that the judges adopt active, participatory roles rather than remaining neutral. The opinions objectify women with mental disabilities through the use of dehumanizing language to describe respondents and often assume that these women do not engage in sex voluntarily. These linguistic techniques package mentally disabled women as "Others" with whom most people would not identify. In contrast to the negative language describing these women, the decisions refer to parents in extremely laudatory terms, a practice which raises the issue of whose interests the courts are protecting.

Examining the reasons advanced for granting sterilization requests provides further insight into sterilization practices. Many of the justifications presented by petitioners seeking sterilizations are wholly unrelated to the best interests of the respondents whose fertility is in jeopardy. Sterilization is implicitly advanced as punishment for sexual promiscuity, as a safeguard of the state fisc, and as a convenience for care givers requesting hysterectomies. The opinions almost uniformly fail to acknowledge the human impact of nonconsensual surgery.

This article explores the modern reality of involuntary sterilization practices as reflected in statutes and case law, and provides a useful statutory and case guide for litigators and legislators who wish to change the law. Part II of this article identifies and discusses the typical rationales supporting coerced sterilization. Part III reviews the constitutional framework for sterilization cases, especially those involving fundamental rights, and explores the possibility of a disparate impact challenge to sterilization practices. Part IV analyzes the enabling statutes and the varied approaches to asserting jurisdiction in the absence of enabling statutes. Part V examines judicial treatment of the individuals subjected to involuntary sterilization. Finally, the conclusion includes suggestions as to how to better protect the rights and the dignity of those at risk of involuntary sterilization.

II. RATIONALES

Statutory and common law advance several justifications for limiting the procreation of mentally disabled individuals. Historically, eugenic advocates claimed that certain "undesirable" and, as they

believed, hereditary traits could be eradicated through sterilizing persons manifesting these traits.¹⁵ Understandably, their efforts were directed at persons who were frequently under the state's control or the control of others: mentally ill and developmentally disabled individuals, and certain classes of criminals.¹⁶ As early as 1897, Michigan considered a bill proposing the use of sterilization to prevent "‘idiocy.’"¹⁷ In 1907, the first "compulsory sterilization law" was passed by the Indiana legislature.¹⁸

Today, sterilization statutes are justified largely by the assumption that mentally¹⁹ impaired individuals are incapable of adequate parenting; therefore, their offspring will inevitably be a financial burden on the state.²⁰ A significant body of case law relies on this rationale. Most of the parents petitioning for sterilization cite the financial inability of their children to care for potential offspring as a factor in their decisions to seek sterilization.²¹ However, financial hardship does not meet constitutional muster where the state draws classifications to protect its fisc.²² It is unclear if this constitutional defect also applies to court-ordered sterilization granted to protect the financial situation of *parents*.

Preventing the births of children with physical and/or mental disabilities is a further justification for sterilizations,²³ regardless of whether the disability is hereditary. This is a hybrid of both the state burden rationale and the eugenic rationale. One authority contends that the institutional pricetag on caring for a child with a hereditary defect

¹⁵ Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 809-10.

¹⁶ See, e.g., *In re Hayes*, 608 P.2d 635, 639 (Wash. 1980) (en banc) (discusses the history of Washington's compulsory sterilization efforts).

¹⁷ BRAKEL, *supra* note 2, at 522.

¹⁸ *Id.* at 523.

¹⁹ Comment, *Eugenic Sterilization Statutes, A Constitutional Re-Evaluation*, 14 J. FAM. L. 280, 287 (1975) [hereinafter *Eugenic*].

²⁰ George P. Smith III, *Limitations on Reproductive Autonomy for the Mentally Handicapped*, 4 J. CONTEMP. HEALTH L. & POL'Y 71, 73 (1988). "[W]ithout a properly functioning mind, one is not only unable to take proper care of oneself but . . . runs the risk (genetic and/or social) of . . . preventing offspring from achieving intellectual independence and thus results in a heavy economic burden to the state and its taxpayers . . ." *Id.* at 73-74 (footnote omitted).

²¹ See *C.D.M. v. State*, 627 P.2d 607, 608 (Alaska 1981); *In re D.D.*, 394 N.Y.S.2d 139, 140 (Surr. Ct. 1977), *aff'd*, 408 N.Y.S.2d 104 (Sup. Ct. 1978); *In re Grady*, 426 A.2d 467, 470 (N.J. 1981); *In re P.S.*, 452 N.E.2d 969, 972 (Ind. 1983); *In re Eberhardy*, 307 N.W.2d 881, 883 (Wis. 1981); *In re Moe*, 432 N.E.2d 712, 715, n.1 (Mass. 1982). In *Wentzel v. Montgomery General Hospital*, guardians claimed that if their ward had a baby, both of them would "become wards of the State, if her family cannot care for both. . . . [T]his will place a financial burden on the State, and it therefore has a compelling interest justifying granting the guardians' petition . . ." 447 A.2d 1244, 1247-48 (Md. Ct. App. 1982).

²² *Eugenic*, *supra* note 19, at 299-300 (citing *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)). See also *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263 (1974) ("[A] State may not protect the public fisc by drawing an invidious distinction between classes of its citizens The conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a durational residence requirement which . . . penalizes exercise of the right to freely migrate and settle in another state." [citation omitted]).

²³ *Eugenic*, *supra* note 19, at 285.

amounts to \$250,000 over a lifetime.²⁴ Although some modern courts mention whether or not the individual's impairment is genetic,²⁵ this does not appear to be a determinative factor in many cases. In fact, a few courts have emphasized that the probability of offspring inheriting an impairment had no bearing on the outcome of the case.²⁶

III. CONSTITUTIONAL FRAMEWORK

A. Fundamental Rights and Equal Protection: Supreme Court Cases

Although many modern appellate courts continue to rely on *Buck v. Bell*, this reliance may be misplaced. Decided in 1927, the *Buck* court based its holding that the Virginia statute did not violate the substantive due process requirements of the Fourteenth Amendment on its finding that the state had a rational basis for its statute. Although in *Buck* the Court did not use the "rational basis" nomenclature which has attached to substantive due process analysis since *Buck*, Virginia's goal of improving the "welfare . . . of society" led the Court to conclude that it could not "say as a matter of law that the grounds do not exist, and if they exist they justify the result."²⁷

Next, the Court held that the statute did not violate the Fourteenth Amendment equal protection requirement. This conclusion appears to be based on finding a rational basis for sterilizing a particular class of persons whose children would financially burden the state.²⁸ Holmes clearly believed that "feeble-minded" persons routinely spent some part of their lives in state institutions and, therefore, as sterilized people were released into the community and fertile persons were admitted in their place, application of the law would be equalized.²⁹

The evolution of fundamental rights and equal protection analysis has produced a broader legal framework in which to consider the questions *Buck* raised. However, courts have been reluctant to keep pace with this evolution of privacy rights analysis in the sterilization context. *Skinner*, in 1942, was the last time the Supreme Court considered the constitutionality of sterilization statutes. Although the Court's approach

²⁴ Smith, *supra* note 20, at 73 & n.13 (citing U.S. Dep't of Health, Education & Welfare, *What Are the Facts About Genetic Disease?* (1978)).

²⁵ C.D.M., 627 P.2d at 608 (at least a 50% probability that C.D.M.'s children would be mentally retarded and a virtual certainty of it if the father shared her genetic impairment); *In re Eberhardy*, 307 N.W.2d at 883 & n.2 (the chances of Eberhardy having a "severely handicapped" baby were "considerable", and of having a child with mental retardation "one out of four"); *In re M.K.R.*, 515 S.W.2d 467, 469 (Mo. 1974) (child would probably be "abnormal").

²⁶ *In re A.W.*, 637 P.2d 366, 368 (Colo. 1981) (en banc) (Court expressly rejects eugenics principles); *In re Grady*, 426 A.2d at 473, n.3 ("We flatly reject continued efforts in recent times to justify compulsory sterilization for eugenics . . . purposes.").

²⁷ 274 U.S. at 207.

²⁸ *Id.*

²⁹ *Id.* at 208.

to fundamental rights in *Skinner* is rendered obsolete by subsequent cases, the Court's approach is instructive. *Skinner* opened with a statement meant to distance itself from Justice Holmes' position in *Buck*: "This case touches a sensitive and important area of human rights."³⁰ The Court then expressed its concern regarding a practice that "deprives certain individuals of a right which is basic to the perpetuation of a race — the right to have offspring."³¹ The Court went on to note that because the right to procreate is "fundamental . . . [,] strict scrutiny is essential."³² Given this characterization, *Buck's* rationality review appears to be no longer sufficient. Although the *Skinner* Court ultimately struck down the statute on the ground that Oklahoma did not have a rational reason for sterilizing larcenists but not embezzlers,³³ the Court emphasized fundamental rights throughout the opinion. Moreover, the concurring opinions reflect discomfort with the implications of sterilization laws. First, Justice Stone was disturbed that the law did not allow the petitioner to show that *his* criminal trait was not inheritable.³⁴ The issue the Court should have addressed was "not one of equal protection, but whether the wholesale condemnation of a class to such an invasion of personal liberty, without . . . opportunity to show that his is not the type of case which would justify resort to it, satisfies . . . due process."³⁵ In his concurrence, Justice Jackson clearly posed the fundamental problem which haunts the most recent sterilization cases:

There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority — even those who have been guilty of what the majority defines as crimes. But this Act falls down before reaching this problem, which I mention only to avoid the implication that such a question may not exist because not discussed. On it I would also reserve judgment.³⁶

In a string of cases involving state intrusions on procreative choice challenged on substantive due process and/or equal protection grounds, the Court confronted concerns that the *Skinner* majority refused to squarely address. In *Griswold v. Connecticut*,³⁷ the Supreme Court struck down a state law which criminalized contraceptive use and counselling. The Court found that certain provisions of the Bill of Rights created a "zone of privacy" which protected the marital relationship and with which the state was prohibited from interfering.³⁸ Since the law

³⁰ 316 U.S. at 536.

³¹ *Id.* (emphasis added).

³² *Id.* at 541.

³³ *Id.* at 542.

³⁴ *Id.* at 544 (Stone, J., concurring).

³⁵ *Id.*

³⁶ *Id.* at 546-47 (Jackson, J., concurring).

³⁷ 381 U.S. 479 (1965).

³⁸ *Id.* at 484-85.

endeavored “to achieve its goals by means of having a maximum destructive impact upon” the marital partnership, it violated the right of privacy of those subject to it.³⁹

*Eisenstadt v. Baird*⁴⁰ extended *Griswold*’s holding to nonmarried individuals. *Eisenstadt* involved a law criminalizing distribution of contraceptives to single persons.⁴¹ The Court held that the state lacked a rational basis for prohibiting distribution of contraceptives to nonmarried individuals while allowing distribution to married persons.⁴² The Court found that the state’s *sole* reason for imposing the prohibition was simply to deny “contraception per se” to single persons.⁴³ Although the Court expressly declined to base its holding on a fundamental rights violation,⁴⁴ it did extend “the right of privacy . . . [to] the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁴⁵

Griswold and *Eisenstadt* paved the way for *Roe v. Wade*,⁴⁶ in which the Court held that states could not completely ban nontherapeutic abortions. Because *Roe* is referenced in a number of recent sterilization cases to support the conclusion that *not* authorizing sterilization would amount to an impermissible intrusion on procreative choice, it is important to note *Roe*’s catalog of dangers resulting from state intrusion:

Maternity . . . may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the stress, for all concerned, associated with the unwanted child [T]he additional difficulties and continuing stigma of unwed motherhood may be involved.⁴⁷

Furthermore, the Court concluded that the state retained an “important interest . . . in protecting potential life.”⁴⁸ In this context, the Court cited *Buck* to support its assertion that an individual does not have “an unlimited right to do with one’s body as one pleases”⁴⁹ The Court based its holding on a substantive due process rationale. Because the right to privacy is “‘fundamental’, . . . regulation limiting these rights may be justified only by a ‘compelling state interest’ ” and the means by which the state promotes its interest “must be narrowly drawn to express

³⁹ *Id.* at 485-86.

⁴⁰ 405 U.S. 438 (1972).

⁴¹ *Id.* at 441-42.

⁴² *Id.* at 447.

⁴³ *Id.* at 443.

⁴⁴ *Id.* at 447, n.7.

⁴⁵ *Id.* at 453.

⁴⁶ 410 U.S. 113 (1973). The “right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” *Id.* at 153.

⁴⁷ *Id.*

⁴⁸ *Id.* at 154.

⁴⁹ *Id.*

only the legitimate state interests at stake."⁵⁰ The Court found that the state's interest in protecting the health of the pregnant woman became "compelling" after the first trimester, and the state's interest in "protecting . . . the potentiality of human life" became "compelling" after the fetus attained "viability."⁵¹ Therefore, state regulation or restrictions of particular kinds could be imposed at these points.⁵²

In 1989, *Roe* was weakened by *Webster v. Reproductive Health Services*⁵³ when the Court decided that the "trimester framework" of *Roe* was "unsound in principle and unworkable in practice."⁵⁴ The Court held that Missouri had an interest in protecting potential human life which was furthered by requiring physicians to conduct viability tests on women seeking abortions when the physician believed the fetus to be twenty weeks old.⁵⁵ The Court conceded the tests were expensive, presented some risks to the mother and fetus, interfered with the physician-patient relationship, and occasionally indicated that the fetus was *not* viable. Nevertheless, the plurality was "satisfied that the requirement of these tests permissibly further[ed] the State's interest in protecting potential human life. . . ."⁵⁶

Webster is also important for what it does not say. The plurality never characterized Missouri's interest in protecting fetal life as "compelling" but only "legitimate."⁵⁷ This follows from the statement that the choice of whether or not to bear a child was only "a liberty interest protected by the Due Process Clause"⁵⁸ This is a departure from the Court's previous holdings that the abortion choice was a "fundamental right."⁵⁹ Given that interference with a fundamental right requires a compelling state interest, characterization of the abortion decision as merely a liberty interest results in the requirement of something less than a compelling state interest to sustain state regulation, perhaps only a "legitimate" interest, as the plurality noted here.

B. Is Involuntary Sterilization an Impermissible Intrusion on Fundamental Rights to Procreative Choice or Privacy?

Modern appellate courts that have confronted the involuntary ster-

⁵⁰ *Id.* at 155 (quoting *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969)).

⁵¹ *Id.* at 163.

⁵² *Id.* at 164-65.

⁵³ 492 U.S. 490 (1989).

⁵⁴ *Id.* at 518 (quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546 (1985)). The trimester framework was discarded by a plurality of justices in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791, 2818 (1992).

⁵⁵ *Id.* at 519.

⁵⁶ *Id.* at 519-20.

⁵⁷ *Id.* at 520.

⁵⁸ *Id.*

⁵⁹ *Id.* (quoting *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420 n.1 (1983)).

ilization issue typically have taken one of four approaches to fundamental rights issues. One line of cases frames the issue as whether the individual's right to be sterilized would be impermissibly restricted if sterilization were *denied*. Other cases acknowledge the fundamental rights to privacy and procreative choice, but engage in only a cursory and simplistic analysis. A third line of decisions denies equal protection and substantive due process challenges on the ground that states' interests in authorizing sterilizations outweigh fundamental rights and provide a reasonable basis for creating legal classifications based on mental disability. Finally, a few cases base their holdings, at least in part, on the ground that involuntary sterilizations invade a fundamental right with no corresponding state interest strong enough to justify the intrusion. Thus, some courts apply some prongs of the compelling interest test but not others, creating a patchwork of analytical techniques with no sound principles emerging.

i. Fundamental Privacy Right to and Liberty Interest in Sterilization

In *In re Valerie N.*⁶⁰ the Supreme Court of California rejected the petitioner's argument that a California statute forbidding the sterilization of "ward[s] or conservatee[s]" promoted her "right of procreative choice . . . by protecting her against sterilization forced upon her"⁶¹ The court chose to frame the issue quite differently. Since Valerie was incapable of exercising her procreative rights, the inquiry was "whether she has a constitutional right *to have these decisions made for her*, . . . in order to protect her interests in living the fullest and most rewarding life" possible.⁶² The court concluded that the statutory *prohibition* of sterilizations denied "developmentally disabled persons . . . privacy and liberty interests protected by the Fourteenth Amendment."⁶³ Given that liberty interests and the right to privacy are "fundamental," the state could intrude upon personal exercise only to further a "compelling interest" and employ means "narrowly drawn" to further its goal.⁶⁴ If the state's interest was in protecting the right of conservatees to independently choose whether or not to bear children, the statute spanned "too broadly for it extend[ed] to individuals who" were permanently incapable of exercising choice. However, having deemed that some conservatees could not exercise *procreative* choices, the court asserted that the prohibition interfered with the conservatee's "exercise of other fundamental rights."⁶⁵ To the extent that sterilization was needed for the exercise of

⁶⁰ 707 P.2d 760 (Cal. 1985).

⁶¹ *Id.* at 771 (quoting Cal. Welf. & Inst. Code § 2356(d)).

⁶² *Id.* (emphasis added).

⁶³ *Id.* at 771-72.

⁶⁴ *Id.* at 774.

⁶⁵ *Id.*

these rights, the state intruded on these rights by not granting the sterilization request. Furthermore, because the woman could not choose whether to procreate or not, the "restriction" did not further the state's goal of protecting that choice.⁶⁶ This reasoning resulted in the court's conclusion that the statute was "constitutionally overbroad."⁶⁷ The court also rested its holding on the equal protection ground that the statute impermissibly denied the choice of sterilization to those acting in the interests of developmentally disabled persons, but this choice remained unfettered for nondisabled women.⁶⁸

The theme that fertility burdens liberty interests also appeared in *In re Grady*, in which the New Jersey Supreme Court held that one's fundamental "right of privacy includes the right to undergo sterilization voluntarily."⁶⁹ Additionally, a choice of sterilization "is . . . a part of an individual's personal right to control her own body and life."⁷⁰ The court concluded that "[t]o preserve that right and the benefits that a meaningful decision would bring to her life, it may be necessary to assert [sterilization] on her behalf."⁷¹ While the court acknowledged "that the right to be sterilized comes within the privacy rights protected from undue governmental interference," it did not pursue this analysis.⁷²

In *In re Moe*, the court reasoned that while "[t]he State has no recognizable interest in *compelling* the sterilization of its citizens," the requested sterilization in this case was not "compulsory."⁷³ Moreover, "incompetent persons need some forum in which to exercise their statutory and constitutional rights"⁷⁴ While the court recognized that procreative choice and a right to privacy were fundamental, it did not view sterilization as an intrusion upon those rights, but rather as a facilitator of the exercise of those rights.⁷⁵ As a result, this court failed to balance the individual's interests against state's interests, as *Roe* requires.

In none of these cases does the court explain *why* one who is incapable of exercising procreative choice must be liberated from the burden of fertility. Lee Ann Grady was not pregnant or at immediate risk of becoming pregnant.⁷⁶ How was fertility interfering with her life? In *Grady*, the parents argued that Lee Ann's autonomy would be furthered in a half-way house, and that sterilization was a prerequisite to this independence. However, Lee Ann had been taking birth control pills for four

⁶⁶ *Id.*

⁶⁷ *Id.* at 776.

⁶⁸ *Id.* at 772.

⁶⁹ 426 A.2d at 473.

⁷⁰ *Id.* at 474.

⁷¹ *Id.* at 475.

⁷² *Id.* at 474.

⁷³ 432 N.E.2d 712, 717 (Mass. 1982).

⁷⁴ *Id.* at 718.

⁷⁵ *Id.* at 720.

⁷⁶ 426 A.2d at 470.

years prior to the hearing;⁷⁷ there was no articulated reason why she could not continue to do so in a supervised setting.

In *Valerie N.*, the court failed to recognize the legislature's clear intent to take the sterilization choice away from the conservator who had almost total control over all other areas of the conservatee's life. Thus, there is a paternalistic clash between the courts and the legislature, each of whom grant mentally disabled women varying degrees of autonomy. It is unlikely that the court would have been as paternalistic if Lee Anne or Valerie had been male, for the state has historically been reluctant to interfere with the procreative exercise of males. Conversely, there remains a cultural preoccupation with female fertility which has created a diminished privacy for all women. With the courts, the state legislatures, and the culture at large repeatedly addressing abortion rights during the last twenty years, privacy in the area of female reproductive rights has been reduced. In sum, the state and the culture have developed a comfort in debating upon and interfering with the procreative choices of women.

A further problem, reflected in *Moe*, is the characterization of involuntary sterilization as noncompulsory. This label is intended to distance modern sterilizations from the time when women in institutions were routinely sterilized in furtherance of eugenic principles. However, the courts' insistence that sterilization of a person who cannot consent is not compulsory overlooks the intrusive nature of involuntary sterilization and trivializes the humanity of the respondents.

The courts' conclusions in these cases rests on the premise that *not* to make a determination for someone incapable of making it is to restrict the ability of another to exercise that right on her behalf. Yet, nowhere in these opinions is the simple right to be left alone addressed.

ii. Fundamental Right to Procreation Acknowledged but Ignored

In *Ruby v. Massey*, parents of mentally and physically disabled minor women argued that a Connecticut statute restricting court-ordered sterilizations of incompetent minors to those in state institutions violated their right as parents to familial privacy and denied their noninstitutionalized daughters equal protection of the laws.⁷⁸ Comparing sterilization to abortion, the court noted that sterilization affects a woman's health, her ability to procreate, her physical well-being, and future possible offspring.⁷⁹ The court then distinguished children who are mentally incapable of deciding for themselves whether to be sterilized and, abandoning its fundamental rights analysis, moved on to hold that

⁷⁷ *Id.*

⁷⁸ 452 F. Supp. at 361, 363, 367 (D.Conn. 1978).

⁷⁹ *Id.* at 365 (citing *Roe v. Wade*, 410 U.S. 113, 162 (1973)).

denial of the "right" to judicially ordered sterilization violated the children's equal protection rights because the state failed to demonstrate a "compelling state interest" that justified denying plaintiffs' access to the sterilization procedure for their children.⁸⁰ Thus, the court paved the way for plaintiffs to sterilize their daughters, despite the infringement on their fundamental right to procreate. Significantly, the Connecticut legislature later repealed the statute at issue in *Ruby* and replaced it with a statute authorizing sterilization of incompetent *adults* only.⁸¹

In *In re Hayes*, the Supreme Court of Washington recognized that tubal ligations and vasectomies "touch . . . upon the individual's right of privacy and the fundamental right to procreate" and that sterilization "should be undertaken only after careful consideration of all relevant factors."⁸² Moreover, the court recognized its responsibility "to protect the individual's right of privacy, and thereby not *unnecessarily* invade that right."⁸³ Similarly, the Supreme Court of Alaska, in *C.D.M. v. State*, concluded that because a tubal ligation irreversibly curtails "the intensely personal right to procreate, . . . the court must take great care to ensure that the incompetent's rights are jealously guarded."⁸⁴ By characterizing the right as "intensely personal" rather than "fundamental," the court distanced itself from the traditional view of fundamental rights. In both cases, the courts refrained from serious inquiry into the state's interest in intruding on the fundamental right, choosing instead to remand the petitions to the trial courts for determination of respondents' best interests. Thus, the traditional implications of the fundamental right to procreate were not fully addressed. Likewise, the court in *In re Terwilliger* concluded that because a tubal ligation was "highly intrusive" and permanently "extinguishes the ward's fundamental right of procreative choice," remand to the lower court for development of a more detailed record with respect to respondent's best interests was required.⁸⁵

In these cases, the courts were concerned with "fundamental rights" only to the extent of requiring procedural safeguards. If an incompetent individual did not argue that his or her fundamental rights were intruded upon, as in *C.D.M.*, the courts found it easier to ignore the traditional ramifications of the fundamental rights doctrine altogether, referring to "fundamental rights" only rhetorically.

Although these opinions raised the issue of fundamental rights in the sterilization context, disabled women's fundamental right to procre-

⁸⁰ *Id.* at 369.

⁸¹ The new statute is CONN. GEN. STAT. ANN. § 45a-690 through § 45a-700 (West 1981 & Supp. 1992).

⁸² 608 P.2d 635, 639 (Wash. 1980).

⁸³ *Id.* at 640 (emphasis added).

⁸⁴ 627 P.2d 607, 612 (Alaska 1981).

⁸⁵ 450 A.2d 1376, 1385-86 (Pa. Super. Ct. 1982) (quoting *In re Moe*, 432 N.E.2d at 712, 717 (Mass. 1982)).

ate never became a serious counterweight to the interests of the state. Courts invoked fundamental rights rhetoric to protect the procedural safeguards surrounding sterilization, but failed to engage in serious doctrinal analysis. The courts did not adequately consider the disabled individual's right *not* to be sterilized in opposition to the interests of the state.

iii. Fundamental Rights and Equal Protection Examined but Sterilization Upheld

Two North Carolina opinions involved the most forcefully argued contentions of the unconstitutionality of a sterilization statute. Given North Carolina's eugenic goals on the face of its statute, these challenges were inevitable. In the case of *In re Moore*, a mentally impaired teenage boy argued that the North Carolina involuntary sterilization statute violated Fourteenth Amendment substantive due process and equal protection.⁸⁶ The Supreme Court of North Carolina, citing *Buck*, concluded that as long as "notice and hearing are provided, [and] if it is applied equally to all persons, and if it is not prescribed as punishment for a crime," the statute was constitutionally sound.⁸⁷ The court reversed the lower court's dismissal of the County Department of Social Services' petition for sterilization of Moore.⁸⁸

Although the *Moore* court acknowledged the teenager's fundamental rights, the court found the interest of the state sufficiently compelling to outweigh those rights. In its substantive due process analysis, the court noted that "[t]he health of the mother and the potential life of the child" are the compelling state interests under *Roe*.⁸⁹ The court then emphasized that North Carolinians were entitled "to prevent the birth of children who will become a burden on the state," because of genetic forms of " 'feble-mindedness, idiocy, or imbecility.' "⁹⁰ Indeed, elected state representatives were responsible " 'to protect the public and preserve the race from [the] known effects of the procreation of mentally deficient children by the mentally deficient' ".⁹¹ Next, the court turned to the state's interest in promoting the welfare of the individual and held that sterilization would "be in [her or his] best interest," when she could not provide for her children and was unable to use other contraceptives.⁹² The court deemed "compelling" all of the foregoing state interests.⁹³

⁸⁶ 221 S.E.2d 307, 308-09 (N.C. 1976).

⁸⁷ *Id.* at 309.

⁸⁸ *Id.* at 316.

⁸⁹ *Id.* at 312.

⁹⁰ *Id.* at 313 (quoting *In re Cavitt*, 157 N.W.2d 171 (Neb. 1968)).

⁹¹ *Id.* Moreover, the United States Supreme Court has held that saving public funds is *not* a compelling interest, contrary to *Moore*'s analysis. *Supra* note 19.

⁹² *Id.* at 312-13.

⁹³ *Id.* at 313.

The *Moore* court also upheld the statute against Moore's equal protection challenge because the classification was based on "reasonable distinctions, . . . affect[ing] all persons similarly situated," and there was a "rational relation" between the classification and the goal of the law,⁹⁴ to "prevent" the parenthood of people with mental disabilities who would not be able to take care of their offspring, or who would have children with specified birth defects. The court held that, given these statutory goals, "the classification . . . is reasonable."⁹⁵

Within a few months of *Moore*, in *North Carolina Ass'n for Retarded Children v. North Carolina*,⁹⁶ the Association and the United States as intervenor brought suit in federal court against North Carolina challenging the constitutionality of the sterilization statute. The court dispensed with the equal protection challenge based on the *Moore* rationale that the classification is reasonably related to compelling state interests.⁹⁷ It paid little attention to the plaintiffs' fundamental rights argument, merely finding that the state's dual purpose of deterring the birth of "defective" babies or children whom their parents could not care for constituted "compelling" interests, without weighing those interests against the individual's rights.⁹⁸

Neither the *N.C. Ass'n* nor the *Moore* court addressed the *Roe* requirement that the statute "be narrowly drawn to express only" the state's compelling interests.⁹⁹ Thus, their analysis used only one component of the fundamental rights doctrine—the compelling interests inquiry. These courts never addressed whether fulfillment of the state's goals *required* sterilization or whether there were less intrusive means of reaching those goals. To ask the question is to answer it in most cases. Many mentally disabled respondents are under extremely close supervision by petitioners who could administer oral contraceptives. The advent of Norplant, an FDA approved contraceptive implanted in a woman's arm, removes the problems of daily contraceptive administration in a procedure much less intrusive than permanent sterilization. Norplant lasts five years and is reversible, unlike sterilization.¹⁰⁰ Moreover, medically, it is a good substitute for oral contraceptives, as its side effects are comparable and its failure rate is less than one percent.¹⁰¹ New contraceptives such as Norplant undermine the need for sterilization as the narrowest means to an end.

The central problem in this line of cases is the courts' failure to

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ 420 F. Supp. 451 (M.D.N.C. 1976).

⁹⁷ *Id.* at 457-58.

⁹⁸ *Id.* at 458.

⁹⁹ *Roe v. Wade*, 410 U.S. 113, 155 (1973).

¹⁰⁰ Steven Findlay, *Birth Control*, U.S. NEWS & WORLD REPORT, Dec. 24, 1990, 58, 59.

¹⁰¹ *Id.*

examine the *individual's* interests in remaining fertile or, in the case of women, at least her interest in not undergoing major surgery. The Supreme Court in *Roe*, *Griswold*, and *Eisenstadt* emphasized women's interests in remaining autonomous and free from state interference inherent in rights of privacy and procreative choice. The state's interests in restricting procreative freedom were measured against this backdrop. In *sterilization* cases, however, the emphasis is almost entirely on the state's interests. When the woman's interests are considered at all, it is in language of paternalism. The courts conclude, based upon no cited authority, that those subject to the statutes would only *benefit* from the surgery, either in terms of being liberated to pursue other goals or by being psychologically unburdened. This conclusory approach is in stark contrast to *Roe's* catalog of the interests of pregnant women in need of an abortion. As discussed in Part III.D., persuasive evidence exists that women who are involuntarily sterilized do not view it as a liberating step but, rather, as degradation, stigmatization, and a limit on their future relationships.¹⁰²

Moreover, the emphasis on the two interests cited in *Roe* may be misplaced. The state's interests in an abortion context do not *become* compelling until a potential life has been developing for one trimester. In the sterilization context, when do these interests *become* compelling? The cases are silent. The opinions do not explain why the state's interests in the mother's and fetus' health are compelling all through the life of a not pregnant, often not sexually active, mentally disabled woman, whereas these interests are compelling in the lives of nondisabled women only when they are pregnant.

iv. Fundamental Rights Upheld as a Basis for Nonauthorization of Sterilization

*In re Eberhardy*¹⁰³ is an unusual case in which the court applied the fundamental rights analysis accurately, with an emphasis on the individual's interest and on least restrictive means. The court's approach to the choice issue is uncommon among sterilization decisions: "Any governmentally sanctioned (or ordered) procedure to sterilize a person who is incapable of giving consent must be denominated for what it is, . . . the state's *intrusion* into the determination of whether or not a person who makes *no choice* shall be allowed to procreate."¹⁰⁴ The court emphasized the permanence of a sterilization order for which judges could "afford no method for correcting an error in the exercise of this discretion."¹⁰⁵

¹⁰² See *infra* notes 142-152 and accompanying text.

¹⁰³ 307 N.W.2d 881 (Wis. 1981).

¹⁰⁴ *Id.* at 893 (emphasis added).

¹⁰⁵ *Id.* at 894.

Moreover, the court pointed out that the likelihood of new birth control devices which could be independently utilized by mentally disabled individuals "militate[d] for restraint."¹⁰⁶ The court distinguished sterilization from other Supreme Court decisions regarding procreation; since sterilization resulted in a permanent end to procreation, it was in a "different classification."¹⁰⁷ Instead of considering the state's interests in *authorizing* sterilization, the court recognized the state's interest in *protecting* mentally incompetent persons from the imposition of sterilization by parties with conflicting interests: "parents, guardians, or . . . social workers."¹⁰⁸ The court further contrasted the contingency of the individual's pregnancy with the permanence of the sterilization procedure.¹⁰⁹ For all of these reasons, the *Eberhardy* court declined to order sterilization absent an enabling statute.¹¹⁰

C. Disproportionate Impact

The argument that sterilization has a disproportionate impact on women in violation of the equal protection clause of the Fourteenth Amendment is absent from sterilization case law. However, several factors encourage an exploration of its applicability in this area. First, the overwhelming number of women who are sterilized as compared to the few men in the case law is evidence of the disproportionate impact of the statutes.¹¹¹ Second, the very procedure of sterilization results in a disproportionate impact. Sterilization surgery

is much more serious in women than in men. In females the surgeon must do an abdominal operation, removing segments of the fallopian tubes . . . and tying the cut ends. In men the operation is relatively simple. Small scrotal skin incisions are made, segments of the vas deferens are removed, . . . and the proximal ends of the vas are tied.¹¹²

Additionally, there is a history of cultural preoccupation with sterilizing women deemed unfit to parent but no corresponding preoccupation with male parenting. Most recently, this theme appeared in an editorial in a distinguished newspaper, where the author proposed that *mothers* on welfare (but not the fathers of their children) be paid money in exchange for Norplant implantation.¹¹³

Given the above factors, it is quite predictable that women would be

¹⁰⁶ *Id.* at 894-95.

¹⁰⁷ *Id.* at 896.

¹⁰⁸ *Id.* at 896-97.

¹⁰⁹ *Id.* at 897.

¹¹⁰ *Id.* at 899.

¹¹¹ See, e.g., *In re Moore*, 221 S.E.2d 307 (N.C. 1976); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) for two rare cases involving males.

¹¹² BRAKEL, *supra* note 2, at 521.

¹¹³ *Poverty and Norplant: Can contraception reduce the underclass?*, PHIL. INQUIRER, Dec. 12, 1990, at A18.

the nearly exclusive subjects of involuntary sterilization statutes. The only evidence that these laws were not intended to be applied to women more than to men is the facial neutrality of the laws themselves. Is facial neutrality enough to thwart a challenge of gender discrimination? In *Washington v. Davis*,¹¹⁴ the Supreme Court held that a law which was racially neutral on its face, but had a “disproportionate impact” on a minority, did not violate the Fifth or Fourteenth Amendment guarantees of equal protection absent proof of discriminatory *intent*. Although *Davis* is significant because it requires disproportionate impact claims to be supported by evidence of discriminatory intent to elicit strict scrutiny, several factors entered into the Court’s treatment of the claim. First, the defendant countered discriminatory implications with evidence of a plausible effort to recruit black applicants, presenting evidence that “[forty-four percent] of new police force recruits had been black” in the prior seven years.¹¹⁵ This evidence may have been extremely persuasive to the majority’s conclusion, for the Court noted that:

[e]ven agreeing with the District Court that the differential racial effect of Test 21 called for further inquiry, we think the . . . Court correctly held that the affirmative efforts of the . . . Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race¹¹⁶

Moreover, the Court indicated that, in cases in which disproportionate impact on one race is extreme, disproportionate impact alone may support a finding of unconstitutionality “because in various circumstances the discrimination is very difficult to explain on nonracial grounds.”¹¹⁷

In his concurring opinion, Justice Stevens expressed discomfort with the majority’s requirement of discriminatory purpose. Stevens emphasized the value of circumstantial evidence in the discriminatory impact context:

[N]ormally the actor is presumed to have intended the natural consequences of his deeds. . . . [T]he line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court’s opinion might assume.¹¹⁸

Challenges similar to that in *Davis* have been launched against laws that disproportionately impact women. In *Geduldig v. Aiello*,¹¹⁹ several California residents challenged the constitutionality of a state disability

¹¹⁴ 426 U.S. 229, 239 (1976). Respondents were former applicants to the D.C. Police Department who claimed that a recruiting test the Department administered to all applicants “excluded a disproportionately high number of Negro applicants” and therefore resulted in discrimination. *Id.* at 232-33.

¹¹⁵ *Id.* at 235.

¹¹⁶ *Id.* at 246.

¹¹⁷ *Id.* at 242.

¹¹⁸ *Id.* at 253-54 (Stevens, J., concurring).

¹¹⁹ 417 U.S. 484 (1974).

insurance program which excluded normal pregnancy and childbirth from coverage, on grounds that the classification's disproportionate impact on women violated equal protection. However, the Court held that "so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point" on the continuum of disabilities the state chose to cover with its disability insurance fund.¹²⁰ Although only women can become pregnant, the Court refused to infer gender discrimination on the face of the statute:

Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons.¹²¹

A similar challenge was brought in *Personnel Administrator of Massachusetts v. Feeney*,¹²² in which a woman questioned the constitutionality of a Massachusetts statute granting top preference for civil service jobs to veterans. The appellee argued that this preference "inevitably operate[d] to exclude women from consideration for the best Massachusetts civil service jobs and thus unconstitutionally denie[d] them . . . equal protection."¹²³ Considering the outcome in *Geduldig*, it is not surprising that, in a case involving a law which *could* benefit some women (those who were veterans), the Court had no trouble upholding the constitutionality of the statute:

[T]here can be but one answer to the question whether this veteran preference excludes significant numbers of women from preferred state jobs because they are women or because they are nonveterans. Apart from the facts that the definition of "veterans" in the statute has always been neutral as to gender and that Massachusetts has consistently defined veteran status in a way that has been inclusive of women who have served in the military, this is not a law that can plausibly be explained only as a gender-based classification.¹²⁴

The weight of the case law indicates a strong trend of disproportionate application of involuntary sterilization statutes to women. Of several dozen modern sterilization cases, only two involved sterilization of men.¹²⁵ Yet, because sterilization statutes are facially gender neutral, an

¹²⁰ *Id.* at 495.

¹²¹ *Id.* at 496, n.20, *superseded by statute*, 42 U.S.C. § 2000(e)(k) (1982).

¹²² 442 U.S. 256 (1979).

¹²³ *Id.* at 259.

¹²⁴ *Id.* at 275.

¹²⁵ *Supra* note 8 and accompanying text.

equal protection challenge based on gender discrimination is unlikely to be successful.

Unfortunately, the intent of the legislatures in enacting sterilization statutes is difficult to obtain. Out of six states contacted for literature representing the legislative history of the most recent statutes, all forwarded only a copy of the statute or the bill as it was enacted.¹²⁶ Two other states replied in telephone requests that there was no legislative history preserved in writing in their states.¹²⁷ Thus, the intent of the legislatures usually must be inferred from other sources, if at all.

Sterilization cases typically involve parents initiating the procedure for their daughters, but seldom for sons.¹²⁸ Nevertheless, granting a sterilization petition is a form of state action, and close examination of sterilization laws indicates they are intended to apply primarily to women.

First, most statutes require a finding that sterilization would be in the individual's "best interest." As reflected in the case analysis, many of the justifications for sterilization of women simply do not apply to men. The argument, set forth in *Valerie N., Grady, and Moe*,¹²⁹ that sterilization eliminates the burden of pregnancy and childbirth, would not apply if the persons in those cases had been male. These cases reasoned that the individual must have a forum for exercising her fundamental right of whether or not to bear children. This analysis was based upon *Roe*, which specifically applied to women, since only women can become pregnant. This same concern for procreative choice, although facially neutral, would be less compelling in the context of sterilization of men. Recall the catalog of "negatives" resulting from unwanted pregnancies which *Roe* emphasized: psychological harm from the pregnancy itself, emotional and physical burdens of taking care of children, and the "continuing stigma of unwed motherhood."¹³⁰ The very essence of the *Roe* analysis is that pregnancy burdens women in a way peculiar to women alone.

Second, another "best interest" consideration courts face only in cases involving sterilization of women is that women are burdened by their menstrual cycles, or that their care givers are inconvenienced by providing personal hygiene related to this cycle. Some of these decisions do involve situations in which hysterectomies are medically necessary, but the question of motive remains. A hysterectomy that is alleged to be necessary for the woman's comfort and that incidentally benefits the care giver, is probably not primarily in the best interests of the woman. The concerns supporting authorization of surgery for the convenience of

¹²⁶ Utah, Maine, Idaho, Oregon, Connecticut, and New Jersey.

¹²⁷ Arkansas and Georgia.

¹²⁸ See *supra* note 8.

¹²⁹ See *supra* notes 60-74 and accompanying text.

¹³⁰ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

others apply primarily to women. Furthermore, legislators that create these laws are aware of the danger of misuses. Ample case law demonstrates the danger, and at least two states were concerned enough to expressly prohibit hysterectomies "for the purpose of sterilization or for the purpose of hygiene and sanitary care of a female's menses."¹³¹ Considerations of physical discomfort and convenience of others do not enter into the best interests analysis as powerfully when the object of the statute is a man. "[W]hen courts purport to defer to a woman's right of reproductive choice, they are frequently only assenting to a course already determined by the woman's family."¹³² Consequently, some justifications for sterilizing women are tailor-made to blur the intentions of convenience of the family—persuasive arguments which cannot be made when the person at issue is male.

Moreover, the fear of unwanted pregnancy resulting from rape may be an unspoken impetus for petitioning a court to have a woman sterilized. The decisions largely reflect an assumption that sexual activity will be coerced rather than voluntary. Institutionalized women have traditionally been targets of molestation and rape.¹³³ However, current laws allow the termination of pregnancy, which may be the only indicator of rape for a woman unable to articulate the crime. By authorizing sterilization of women whom the courts presume have no understanding of sex, the state facilitates the danger of undetected crimes against women. Facilitating the rape of institutionalized women clearly is not in their "best interest." Moreover, the cases suggest that institutional authorities encourage parents to sterilize their daughters for the convenience of the staff and to prevent liability for offspring resulting from rape.¹³⁴

Finally, petitioners often assert that the woman is mentally unable to care for offspring. Facially, this factor would be just as applicable to men as to women. However, in reality, women are more likely than men to be responsible for the daily care of children. Paternity may be the first hurdle in the process of forcing financial and other support from the father. If the father does not deny paternity, there is still the question of whether or not he could or would offer financial support of the child. Culturally, women are expected to have ultimate responsibility for the care of an unwanted child. Pursuing financial support from a develop-

¹³¹ CONN. GEN. STAT. ANN. § 45a-700 (West Supp. 1992); OR. REV. STAT. ANN. § 436.325 (Butterworth 1992).

¹³² Stefan, *supra* note 3, at 412.

¹³³ Adrienne Asch & Michelle Fine, *Introduction*, in *WOMEN WITH DISABILITIES* 22-23 (1988).

¹³⁴ For example, in *M.K.R.*, a 13-year old girl's school had suggested to M.K.R.'s parents that she be sterilized; *In re M.K.R.*, 515 S.W.2d 467 (Mo. 1974). In *Ruby*, the parents of young girls had been unsuccessfully trying to place them in institutions for years; *Ruby v. Massey*, 452 F. Supp 361 (D. Conn. 1978). In *Grady*, the parents were intending to situate Lee Ann in a controlled housing setting, while in *Eberhardy*, the parents wished to continue to send their daughter to camp, but were afraid of pregnancy resulting from the visits; *In re Eberhardy*, 307 N.W.2d 881 (Wis, 1981).

mentally disabled man in a court of law most likely would be futile. Cultural expectations of parental gender roles present another reason why more women than men are sterilized.

Given the reasonable assumption that legislators knew of the above factors—sterilization of women for the convenience of those who care for their hygiene, the greater burden of pregnancy and childbirth on women, the costs of providing for unplanned children where paternity might be disputed, the greater physical intrusiveness and risk via female sterilization procedures, the “procreative choice” argument which has traditionally been emphasized in issues of female reproduction and the historical obsession with controlling the fertility of women deemed unfit to parent—the boundaries “between discriminatory purpose and discriminatory impact” are indeed faint.¹³⁵

In light of *Geduldig* and *Feeney*, however, the current Supreme Court is unlikely to infer discriminatory intent based upon disproportionate impact alone. The best indicator of this is *Geduldig*, for there the law could *only* discriminate against women since only women become pregnant, and yet the Court carved the boundaries not between women and men, but between pregnant and nonpregnant *individuals*.¹³⁶ Unfortunately, in the sterilization context, the Court could more easily ignore the impact of such a classification on women, for the sterilization statutes clearly distinguish, not between men and women, but between competent and incompetent people. The current Court would in all likelihood refuse to view the classification as gender-based absent some showing of discriminatory intent, about which, as noted above, there is very little direct evidence. (However, litigators may be more successful in advancing the disproportionate impact grounds in state courts based on state constitutions).

The state action requirement may present an additional problem for disproportionate impact challenges, which attack the discriminatory actions of public, but not private, actors. In most, but not all, states, sterilization laws apply only upon the petition of a private party, as opposed to cases like *Geduldig* and *Feeney*, which involved government actors.

D. Sterilization as It Impacts on the Fundamental Right of Marriage and Parenthood

As noted in *Skinner*,¹³⁷ and two decades later in *Loving v. Virginia*, “freedom to marry” is a fundamental right.¹³⁸ In addition, under *Gris-*

¹³⁵ *Washington v. Davis*, 426 U.S. at 253-54 (Stevens, J., concurring).

¹³⁶ *Geduldig v. Aiello*, 417 U.S. at 496.

¹³⁷ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

¹³⁸ 388 U.S. 1 (1967).

wold, the marital relationship falls within an intensely protected zone of privacy.¹³⁹ The right to have children as well is a fundamental right.¹⁴⁰ Therefore, this section explores the impact upon both the marriage possibilities for the sterilized woman and the later procreative choices of the marital *partnership* for those who do marry.

Impressive evidence indicates that men and women with mental disabilities do in fact marry. As Adrienne Asch and Michelle Fine note, "[t]he only group of disabled adults in which women are *more* likely than men to be married are women who are labeled retarded," since men have historically preferred women whom they could control.¹⁴¹ Moreover, the potential partners of mentally disabled women are not only similarly disabled men but also nondisabled men who presumably would not be classified as unable to care for children. Some individuals would not consider marriage to an infertile person, so eliminating this potentially critical aspect of desirability in a mate results in a potentially smaller pool of partners for sterilized women. To the extent that sterility restricts the marital possibilities of a mentally disabled woman, it intrudes upon that person's fundamental freedom to marry.

The impact of involuntary sterilization on subsequent dating and marriage is reflected in a survey of about fifty men and women who had been sterilized while in a California institution for mentally retarded individuals.¹⁴² All of those interviewed had been deemed incompetent while institutionalized, but most at the time of the survey "had IQs over 50,"¹⁴³ characteristics common to many of the respondents in the sterilization case law. The purpose of the study was to determine for the first time how these people felt about the sterilization surgeries they had undergone.¹⁴⁴ The survey found that sixty-eight percent of the men and women "disapproved of the sterilization operation" which had been performed on them; the approval percentage was only about twenty percent. More importantly, whether the interviewee was single or married correlated with whether or not she or he approved of her or his infertility. "[M]arried persons are much more likely to be opposed to sterilization than" single people.¹⁴⁵ Most of the persons surveyed had gone on to marry after sterilization and release from the institution.¹⁴⁶

The most common ground for disapproval of the sterilization was that the surgery would "prevent [them] . . . from passing as normal, particularly if she or he is contemplating marriage to a normal person, and"

¹³⁹ 381 U.S. at 484-85.

¹⁴⁰ Skinner, 316 U.S. at 541.

¹⁴¹ Adrienne Asch & Michelle Fine, *supra* note 133, at 15.

¹⁴² G. Sabagh & R.B. Edgerton, *Sterilized Mental Defectives Look at Eugenic Sterilization*, 9 EUGENICS QUARTERLY 213 (1962).

¹⁴³ *Id.* at 214.

¹⁴⁴ *Id.* at 213-14.

¹⁴⁵ *Id.* at 217.

¹⁴⁶ *Id.* at 217 & n.7.

infertility was viewed "as preventing the . . . [person] from assuming the normal roles of motherhood or fatherhood."¹⁴⁷ One interviewee stated that "[w]hen a girl . . . meets a guy and gets married — well, if she is sterilized then the guy wonders why she can't have no children,"¹⁴⁸ so the woman might simply "lie" about having undergone the sterilization surgery, and instead claim that she "had an accident."¹⁴⁹ This reflects a common fear of being considered less desirable as a marriage partner and great anxiety about being considered different. One man never told his wife that he had been sterilized; another individual broke her engagement when she learned that her fiancée's parents wanted grandchildren.¹⁵⁰ Moreover, many of those who were questioned expressed "[a]n intense feeling of deprivation at the thought of not being able to bear children."¹⁵¹ The authors concluded that these persons experience a "degraded" status of self.¹⁵²

The results of this survey indicate that mentally disabled persons sterilized without their consent not only comprehended what had happened to them, but that they also felt stigmatized, degraded, and less desirable as marriage partners. One traditional component of marriage was irretrievably taken from them. Thus, involuntary sterilization invades the fundamental right of marriage, albeit unintentionally.

IV. STERILIZATION OF MENTALLY DISABLED PERSONS

A. Enabling Statutes

As many as 70,000 individuals have been sterilized pursuant to enabling statutes.¹⁵³ To date, at least fourteen states have statutes authorizing sterilization of persons with mental impairments who are deemed incapable of consent.¹⁵⁴ For the most part, these statutes pro-

¹⁴⁷ *Id.* at 218.

¹⁴⁸ *Id.* at 219.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 220. The subsequent history of the Bucks themselves is revealing in this regard. Doris Buck, Carrie's sister, who had also been sterilized while institutionalized, expressed deep regret in a 1980 interview. Doris Buck and her husband spent years confused as to why they could not have children, for Doris had never been told she was sterilized. "I broke down and cried . . . My husband and me wanted children desperate . . . I never knew what they'd done to me." Robert Reinhold, *Virginia Hospital's Chief Traces 50 Years of Sterilizing the "Retarded"*, NEW YORK TIMES, Feb. 23, 1980, at A6.

¹⁵² *Id.*

¹⁵³ Smith, *supra* note 20, at 77 n.35 (citing Statistics from Human Betterment Ass'n of America, Summary of U.S. Sterilization Laws 2 (1958)).

¹⁵⁴ ARK. CODE ANN. §§ 20-49-101 to -304 (Michie 1987); CONN. GEN. STAT. ANN. §§ 45a-690-700 (West 1981 & Supp. 1992); GA. CODE ANN. §§ 31-20-3 to -6 (1985 & Supp. 1991); IDAHO CODE §§ 39-3901 to -3910 (1985); ME. REV. STAT. ANN. tit. 34-B, §§ 7001 to 7017 (West 1988); MINN. STAT. ANN. § 525.56 (West 1975 & Supp. 1992); MISS. CODE ANN. §§ 41-45-1 to -11 (1972 & Supp. 1991); N.J. STAT. ANN. §§ 30:6D-3 to -5 (West 1981 & Supp. 1992); N.C. GEN. STAT. §§ 35-36-50 (1990); OHIO REV. CODE ANN. § 5123.86 (Anderson 1989); OR. REV. STAT. §§ 436.205 to .335 (1991); UTAH CODE ANN. §§ 62A-6-101 to -166 (1989); VT. STAT. ANN. tit. 18, §§ 8708-16 (1987); VA. CODE ANN. §§ 54.1-2975 to -2980 (Michie

vide extensive procedural and substantive safeguards ostensibly designed to protect the class from arbitrary enforcement.

i. Subjects of the Statutes

Statutes may apply to adults only,¹⁵⁵ or may include minors.¹⁵⁶ Some statutes only apply to residents of state institutions¹⁵⁷, whereas others include noninstitutionalized persons as well.¹⁵⁸ The statutes define target individuals in a variety of ways that reflect the attitudes of our culture toward people with disabilities. A few statutes use antiquated and offensive terms, defining the target individuals as "mentally retarded."¹⁵⁹ Only one statute, enacted recently, uses the label "developmentally disabled."¹⁶⁰ The New Jersey statutory definition of developmental disability is extremely specific: the applicable disability is caused by "a mental or physical impairment" or both; "is manifest before age 22"; is probably permanent, and creates "substantial functional limitations in" at least "three . . . areas of major life activity. . . ."¹⁶¹ Furthermore, this statute embraces some impairments which are not associated with mental illness, including those stemming from "autism, cerebral palsy, epilepsy, spina bifida and other neurological impairments" limiting major life activities.¹⁶² Most states apply these statutes to individuals

1991). Omitted from this discussion are statutes which authorize solely voluntary sterilizations of developmentally disabled adults where their competency to consent must be established according to statutory procedure. See COLO. REV. STAT. § 27-10.5-128(4) (1989 & Supp. 1992) ("No person with a developmental disability who is over eighteen years of age and has the capacity to participate in the decision-making process regarding sterilization shall be sterilized in the absence of the person's informed consent."). However, Colorado's highest court held that this statute did not forbid sterilization of developmentally disabled minors. *In re A. W.*, 637 P.2d 366, 371 (Colo. 1981). In addition, COLO. REV. STAT. § 27-10.5-130 (Supp. 1992) allows sterilization of incompetent individuals without informed consent.

¹⁵⁵ CONN. GEN. STAT. ANN. § 45a-691 (West 1981 & Supp. 1992). See also OR. REV. STAT. ANN. § 436.225(3) (1991).

¹⁵⁶ See IDAHO CODE § 39-3901(a) (1985) (statute applies to persons "past his or her age of puberty"); ME. REV. STAT. ANN. tit. 34-B, §§ 7004(2), 7005(1) (West 1988) ("court order required" before sterilizing a minor, an institutionalized person, a ward "under . . . guardianship or conservatorship," or one "from whom a physician could not obtain informed consent"); MISS. CODE ANN. § 41-45-5 (1972) (institutionalized adults and minors); N.J. STAT. ANN. § 30:6D-5(a)(4) (West 1981) ("competent adult" must give "informed consent" to sterilization; "if a minor or . . . incompetent adult," court-appointed "guardian ad litem" must give consent); N.C. GEN. STAT. §§ 35-36 (1990) (no minimum age specified).

¹⁵⁷ MISS. CODE ANN. § 41-45-1 (1972 & Supp. 1991); N.J. STAT. ANN. § 30:6D-3(c) (West 1981 & Supp. 1992); OHIO REV. CODE ANN. § 5123.86(A) (Anderson 1989).

¹⁵⁸ CONN. GEN. STAT. ANN. § 45a-691 (West 1981); ME. REV. STAT. ANN. tit. 34-B, § 7004(2) (West 1988); N.C. GEN. STAT. §§ 35-36, -37 (1990); OR. REV. STAT. ANN. §§ 436.205-.335 (1991).

¹⁵⁹ MINN. STAT. ANN. § 525.56(4)(c) (West 1975 & Supp. 1992) ("mentally retarded ward or conservatee"). See also N.C. GEN. STAT. § 35-36 (1990) ("mentally ill or mentally retarded"); VT. STAT. ANN. tit. 18, § 8705(a) (1987) ("mentally retarded adults" with consent absent court order).

¹⁶⁰ N.J. STAT. ANN. §§ 30:6D-1 to -5 (West 1981 & Supp. 1992) (developmentally disabled people "receiving services for the developmentally disabled at [a] facility").

¹⁶¹ N.J. STAT. ANN. § 30:6D-3(a) (West 1981 & Supp. 1992).

¹⁶² *Id.*

who are deemed permanently incapable of consenting to sterilization.¹⁶³

Some statutes authorize sterilization of individuals with mental disabilities who cannot care for offspring alone or even with financial help.¹⁶⁴ Other laws reflect eugenic goals. Among these, one statute authorizes sterilizations of institutionalized residents with "*hereditary* forms of insanity that are recurrent, idiocy, imbecility, or feeble-mindedness," if it is in "society[']s]" or the individual's "best interests."¹⁶⁵ Another statute also authorizes compulsory sterilization, placing a "duty" upon county officials to petition for sterilizations of mentally impaired individuals who are either unable to care for children, likely to bear children with loosely specified defects, or when sterilization would be in the individual's "best interest."¹⁶⁶ A federal court interpreted this statute to require a finding that the individual was likely to be sexually active without using effective birth control,¹⁶⁷ thus ostensibly narrowing the statute's application. The court also suggested that the petitioner would have to *prove* that the individual would likely have a child with genetic defects,¹⁶⁸ raising unanswered questions of what degree of probability would be required to satisfy the statute. However, since an alternative ground justifying the statute is inability to raise a child, the impact of the genetic proof requirement is probably insignificant.

Similar to the language in this statute, the language in many opinions objectifies the disabled individual. One court described a teenage girl as follows:

Penny . . . suffers from Downs Syndrome, severe psycho-motor retardation, heart disease and impaired hearing. Her intelligence level, that of a two-year-old, is unlikely to improve. She cannot speak or clothe and feed herself, and she is not toilet trained. Finally, she suffers from severe psychological problems that her doctors believe will be aggravated if she begins menstruation.¹⁶⁹

Similarly, another court granting permission for a hysterectomy

¹⁶³ VA. CODE ANN. § 54.1-2976.4 (Michie 1991). See also OHIO REV. CODE ANN. §§ 5123.86(A)-(C) (Anderson 1989); OR. REV. STAT. § 436.215 (1987) ("individuals incapable of giving informed consent."); UTAH CODE ANN. § 62A-6-108(1) (1989) (court must find that person "is [in]capable of . . . informed consent").

¹⁶⁴ GA. CODE ANN. § 31-20-3(a) (1985). See also ARK. CODE ANN. § 20-49-101(3) (Michie 1987) (statute applies to those who cannot provide for themselves because of "mental retardation, mental illness, imbecility, idiocy, or other mental incapacity" and are likely to procreate and unlikely to improve to the point where they can take care of themselves); IDAHO CODE § 39-3901(a) (1985) (statute applies to individuals who would be able to live outside of "an institution or remain in a community program" and lead a more independent life without responsibility for children).

¹⁶⁵ MISS. CODE ANN. § 41-45-1 (1972 & Supp. 1991) (emphasis added). See also N.C. GEN. STAT. §§ 35-36 (1990) (statute applies to mentally impaired individuals whose sterilization would be either in their own "best interest . . . or for the public good").

¹⁶⁶ N.C. GEN. STAT. §§ 35-37, 35-39 (1990).

¹⁶⁷ North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451, 457 (M.D.N.C. 1976).

¹⁶⁸ *Id.* at 458.

¹⁶⁹ *In re Penny N.*, 414 A.2d 541, 542 (N.H. 1980).

described the thirteen-year-old respondent, S.C.E., as "severely mentally retarded . . . [with] a mental age of . . . [five] years. She is so mentally retarded that she has the use of only one arm and must have help from her parents whenever she uses the toilet."¹⁷⁰ In *Ruby*, the court described parent-petitioners' adolescent children as "severely mentally retarded and physically handicapped (blind-deaf)."¹⁷¹ Two of the girls had "no useful communication abilities"; the third had "only minimal ability to communicate."¹⁷² Further, the court opined that institutionalization of all three girls was "inevitable . . . because of their grossly impaired mental functioning and physical handicaps."¹⁷³

Dehumanizing language in both statutes and the case law facilitates acceptance of the imposition of sterilization upon those who cannot speak for themselves. The decision of whether or not to intrude upon a person's bodily integrity and autonomy extinguishes the possibility of procreation. Judges objectify individuals whose bodily integrity, autonomy, and procreative potential are subject to violation by the state. Linguistic distancing techniques also prevent the reader from recognizing the humanity of teenage girls like S.C.E. and Penny N. Most readers do not identify with these portraits framed by legal analysis. Thus, readers may be less likely to reflect upon sterilization's violation of bodily integrity and autonomy. The language of the opinions makes it easy to side with both the judge, whose humanity resonates through the words and reasoning of the opinion, and the parent-petitioners who are described in extremely respectful language, as discussed below. Often, the opinions hide all signs of the respondent's humanity from view, reflecting cultural isolation of disabled individuals in general.¹⁷⁴

Consistent with a dehumanized view of mentally disabled individuals, many courts do not recognize the possibility that these women might voluntarily engage in sexual expression. Instead, courts assume that sex is *imposed* upon them through rape or coercion. This assumption has several ramifications. First, the assumption operates as another distancing facilitator. It is easier to extinguish the procreative ability of someone who would only become pregnant as a result of force or exploitation. Second, the presumption that an individual would only be "desired" by someone who wished to rape or exploit her perpetuates the notion that the individual has no qualities which would attract a nonexploitive, loving partner. This presumption is most clearly expressed in the opinions involving women who are both physically and mentally impaired. The courts frequently catalog and emphasize physical impairments for no

¹⁷⁰ *In re S.C.E.*, 378 A.2d 144, 144 (De. Ch. 1977).

¹⁷¹ *Ruby v. Massey*, 452 F. Supp. 361, 363 (D.Conn. 1978).

¹⁷² *Id.*

¹⁷³ *Id.* (footnote omitted).

¹⁷⁴ *See, e.g. C.D.M. v. State*, 627 P.2d 607 (Alaska 1981); *In re S.C.E.*, 378 A.2d 144 (Del. Ch. 1977).

apparent reason, emphasizing "Otherness" and strengthening the implication that intimate partnerships are not possible for such individuals. Thus, courts lay the groundwork for doing things *to* disabled women that might outrage the public if these women were presented in a positive, fully human posture.

ii. Petitioners and Procedure

The statutes authorize parents and guardians,¹⁷⁵ the party subject to the sterilization,¹⁷⁶ her or his relatives,¹⁷⁷ physicians,¹⁷⁸ spouses,¹⁷⁹ "next friend[s],"¹⁸⁰ directors or officers of state institutions for mentally impaired persons,¹⁸¹ directors of county "social services" departments or state "health and welfare" departments,¹⁸² guardians ad litem,¹⁸³ conservators and guardians,¹⁸⁴ and "interested part[ies]"¹⁸⁵ to petition for sterilization.

The opinions show great deference to the parents and guardians of respondents.¹⁸⁶ First, as Susan Stefan points out, the fact that the parents have not institutionalized their children gives them "*credibility* in seeking sterilization and poses a veiled threat for the woman."¹⁸⁷ Second, the courts imply that because the parents have raised a disabled child at home, they are undoubtedly acting only in the best interests of the child when they seek sterilization. Voluntarily assuming the care of a

¹⁷⁵ See ARK. CODE ANN. § 20-49-202(a) (Michie 1987) (guardian if person is "adult alleged incompetent" and "parent or guardian" if "minor alleged incompetent"); GA. CODE ANN. § 31-20-3(c)(1) (1985 & Supp. 1991); IDAHO CODE § 39-3903(a) (1985); MINN. STAT. ANN. § 525.56(y)(b) (West 1975 and Supp. 1992) (guardian); N.C. GEN. STAT. §§ 35-37 (1990) (inside or outside state institution); OHIO REV. CODE ANN. § 5123.86(c) (Anderson 1989) (guardian consent required if resident incompetent, but court order not required); VT. STAT. ANN. tit. 18, § 8709(a) (1987); VA. CODE ANN. §§ 54.1-2975.1, 54.1-2976.1 (Michie 1991).

¹⁷⁶ VT. STAT. ANN. tit. 18, § 8709(a) (1987) (mentally retarded adult[s]). See also CONN. GEN. STAT. ANN. § 45a-692 (West 1981); N.J. STAT. ANN. § 30:6D-5(a)(4) (West 1981); OR. REV. STAT. § 436.235 (1991).

¹⁷⁷ VT. STAT. ANN. tit. 18, § 8709(a) (1987) ("near relative[s]"). See also GA. CODE ANN. § 31-20-3(c)(1) (1985 & Supp. 1991); IDAHO CODE § 39-3903(a) (1985).

¹⁷⁸ VT. STAT. ANN. tit. 18, § 8709(a) (1987). See also CONN. GEN. STAT. ANN. § 45a-692 (West 1981); OR. REV. STAT. § 436.235 (1991).

¹⁷⁹ VA. CODE ANN. §§ 54.1-2975.1 to .1-2976.1 (Michie 1991).

¹⁸⁰ VA. CODE ANN. § 54.1-2976.1 (Michie 1991). See also OR. REV. STAT. § 436.235 (1991) ("interested person concerned with the respondent's health and well-being").

¹⁸¹ OHIO REV. CODE ANN. § 5123.86(C) (Anderson 1989) (if resident is incompetent, and does not have a guardian, Director must get approval from court). See also CONN. GEN. STAT. ANN. § 45a-692 (West 1981 & Supp. 1992); MISS. CODE ANN. § 41-45-3 (1972 & Supp. 1991) (director of institution petitions "the board of trustees of mental institutions"); N.C. GEN. STAT. § 35-36 (1990).

¹⁸² N.C. GEN. STAT. § 35-37 (1990). See also IDAHO CODE § 39-3903(a) (1985).

¹⁸³ N.J. STAT. ANN. § 30:6D-5(a)(4) (West 1981).

¹⁸⁴ MINN. STAT. ANN. § 525.56(3)(4)(b) (West 1975 & Supp. 1992).

¹⁸⁵ CONN. GEN. STAT. ANN. § 45a-692 (West 1981 & Supp. 1992).

¹⁸⁶ The Supreme Court of New Jersey noted in *In re Grady*, that shortly after Lee Ann was born, her "parents decided not to place her in an institution but to care for her at home. Since that time they have provided her with love and emotional support, as well as the physical necessities of life." 426 A.2d 467, 469-70.

¹⁸⁷ Stefan, *supra* note 3, at 423 (emphasis added).

mentally disabled child is automatically equated with a self-sacrificing family mentality which seeks, above all else, to act in the child's best interest. Third, some courts openly empathize or sympathize with the plight of the parents,¹⁸⁸ suggesting that judges are motivated to authorize sterilizations by a desire to please the *parents*.¹⁸⁹

Petitioners typically must follow a detailed set of procedures from the filing of the petition to the close of the hearing.¹⁹⁰ Only one state allows parents and guardians "to seek sterilization . . . through direct medical channels" in cases where a minor child has been found "incompetent."¹⁹¹

Typically, the petitioner carries the burden of proof in the proceeding, and must meet the standard of clear and convincing evidence.¹⁹²

¹⁸⁸ In *In re Hayes*, the court noted that "[d]uring the year or so that Edith has been capable of becoming pregnant, . . . they have become frustrated, depressed and emotionally drained by" the search for a workable contraceptive solution. 608 P.2d 635, 637 (Wash. 1980).

¹⁸⁹ In a recent article, Professor Scott has argued that courts *should* consider the effect which a denial of sterilization would have upon the "seriously impaired" woman's parents. Scott, *supra* note 15, at 846. Scott views the child's "interest in continued care by her parents" as "substantial"; to risk institutionalization as a result of a petition denial is to undermine this interest. *Id.* at 845-46. Like the judges in the opinions, Scott is openly motivated by a desire to ease the burdens of the severely disabled child's family. In fact, she returns to the theme of parental burdens and family instability throughout her article. *Id.* at 825, 845-46, 856. There are several problems with this approach. As discussed below, the motivations of the parents are far from clear; parents are driven into court by a variety of forces and motives which may overwhelm a reasoned consideration of what in fact is the best decision for the child's welfare. Scott, however, rests her argument for the consideration of family stress, as well as her proposal of allowing the parents to be the primary decision makers, on the assumption that the parents will seek sterilization (excluding hysterectomies) only when they believe it is in their child's best interests. *Id.* at 854-55. Second, there is a great danger in dependency on terms such as "family burdens" and "the child's interest in family stability." These phrases have the potential for becoming talismanic. They effectively distance us from the concern for the child's interest in autonomy and dignity, and overemphasize the threat of abandonment and institutionalization. The child is viewed as merely an extension of her family rather than as an individual entity. "Interest in family stability" also invests the courts and the culture with comfort about the decision to sterilize, for it threatens an alternative to sterilization which would create a fiscal burden—institutionalization. In the name of family stability, careful considerations of necessity, impact on fundamental rights, dignity, autonomy, and independence are easily rushed through or ignored.

¹⁹⁰ However, some statutes are silent on procedure and standards. The Ohio statute, for instance, applying only to institutionalized persons, goes no further than specifying that a state hospital may petition the court for approval to sterilize a resident who is incapable of informed consent and has no guardian who can consent for her or him. No mention of hearing, procedures, or standards follows. OHIO REV. CODE ANN. § 5123.86(c) (Anderson 1989). Moreover, the New Jersey statute does not specify any criteria by which the court determines sterilization permission except "necessity." N.J. STAT. ANN. § 30:6D-5(a)(4) (West 1981).

¹⁹¹ ARK. CODE ANN. § 20-49-301(b) (Michie 1987). This route is said to be "an alternative" to the statutory procedures set forth in the code; presumably, the statutory procedural requirements would be binding only upon non-guardians and non-parents. *Id.*

¹⁹² UTAH CODE ANN. § 62A-6-112(2) (1989). See also ME. REV. STAT. ANN. tit. 34-B, § 7013(4) (West 1988); N.J. STAT. ANN. § 30:6D-5(a)(4) (West 1981) (burden of proof on petitioner, but no standard of proof specified); N.C. GEN. STAT. §§ 35-43 (1990) (no mention of standard of proof or who carries the burden; however, the requirements of "clear, strong and convincing evidence" and burden on the petitioner were imposed in *In re Truesdell*, 304 S.E.2d 793, 806 (N.C. Ct. App. 1983); VT. STAT. ANN. tit. 18, § 8711(e) (1987). But see CONN. GEN. STAT. ANN. § 45a-697 (West 1981 & Supp. 1992) (no mention of standard of proof or who has the burden of proof in incompetency phase of hearing).

The petition must include "facts describing the [disabled individual's] alleged inability to give informed consent," why the petitioner believes the individual's inability to consent will not change in the near future, and why the petitioner is seeking sterilization.¹⁹³ Once the petition is filed, a mandatory hearing is held within thirty days.¹⁹⁴ In some states, a hearing is held only upon petitioner's request.¹⁹⁵ Notice of the petition and of the hearing must be served upon the individual's "parent, legal guardian or conservator, . . . spouse, . . . sibling" if her or his parents are deceased.¹⁹⁶ Upon request, the court will appoint counsel for respondents in cases of indigency or inability to request counsel.¹⁹⁷ Some statutes provide only that the individual is *entitled* to counsel.¹⁹⁸ Other

¹⁹³ OR. REV. STAT. § 436.245 (1991). *See also* VT. STAT. ANN. tit. 18, § 8709(b) (1987). *But see* GA. CODE ANN. § 31-20-3(c)(1) (1985 & Supp. 1991) (petition need only contain consent of parent or guardian ad litem and "reasons why such person is . . . subject to this Code section").

¹⁹⁴ OR. REV. STAT. § 436.255(1) (1991). *See also* CONN. GEN. STAT. ANN. § 45a-693 (West 1981 & Supp. 1992); IDAHO CODE § 39-3903(e) (1985) (mandatory hearing); ME. REV. STAT. ANN. tit. 34-B, §§ 7004(2), 7006, 7007, 7008(5,6), 7013 (West 1981) (two hearings required before sterilization of an individual incapable of informed consent. The proponent first petitions for a hearing to determine if the person is capable of informed consent. If the court finds the person incapable, the proponent must file a second petition for a hearing to determine if sterilization is in her or his "best interest"); MINN. STAT. ANN. § 525.56(4)(b) (West 1975 & Supp. 1992) ("court shall fix time and place for the hearing"); VT. STAT. ANN. § 8709(c) (1987) (hearing required "not more than 45 days" from filing of petition); MISS. CODE ANN. § 41-45-5 (1972).

¹⁹⁵ *See, e.g.*, N.J. STAT. ANN. § 30:6D-5(a)(4) (petitioner "may petition a court . . . to hold a hearing") (West 1981); N.C. GEN. STAT. § 35-43 (1990).

¹⁹⁶ OR. REV. STAT. § 436.255(2) (1991). *See also* ARK. CODE ANN. §§ 20-49-203(b)(1)-(7) (Michie 1987) (notice to the person "if over fourteen years of age," to the parents if she or he "is a minor," to the spouse, guardian, caregiver, close relative if no parent or spouse, and, at the court's discretion, to anyone else and any state or federal entity caring for the person); CONN. GEN. STAT. ANN. § 45a-693 (West 1981 & Supp. 1992) (notice upon the person, and, at the court's discretion, parents, spouse, siblings, and the "office of protection and advocacy"); GA. CODE ANN. § 31-20-3(c)(4) (1985 & Supp. 1991) (ten day notice to the person and her or his lawyer); ME. REV. STAT. ANN. tit. 34-B, §§ 7007(3), 7012 (West 1988) (notice of informed consent and best interest hearing to the person and guardian or custodian); MISS. CODE ANN. § 41-45-5 (1972) (notice to the resident, "legal guardian," or "next of kin" if no guardian. Absent next of kin or guardian, the trustee must "apply to the chancery court" for appointment of "guardian . . . to defend the rights and interests of the inmate."); N.C. GEN. STAT. § 35-41 (1990) (notice served upon the individual and guardian, guardian ad litem, or next of kin); UTAH CODE ANN. § 62A-6-110 (1989) (notice required "20 days before the hearing" on the person, "parents, spouse, guardian, or custodian and on his attorney"); VT. STAT. ANN. tit. 18, § 8709(c) (1987) (notice required to the person, his attorney, and "legal guardian and nearest relative."); VA. CODE ANN. §§ 54.1-2975.2, .1-2976.2 (Michie 1991) (no time requirement for notice).

¹⁹⁷ OR. REV. STAT. § 436.265 (1991). *See also* CONN. GEN. STAT. ANN. § 45-78t (West 1981) (counsel appointed if person is unrepresented; if indigent, appointed counsel compensated by state); IDAHO CODE § 39-3903(b) (1985) (court will appoint counsel and state will pay for counsel if court concludes indigency); ME. REV. STAT. ANN. tit. 34-B, §§ 7008(1), 7013(2) (West 1988) (counsel appointed if indigent or "unable to request counsel" in informed consent and best interest hearings); MINN. STAT. ANN. § 525.56(4)(b) (West 1991) (indigency not an explicit requirement); N.J. STAT. ANN. § 30:6D-5(a)(4) (West 1981) (indigency required); OHIO REV. CODE ANN. § 5123.86(C) (Anderson 1989) (statute applies to institutionalized mentally retarded persons only; attorney appointed if resident is "indigent"); VT. STAT. ANN. tit. 18, § 8710 (1987) (indigency required); VA. CODE ANN. §§ 54.1-2975.2, 54.1-2976.2 (Michie 1991) (indigency not an explicit requirement).

¹⁹⁸ GA. CODE ANN. § 31-20-3(c)(7) (1986 & Supp. 1991). *See also* ARK. CODE ANN. § 20-49-204(b) (Michie 1987); MISS. CODE ANN. § 41-45-7 (1981) (right to counsel only in hearing

states either require or authorize appointment of guardians ad litem for the disabled individual.¹⁹⁹

At the hearing, the respondent may introduce evidence and cross-examine witnesses.²⁰⁰ Reflecting a concern for balance, one state *requires* the respondent's attorney to ensure "that information and evidence in opposition to sterilization without informed consent is fully represented" at the best interest hearing.²⁰¹ The informed consent stage of the hearing requires the respondent's presence, unless the court approves a waiver.²⁰² However, some statutes provide only that the respondent is "entitled" to be present at the hearing.²⁰³

In many states, the threshold question at the hearing is whether the individual is capable of informed consent. To determine competency, one state requires the court to appoint at least "[two] disinterested experts . . . in the field of developmental disabilities or mental health, including at least one psychologist" who must evaluate the individual and "testify at the hearing."²⁰⁴ Typically, should the court find that the respondent is capable of informed consent and desires sterilization, the court will order it performed upon the individual's written consent.²⁰⁵ If the individual is capable of informed consent but does not wish to be

before institution's board of trustees); N.C. GEN. STAT. § 35-45 (1990) (person is entitled to be represented, but further requirement that "[e]very person subject to be sterilized . . . shall have counsel at every stage of the proceedings.").

¹⁹⁹ VT. STAT. ANN. tit. 18, § 8710 (1987) (appointment of guardian ad litem authorized). See also ARK. CODE ANN. § 20-49-201(c) (Michie 1987) (mandatory appointment of guardian ad litem); UTAH CODE ANN. § 62A-6-111(1) (1989) (mandatory appointment of guardian ad litem).

²⁰⁰ OR. REV. STAT. ANN. § 436.275(2) (1991). See also ARK. CODE ANN. § 20-49-204(b) (Michie 1987); CONN. GEN. STAT. ANN. § 45a-690 (West 1981 & Supp. 1992) ("right to present evidence and cross-examine witnesses"); IDAHO CODE § 3903(e) (1985) (right to cross-examine; counsel for person may present evidence of two physicians on behalf of the person; the physicians will be compensated by the state); ME. REV. STAT. ANN. tit. 34-B, §§ 7008(1), 7013(2) (West 1988); MISS. CODE ANN. § 41-45-7 (1981) (the board of trustees may consider legal evidence as may be offered by any party to the hearing; however, no mention of right to cross-examination); N.J. STAT. ANN. § 30:6D-5(a)(4) (West 1981) (right to cross-examine); N.C. GEN. STAT. § 35-43 (1990); VT. STAT. ANN. tit. 18, § 8711(a) (1987).

²⁰¹ ME. REV. STAT. ANN. tit. 34-B, § 7013(2) (West 1988). The absence of such opposition in many of the cases is striking. See *C.D.M. v. State*, 627 P.2d 607, 609, n.4 (Alaska 1981) (guardian ad litem at hearing had "reluctantly argued that jurisdiction [to order sterilization] did not exist. On appeal, he . . . now joins C.D.M.'s parents in urging us to find that jurisdiction does exist.").

²⁰² OR. REV. STAT. § 436.285 (1991). See also CONN. GEN. STAT. ANN. §§ 45-78v, -78x (West 1981 & Supp. 1992) (mandatory presence of person at informed consent hearing but at best interests hearing presence may be excused "for good cause"); ME. REV. STAT. ANN. tit. 34-B, §§ 7008(4), 7013(2) (West 1988) (person is required to attend hearing unless appearance is waived and waiver is approved by court); N.J. STAT. ANN. § 30:6D-5(a)(4) (West 1981) (person's presence at hearing is required; no mention of waiver); UTAH CODE ANN. § 62A-6-111(3) (1989).

²⁰³ ARK. CODE ANN. § 20-49-204(b) (Michie 1987). The Idaho statute requires only the presence of the individual's attorney. IDAHO CODE ANN. § 39-3903(e) (1985).

²⁰⁴ ME. REV. STAT. ANN. tit. 34-B, § 7008(3) (West 1988). See also CONN. GEN. STAT. ANN. § 45-78u (West 1981 & Supp. 1992) (evidence of at least three court-appointed impartial experts who have personally observed, examined or worked with respondent within the prior twelve months must present evidence of person's incapacity to give "informed consent").

²⁰⁵ See, e.g., OR. REV. STAT. § 436.295(1)(a) (1991).

sterilized, the court will prohibit sterilization.²⁰⁶ Only when the court determines that the individual is incapable of consenting will it proceed to determine the individual's best interests.²⁰⁷

Often, the next stage of the hearing requires "medical, psychological and social evidence as to whether sterilization is in the best interest of the individual."²⁰⁸ Some statutes make this stage discretionary.²⁰⁹ "Best interest" analysis may consider the following factors: the respondent is fertile, "is likely to engage in sexual activity at the present or in the near future,"²¹⁰ every "less drastic" birth control measure, "including super-

²⁰⁶ See, e.g., OR. REV. STAT. § 436.295(1)(b) (1991).

²⁰⁷ OR. REV. STAT. § 436.295(2) (1991). See also CONN. GEN. STAT. ANN. § 45a-691 (West 1981 & Supp. 1992) ("whenever a person is under a guardianship or conservatorship, the court shall permit sterilization only upon showing that . . . [it] is in the best interest of the person"); ME. REV. STAT. ANN. tit. 34-B, § 7008(6) (West 1988) (if court determines inability to give informed consent to sterilization, no procedure will be authorized unless court determines through additional hearing that sterilization meets best interests requirements); VT. STAT. ANN. tit. 18, § 8711(c)(1)-(2) (1987) ("court shall determine . . . whether the respondent is mentally retarded. . . [and] whether [she or he] is competent to give informed consent."); VA. CODE ANN. § 54.1-2975.4 (Michie 1991) (court must find "by clear and convincing evidence" that the person is incapable of providing informed consent to the surgery and that this is unlikely to change "in the foreseeable future"); VA. CODE ANN. § 54.1-2976.4 (Michie 1991) (either the person must have "been adjudicated incompetent" or must be finding that the person is "incapacitated for the purpose of consenting" and this is "unlikely to" change "in the foreseeable future.").

²⁰⁸ OR. REV. STAT. § 436.305(1) (1991). See also ARK. CODE ANN. § 20-49-204(a) (Michie 1987) (evidence of incompetence must include two medical witnesses); CONN. GEN. STAT. ANN. § 45-78y (West 1981 & Supp. 1992) ("court shall hear medical, social, educational, residential and psychological evidence . . . as to whether . . . sterilization is in the best interest of the individual"); MINN. STAT. ANN. § 525.56(4)(c) (West 1975 & Supp. 1992) (best interests requirement; court appoints a physician, a psychologist who is qualified in the diagnosis and treatment of mental retardation, and a social worker to evaluate the ward or conservatee and report to the court); VT. STAT. ANN. tit. 18, §§ 8711(c)(3), 8711(d) (1987) (best interests requirement; "comprehensive medical, psychological and social evaluation of the person" is required); VA. CODE ANN. § 54.1-2977 (Michie 1991) (statute does not specifically use "best interests" nomenclature; the evidence must include "independent evidence based on a medical, social and psychological evaluation of the person").

²⁰⁹ UTAH CODE ANN. § 62A-6-108(2) (1989 & Supp. 1991). The Georgia statute requires that, prior to the hearing, a team of "a psychologist or psychiatrist qualified in the field of mental retardation and brain damage and one physician" evaluate the individual and submit recommendations in a report to the court, the respondent, her or his lawyer, and guardian ad litem. Additionally, Georgia is unique in requiring that a committee from the hospital where the surgery is to be performed submit its approval before the hearing. The committee need only determine that the impairment is permanent in order to grant approval. In respect to both reports, respondents have the right to cross-examine the authors. GA. CODE ANN. § 31-20-3(c)(1)-(3) (1985 & Supp. 1991). See also N.C. GEN. STAT. § 35-40 (1990) ("petition shall contain allegations of the results of psychological . . . tests supporting the assertion that such person is subject to . . . this Article; shall contain the statement of a physician who has examined such person affirming whether or not there is any known contraindication to the . . . procedure").

²¹⁰ OR. REV. STAT. § 436.205(1) (1991). See also CONN. GEN. STAT. ANN. § 45a-690(d)(4) (West 1981 & Supp. 1992) ("the individual has the capability and a reasonable opportunity for sexual activity"); VA. CODE ANN. § 54.1-2977.A.1 (Michie 1991) ("person is engaging in sexual activity at the present time or is likely to . . . in the near future and that pregnancy would not usually be intended by such person if . . . competent"); MINN. STAT. ANN. § 525.56(4)(c) (West 1975 & Supp. 1992) (must be expert evidence on "whether sterilization is necessary"); VT. STAT. ANN. tit. 18, § 8711(c)(3)(A)-(B) (1987); ME. REV. STAT. ANN. tit. 34-B, §§ 7011(7), 7013(3)(A) (West 1988) ("medical statement" of the person's "physiological capability" to have children will be considered by the court).

vision, education and training, have proved unworkable or inapplicable, or are medically counter-indicated," the type of sterilization surgery is "the least intrusive method" and is reasonably safe,²¹¹ and the individual is irreversibly unable to raise a child, with or without help.²¹² Consequently, if the court determines that sterilization is in the best interest of the individual, it will authorize it.²¹³ Some statutes authorize appeals and stay enforcement of court orders until completion of the appeals process.²¹⁴

States place varying degrees of emphasis on these best interest factors, whereas some dispense with them altogether. Some states do not use a purely objective best interests analysis, but also require a "substituted judgment" determination of the decision the individual would make if she or he were able to give "informed consent."²¹⁵ In contrast, Georgia has neither a best interests nor a substituted judgment standard, requiring only evidence of a permanent impairment and a finding that alternative contraceptives are not "feasible," required in the pre-hearing medical report.²¹⁶ Although Maine requires the court to consider evidence on various factors during the best interest hearing, the court is required to find only that "less drastic" birth control methods "have proven . . . unworkable or inappropriate . . . and . . . sterilization is

²¹¹ OR. REV. STAT. § 436.205(1) (1991). *See also* CONN. GEN. STAT. ANN. § 45a-690 (West 1981 & Supp. 1992) ("less drastic alternative contraceptive methods have been proved unworkable or inapplicable"); ME. REV. STAT. ANN. tit. 34-B, §§ 7011(6), 7013(3)(B) (West 1988) ("court shall hear and consider evidence on . . . less drastic alternative methods which have been tried or the reasons those methods are believed to be unworkable and inappropriate"); MINN. STAT. ANN. § 525.56(4)(c) (West 1991) ("least intrusive method" required, and "medical report shall specifically consider the medical risks of sterilization, the consequences of not performing the sterilization, and whether alternative methods of contraception could be used to protect the best interests of the ward or conservatee."); UTAH CODE ANN. § 62A-6-108(1)(e) (1989) (listing "alternatives" to surgery, including "drugs, intrauterine devices, education and training"); VT. STAT. ANN. tit. 18, § 8711(c)(3)(E) (1987) (finding required "that no effective, less drastic alternative to sterilization is medically indicated which will meet the needs of the respondent"); VA. CODE ANN. § 54.1-2977.A.3 (Michie 1991) (the type of surgery "conforms with standard medical practice" and does not carry with it "unreasonable risk" to the person's "life and health").

²¹² OR. REV. STAT. § 436.205(1) (1991). *See also* CONN. GEN. STAT. ANN. § 45a-690(d)(6) (West 1981 & Supp. 1992) ("the physical or emotional inability to care for the child"); UTAH CODE ANN. § 62A-6-108(i) (1989) ("the likelihood that he could adequately care and provide for a child."); VT. STAT. ANN. tit. 18, § 8711(c)(3)(C) (1987) ("respondent's disability renders the respondent incapable now or in the future of caring for a child"); VA. CODE ANN. § 54.1-2977.A.4 (Michie 1991) ("permanently incapable of caring for and raising a child.").

²¹³ OR. REV. STAT. § 436.305(3) (1991). *See also* CONN. GEN. STAT. ANN. § 45a-699(b) (West 1981 & Supp. 1992) ("The court shall give its consent to sterilization only if it finds by clear and convincing evidence that such operation . . . is in the best interests of the individual.").

²¹⁴ ARK. CODE ANN. § 20-49-206 (Michie 1987). *See also* GA. CODE ANN. § 31-20-3(c)(6) (1985 & Supp. 1991); IDAHO CODE § 39-3904 (1985); ME. REV. STAT. ANN. tit. 34-B, § 7013(7) (West 1988); MISS. CODE ANN. §§ 41-45-11, -45-13 (1972); N.C. GEN. STAT. §§ 35-44 (1990); VT. STAT. ANN. tit. 18, § 8714 (1987).

²¹⁵ UTAH CODE ANN. § 62A-6-108(4) (1989).

²¹⁶ GA. CODE ANN. §§ 31-20-3(c)(2), -20-3(c)(5) (1985 & Supp. 1991). *See also* IDAHO CODE §§ 39-3901(a), -3903(e) (1985) (no best interests or substituted judgment finding required; only requirements are "mental retardation," inability to take care of offspring, and potential for greater independence without "the obligations of parenthood").

necessary to preserve the physical or mental health of the person."²¹⁷ Mississippi requires only that the Board of Trustees of the institution find the resident "insane, idiotic, imbecile or feeble-minded," that the resident is the probable potential parent of offspring likewise afflicted, that she or he may be safely subjected to surgery, and that the "welfare of the inmate and of society will be promoted" by the procedure.²¹⁸ Some statutes do not even require a finding that the individual is capable of reproducing.²¹⁹ For example, Utah provides that fertility is a rebuttable presumption in those who are physically normal,²²⁰ raising the danger that a court will authorize completely useless surgery. In some states, exhaustive attention to alternative means of contraception contrasts with a more casual approach taken in other states. For example, in Virginia the only required finding on alternative means of contraception is that "[t]here is no reasonable alternative method,"²²¹ as contrasted to more stringent standards in Maine, Utah and Vermont.²²²

While some statutes require a finding of probable sexual activity, a statute may go further and require consideration of whether or not the individual might be sexually victimized.²²³ This misplaced concern also has been manifested in case law. For example, in *In re P.S.*, the court feared that the institutionalized P.S. was at risk of being "sexually assaulted," and thereby becoming pregnant.²²⁴ In the case of *C.D.M. v. State*, the court, citing no authority, stated that persons with mental retardation "are characteristically highly susceptible to being sexually victimized by virtue of their very innocent, trusting and loving nature."²²⁵ Similarly, in *Hudson v. Hudson*, the parents claimed that their daughter, who had recently mentioned having a "boyfriend," was

²¹⁷ ME. REV. STAT. ANN. tit. 34-B, § 7013(5) (West 1988).

²¹⁸ MISS. CODE ANN. § 41-45-9 (1981 & Supp. 1991). See also N.C. GEN. STAT. § 35-43 (1990) (only required findings are permanent inability to care for a child, or likely to produce a child who probably would have serious physical, mental, or nervous diseases or deficiencies. However, North Carolina courts have required additional findings, including the absence of alternative less intrusive contraceptives that the individual is able and willing to use, *In re Truesdell*, 304 S.E.2d 793, 806 (N.C. Ct. App. 1983), *modified and aff'd*, 329 S.E.2d 630 (N.C. 1985)).

²¹⁹ VA. CODE ANN. §§ 54.1-2977 to .1-2980 (Michie 1991). See also ARK. CODE ANN. §§ 20-49-101 to -304 (Michie 1987); IDAHO CODE §§ 39-3901 to -3904 (1985); MISS. CODE ANN. § 41-45-9 (1972 & Supp. 1991); N.C. GEN. STAT. §§ 35-36 to -50 (1990).

²²⁰ UTAH CODE ANN. § 62A-6-108(1)(c) (1989). See also CONN. GEN. STAT. ANN. § 45a-690 (West 1981 & Supp. 1992) (a "best interest" analysis includes whether or not the person is physically mature and if "there is no evidence of infertility," but no required finding of fertility). In addition, courts have concluded the existence of fertility solely from the fact that a woman menstruates. See *In re Truesdell*, 329 S.E.2d 631 ("regular monthly menstruation makes it reasonable to assume that [Sophia] ovulates and is fertile"). *Id.* at 631.

²²¹ VA. CODE ANN. § 54.1-2977.2 (Michie 1991).

²²² See *supra* note 211.

²²³ UTAH CODE ANN. § 62A-6-108(1)(f) (1989).

²²⁴ 452 N.E.2d 969, 972 (Ind. 1983). The court denied plaintiff's request for a preliminary injunction barring parents from having P.S. sterilized. *Id.* at 977.

²²⁵ *C.D.M. v. State*, 627 P.2d 607, 608 (Alaska 1981). The court remanded the case to the trial court for a factual determination of respondent's best interests. *Id.* at 614.

"very trusting and [could] be led and induced to do almost anything by anyone."²²⁶ A few courts felt that sex should ideally be *prevented* but, that since this was probably impossible, sterilization was the next best step for avoiding the complications of sexual activity. For example, in *In re Hayes*, the parents argued that their daughter Edith had to be sterilized in part because "it . . . [was] impossible to supervise her activities closely enough to prevent her from becoming involved in sexual relations."²²⁷ *Denial* of a sterilization petition was affirmed in *In re Truesdell*, because the respondent was "so closely supervised," she had few if any opportunities "for . . . heterosexual contact."²²⁸

Conspicuously absent from most statutes is a requirement that the disabled individual's views be considered and weighed in the decision. Only a few statutes require consideration of the respondent's views regarding the proposed sterilization, according these "views . . . such weight in its decision as the court deems appropriate."²²⁹ Some statutes also require the court to at least consider what psychological effects the procedure may have on the individual.²³⁰

B. Jurisdiction Absent an Enabling Statute

In states in which no specific statute authorizes sterilization of mentally incompetent persons, or in which statutory authority for sterilization is significantly limited, courts faced with a petition for sterilization have had varied responses.

i. General Jurisdiction

Some courts have held that a state constitutional grant of general jurisdiction directly to lower courts, absent statutory limitations, consti-

²²⁶ 373 So. 2d at 311. The court denied petitioner's request for an order authorizing sterilization. *Id.* at 312. See also *In re M.K.R.*, where the trial court, found that M.K.R. was "'overly friendly,' . . . and . . . faced with the constant threat of being assaulted and ravished." 515 S.W.2d 467, 469 (Mo. 1974). In addition, in *Nilsson*, the court authorized a hysterectomy for a 14-year old girl who, based upon traditional IQ indications, was only mildly retarded. The court found persuasive "testimony that Becky was becoming aware of boys and there exists the possibility that she could participate in *promiscuous* sexual activities or . . . sexual activities could be imposed upon her . . ." *In re Nilsson*, 471 N.Y.S.2d 439, 442 (Sup. Ct. 1983) (emphasis added).

²²⁷ 608 P.2d 635, 637 (Wash. 1980) (en banc).

²²⁸ 329 S.E.2d 630, 636 (N.C. Ct. App. 1985).

²²⁹ VA. CODE ANN. § 54.1-2975.5 (Michie 1991). See also UTAH CODE ANN. § 62A-6-108(3) (1989) (requirement that the person be interviewed by the court to determine his views. "The expressed preference of the person shall be made a part of the record . . ." However, "[t]he court is not bound by the expressed preference of the subject," but if the person does not desire sterilization, "the court shall deny the petition unless the petitioner proves beyond a reasonable doubt that the person will suffer serious physical or psychological injury if the petition is denied."); VA. CODE ANN. § 54.1-2976.5 (Michie 1991) (pertaining to adults).

²³⁰ UTAH CODE ANN. § 62A-6-108(1)(d) (1989). See also ME. REV. STAT. ANN. tit. 34-B, §§ 7011(9), 7013(3) (West 1988) ("court shall hear and consider evidence on . . . beneficial or detrimental psychological effects of sterilization on the person" and the person's own views).

tutes adequate jurisdiction to authorize sterilizations of mentally incompetent persons.²³¹ Some of these courts draw upon the grant of general jurisdiction from their legislatures, state constitutions, or both, while ignoring the implications of statutes that limit sterilizations. For example, one court held that even though a statute specifically stated that no sterilizations were to be performed without informed "consent,"²³² the probate courts had jurisdiction to hear and act upon sterilization petitions brought on behalf of "incompetent" individuals. The authority was said to derive from a statute requiring guardians to seek "aid" from various state agents to ensure the health and welfare of their wards.²³³

ii. No Jurisdiction Absent an Enabling Statute

Courts have denied petitions for sterilization on the ground that, absent specific statutory permission to grant such petitions, they lacked jurisdiction and would be liable if they granted sterilization petitions.²³⁴ However, the majority of these cases were decided before the Supreme Court's holding in *Stump v. Sparkman*.²³⁵ *Stump* presented the question of whether a judge who had authorized sterilization of a "somewhat retarded" minor, in a state with no enabling statute, was immunized from liability when the minor subsequently sued him for constitutional violations and "assault and battery."²³⁶ The Court granted the petition to Sparkman's mother upon her request in the judge's chambers. Sparkman was told that she was being hospitalized for the removal of her appendix; she did not learn of her sterility until after she was married.²³⁷ Because Sparkman claimed Fourteenth Amendment Due Process and Equal Protection violations of her right to privacy and right to procreate, the validity of her constitutional claims depended on a finding of state action, and the only conceivable state actor was Judge Stump.²³⁸ However, the Court held that the judge was protected by judicial immunity because he "performed the type of act normally performed only by judges and . . . he did so in his capacity as a Circuit Court Judge."²³⁹ A judge will lose his immunity only if he acts without any jurisdiction

²³¹ Hayes, 608 P.2d at 638; *In re Matejski*, 419 N.W.2d 576, 577 (Iowa 1988); *In re P.S.*, 452 N.E.2d 969, 976 (Ind. 1983).

²³² *In re Moe*, 432 N.E.2d 712, 717 (Mass. 1982) (citing MASS. GEN. L. ch. 112, § 12W).

²³³ Moe, 432 N.E.2d at 716 (citing MASS. GEN. L. ch. 201 § 6A, as amended through St. 1978, ch. 478, § 95).

²³⁴ See *Frazier v. Levi*, 440 S.W.2d 393, 395 (Tex. Civ. App. 1969); *In re M.K.R.*, 515 S.W.2d 467, 470-471 (Mo. 1974); *In re Holmes v. Powers*, 439 S.W.2d 579, 580 (Ky. 1968); *In re D.D.*, 408 N.Y.S.2d 105 (Sup. Ct. 1977); *In re S.C.E.*, 378 A.2d 144, 145-46 (Del. Ch. 1977); *Hudson v. Hudson*, 373 So. 2d 310, 312 (Ala. 1979); *A.L. v. G.R.H.*, 325 N.E.2d 501, 502 (Ind. Ct. App. 1975).

²³⁵ 435 U.S. 349 (1978).

²³⁶ *Id.* at 352-53.

²³⁷ *Id.*

²³⁸ *Id.* at 353-54, n.2.

²³⁹ *Id.* at 363.

whatsoever; if he merely acts "in excess of his authority" or erroneously, he is insulated from future liability by the judicial immunity doctrine.²⁴⁰ Although the Court devoted its attention only to the issue of judicial immunity, not to the validity of court-ordered sterilizations, later decisions often cite *Stump* as support for assuming jurisdiction to authorize sterilizations absent express legislative authorizations.²⁴¹ However, "*Stump* illustrates the dangers inherent in allowing courts of general jurisdiction to order sterilizations" without legislative safeguards.²⁴²

iii. *Parens Patriae*

Some courts rely exclusively on the *parens patriae* doctrine²⁴³ for authority to order sterilizations.²⁴⁴ Others, after finding that lower courts have plenary jurisdiction to grant sterilizations, invoke *parens patriae* to support assertions of an obligation to "protect" the legally incompetent.²⁴⁵ Several courts have concluded that failing to hear and decide these petitions without statutory authority would be "an abdication of . . . judicial responsibilities, leaving [the respondents] . . . and . . . [their] parents without any means of recourse."²⁴⁶

iv. Judicial Expansion of Statutory Authority

The 1978 federal case of *Ruby v. Massey*²⁴⁷ arose under a statutory regime that permitted sterilizations of institutionalized children only. The parents in *Ruby* argued that they were entitled to the same procedure for their children who were living at home. The parents argued that the Connecticut statute authorizing sterilization of minors in state institutions violated the Equal Protection Clause by excluding their at-home children from the same statutory benefits with no rational justification.²⁴⁸

²⁴⁰ *Id.* at 356-57.

²⁴¹ See *C.D.M. v. State*, 627 P.2d 607, 611 (Alaska 1981); *In re Terwilliger*, 450 A.2d 1376, 1379-80 (Pa. Sup. Ct. 1982).

²⁴² *C.D.M.*, 627 P.2d at 616 (Mathews, J., dissenting) (emphasis added). See also *In re Hayes*, 608 P.2d 635, 646 (Wash. 1980) (en banc) (Rosellini, J., dissenting) (*Stump* "does not stand as an endorsement of judicially ordered sterilizations but rather as an uncompromising assertion of . . . immunity [I]t also stands as an ominous warning of how easily the asserted power to order sterilization can be mistakenly exercised.").

²⁴³ *Parens patriae* power is an "inherent authority" of a court "to protect those persons within the state who cannot protect themselves because of a legal disability." *Terwilliger*, 450 A.2d at 1381, 1382.

²⁴⁴ *In re Sallmaier*, 378 N.Y.S.2d 989, 991 (Sup. Ct. 1976); *In re Grady*, 426 A.2d 467, 481 (N.J. 1981).

²⁴⁵ *Terwilliger*, 450 A.2d at 1381; *Wentzel v. Montgomery Gen. Hosp.*, 447 A.2d 1244, 1253 (Md. Ct. App. 1982); *C.D.M.*, 627 P.2d at 612.

²⁴⁶ *C.D.M.*, 627 P.2d at 611 (footnotes omitted).

²⁴⁷ *Ruby v. Massey*, 452 F. Supp. 361 (D.Conn 1978).

²⁴⁸ *Id.* at 366-67. The statute in question was CONN. GEN. STAT. ANN. § 19-569g. The revised Connecticut statute, CONN. GEN. STAT. ANN. §§ 45a-690-700 (West 1981 & Supp. 1992), effective in 1979, applies to both institutionalized and noninstitutionalized adults.

The court sustained their equal protection challenge, holding that the statutory omission of noninstitutionalized children did not “further the state’s interests and that the statute did not *explicitly* limit its application to institutionalized persons.”²⁴⁹

v. Interpretations of Legislative History and Intent

Courts have consistently construed legislative intent to expand their power to grant sterilization petitions. For example, the highest court in Colorado held that a statute limiting sterilizations to mentally competent adults did not imply a legislative intent to deny sterilizations to mentally incompetent minors.²⁵⁰ The court reasoned that, absent express statutory limitations, the state constitution granted the courts authority to hear and decide petitions for sterilizations of developmentally disabled minors.²⁵¹

Courts have been reluctant to find that *repeal* of prior sterilization statutes implied an intent to prevent courts from deciding sterilization cases. Although ultimately deciding against authorizing sterilizations, one court noted that the 1977 repeal of a compulsory sterilization law based upon eugenic principles was irrelevant to the case because the petitioners were not requesting sterilization for *eugenic* purposes.²⁵² The court reasoned that the only implications of the repeal were that legislators either grew disillusioned with “the efficacy of eugenic sterilization of institutionalized persons” or became concerned with the constitutional issues of due process procedures and consent.²⁵³ However, a federal court drew the opposite inference from the fact that several sterilization bills had failed in the Ohio legislature,²⁵⁴ holding “that the legislature does not believe that sterilization is presently within the power of any court,” and that the public itself did not support such legislation.²⁵⁵

²⁴⁹ Ruby, 452 F. Supp. at 368-69. The court found that by limiting the statute’s application in practice to institutionalized persons, the state was invidiously discriminating against the plaintiff class. The court-created remedy to this denial of equal protection was to allow plaintiffs the same procedural route to sterilization embodied in the statute. *Id.* at 369.

²⁵⁰ A.W., 637 P.2d 366, 371 (Colo. 1981) (en banc). The statute at issue is COLO. REV. STAT. § 27-10.5-128-132 (1989).

²⁵¹ *Id.* at 373-74.

²⁵² In re Eberhardy, 307 N.W.2d 881, 884, 888, 890 (Wis. 1981).

²⁵³ *Id.* at 890. In a footnote, the court noted that since the repeal, several bills proposing new laws for sterilizations of mentally incompetent persons had failed. *Id.* at 890, n.11. The court conceded that some of these bills were “not eugenic but [based upon] a concern for the incompetent’s well being.” *Id.*

²⁵⁴ Wade v. Bethesda Hospital, 337 F. Supp. 671, 674 (S.D. Ohio 1971).

²⁵⁵ *Id.*

V. ANALYSIS OF CASE LAW REVEALS THE AFFECTED INDIVIDUALS

A. Age, Gender, and Indications of Disability

Courts depend on IQ levels as an indicator of an individual's ability to comprehend sex and contraceptives. The traditional scale courts use to define the extent of retardation indicates that persons with IQs under twenty are "profoundly retarded"; twenty to thirty-five "severely retarded"; thirty-six to fifty-one "moderate[ly] retarded"; fifty-two to sixty-seven "mildly retarded"; and sixty-eight to eighty-three "borderline."²⁵⁶ However, studies indicate that whether or not one understands sex and contraceptives depends more on factors such as her or his home environment and gender. "'IQ level [is] not a limitation to sexual knowledge.'"²⁵⁷

What aspects of living do these "mental ages" limit? In *Wentzel*, the court quickly stated that Sonya's IQ was twenty-five to thirty (the equivalent of a mental age of one to two years),²⁵⁸ yet the Brief for Petitioner stated that Sonya could "sing" and "play the piano."²⁵⁹ In light of this fact omitted from the opinion, IQ and mental age appear to be dubious indicators of one's learning capacity. Someone with an IQ of thirty and a mental age of two who learned to play the piano might also learn how to use contraceptives.

B. Reasons Advanced for Sterilization

i. Sexual Promiscuity

Reliance upon sexual promiscuity to support a petition for sterilization has appeared in the few decisions involving women who actually were sexually active, indicating that motives of the petitioners may include punishment for a disapproved lifestyle and control of sexual expression. For example, in *Cook v. State*, a teenage victim of familial physical and sexual abuse was the object of a petition for sterilization, after she "engaged in a series of indiscriminate and impulsive sexual involvements" while institutionalized.²⁶⁰ Similarly, the mother in *Stump* obtained a court order for sterilization of her fifteen-year-old daughter on the grounds that her daughter "had been associating with . . . 'men' and had stayed out overnight with them on several occasions."²⁶¹

²⁵⁶ C.D.M. v. State, 627 P.2d 607, 608, n.2 (Alaska 1981).

²⁵⁷ E.J. Saunders, *The Mental Health Professional, the Mentally Retarded, and Sex*, 32 HOSP. & COMMUNITY PSYCHIATRY 717, 720 (1981), quoted in Stefan, *supra* note 3, at 425-26.

²⁵⁸ *Wentzel v. Montgomery Gen. Hosp.*, 447 A.2d 1244, 1245 (Md. Ct. App. 1982).

²⁵⁹ Brief for Appellant at 4, *Wentzel*, 447 A.2d at 1244.

²⁶⁰ 495 P.2d 768, 770 (Or. Ct. App. 1972).

²⁶¹ 435 U.S. at 351. See also *Frazier v. Levi*, 440 S.W.2d 393, 394 (Tex. Civ. App. 1969) (parents of a 34-year-old mother of two petitioned for her sterilization, claiming that she was "sexually

In re Johnson, illustrates the continuing force of a petitioner's claim of promiscuity.²⁶² The North Carolina statute in *Johnson* recognizes inability to care for children as an exclusive ground for sterilizing mentally disabled individuals. On this ground, a county official petitioned to have Johnson sterilized, offering testimony to disparage Johnson's lifestyle.²⁶³ Although Johnson was only mildly retarded, wanted children, and had been involved with at least one man who wished to marry her, the court held that the petitioner had proven "that . . . the respondent . . . had exhibited emotional immaturity, the absence of a sense of responsibility, a lack of patience with children, and continuous nightly adventures with boyfriends" and therefore, Johnson would not "meet any acceptable standard of fitness to care for a child."²⁶⁴ In short, Johnson would not be a good mother.

ii. Financial Burden of Offspring

Not surprisingly, case law profiles of disabled individuals indicate that poor women face a greater risk of involuntary sterilization than their wealthier peers. Petitioners frequently argue that they or the public will have to support the potential children of the respondents.²⁶⁵ This argument has remained forceful throughout decades of sterilization law. Recall that two statutes authorize sterilizations based on grounds that *society* alone will benefit from the sterilization of a mentally incompetent person.²⁶⁶ Other states require a determination of whether the individual is capable of caring for children.²⁶⁷ This "societal concern" over preventing the birth of children to poor incompetent women indicates that the sentiment expressed by Justice Holmes in *Buck* that society ben-

promiscuous" and that they could not afford to care for more children); *In re Simpson*, 180 N.E.2d 206, 207 (Prob. Ct. Ohio, 1962) (mother of an adult woman with one child claimed that her daughter "has been sexually promiscuous with a number of young men").

²⁶² *In re Johnson*, 263 S.E.2d 805 (N.C. Ct. App. 1980).

²⁶³ Johnson's foster mother testified that Johnson "went out every night, had boyfriends, came in later than she was supposed to, slept most of the day and refused to take birth control pills." There was further testimony that Johnson had had an abortion. *Id.* at 807.

²⁶⁴ *Id.* at 807, 809.

²⁶⁵ In the case of *In re Kemp*, parents of an adult woman claimed that they "and/or the general public" would be responsible for the financial support of their daughter's offspring. 118 Cal. Rptr. 64, 65 (Cal. Ct. App. 1974). In *In re Simpson*, a mother of a developmentally disabled woman who was already supporting one child of her daughter argued that the public would have to support further offspring and that she was presently attempting to secure welfare and dependent child support for the child in her care. 180 N.E.2d at 207-08. In *Frazier v. Levi*, the mother was also supporting the daughter's two developmentally disabled children, and argued that she was "unable to stand the physical, financial or emotional strain" of supporting any more children. 440 S.W.2d at 393-94. In *Holmes v. Powers*, county officials sought the sterilization of a single developmentally disabled mother of "two illegitimate children." 439 S.W.2d 578, 580 (Ky. 1968). And in *Wentzel v. Montgomery Gen. Hosp.*, the 61-year-old grandmother of a physically and mentally disabled girl contended that if the girl had children, the state would probably have to financially support them. 447 A.2d at 1247-48.

²⁶⁶ See *supra* note 165 and accompanying text.

²⁶⁷ See *supra* note 212 and accompanying text.

efits from sterilizing those who "sap the strength of the State"²⁶⁸ retains popularity. Indeed, the culture remains preoccupied with coercing poor women, incompetent or not, from reproducing, as reflected in a newspaper editorial advocating mandatory implantation of Norplant as a means of "reducing the underclass."²⁶⁹ In the sterilization context, "inability to care for children" refers to more than the resources necessary to actually care for children. If this were the entire meaning of the phrase, courts would address solutions such as daycare and surrendering unwanted children for adoption. Indeed, there is evidence that many people are eager to adopt children with developmental disabilities.²⁷⁰ The implication is that "inability to care for children" are code words that justify societal control of mentally disabled women's reproduction.

iii. Physical and Psychological Need, or the Convenience of Others?

Because hysterectomies result in the termination of menstruation, many considerations are unique to this particular sterilization procedure. First, hysterectomy is the only method which results in the alleviation of menstrual discomfort and annoyance for the patient. Second, this is the only surgery which provides an immediate, tangible relief to the woman's caretaker, by relieving the caretaker of personal hygiene burdens. Third, this surgery is far more dangerous to the health of the woman than any other sterilization procedure.²⁷¹

Alleviation of a respondent's discomfort, coupled with traditional grounds (inability to care for children, for instance) result in a very strong case for hysterectomy. Petitioners may characterize alleviation of physical or emotional pain, either expressly or implicitly, as a medical necessity. For example, in *Nilsson*, a hysterectomy for a fourteen-year-old was sought on grounds that Rebecca had "serious menstrual discomfort," was unable to take care of her hygiene, and would not be able to care for children.²⁷² The court approved the petition based on medical

²⁶⁸ *Buck v. Bell*, 274 U.S. 200, 207 (1927).

²⁶⁹ *Poverty and Norplant: Can contraception reduce the underclass?*, PHIL. INQUIRER, Dec. 12, 1990, at A18.

²⁷⁰ Mary McGrory, *Children from the Heart*, WASH. POST, Feb. 3, 1991, at C1. McGrory interviewed Janet Marchese, who ran a national placement service for developmentally disabled children. Marchese stated that there are typically approximately 100 families on the waiting list who are specifically seeking to adopt developmentally disabled children.

²⁷¹ Doug Podolsky, *Saved From the Knife*, U.S. NEWS & WORLD REPORTS, Nov. 19, 1990, at 76. "Up to half [of patients undergoing hysterectomies] suffer complications such as high fever and abdominal bleeding. Long-term effects may include incontinence, chronic pain and diminished sexual response. Among premenopausal women, hysterectomy increases the risk of heart disease by three times. . . . Harvard researchers link protective effects to the ovaries; they have found an elevated risk of heart disease only when these reproductive glands are also removed, as happens in about 41 percent of hysterectomies. . . . [S]o-called female castration causes estrogen levels to plummet, increasing the risk of osteoporosis in younger women and inducing menopause. Symptoms, from hot flashes to depression, can be so severe that doctors prescribe estrogen-replacement therapy, sometimes with testosterone to raise libido."

²⁷² *In re Nilsson*, 471 N.Y.S.2d 439, 440, 441 (Sup. Ct. 1983).

expert testimony that a hysterectomy “would rectify one prospective difficulty [pregnancy] and one actual existing difficulty [menstrual pain].”²⁷³ Similarly, a petition for hysterectomy was approved in *Sallmaier* based, in part, on the fact that a twenty-three-year old’s “personal hygiene . . . must be handled by her mother.”²⁷⁴ The respondent’s IQ of sixty-two²⁷⁵ indicates that she also was probably only mildly impaired,²⁷⁶ and may well have been capable of learning to perform simple hygiene tasks. In these cases, the surgery will result in an immediate benefit for the caretaker of the child. Where medical need is forcefully argued, the danger arises that “medical need” will outweigh every negative implication of sterilization. Although several of these women arguably were educable, the courts did not inquire about any attempts to teach them how to care for themselves. Moreover, courts rarely question the severity of the menstrual pain, or whether medication would be an effective remedy. In sum, courts are too willing to rest hysterectomy authorizations on the ground of medical need, overlooking the incidental benefits that may have motivated the parents or institutional staffs to seek authorization for hysterectomies.

V. CONCLUSION

Both courts and state legislatures have grappled with the problem of preventing unintended pregnancies of mentally impaired individuals but have typically taken a narrow approach which overemphasizes the interests of others and trivializes or ignores the individual’s interest in nonintrusion. One goal of this article has been to present a review for use by attorneys working with sterilization law and legislators who wish to change sterilization laws in their states. I will close by advancing several proposals which may facilitate a more cautious approach to sterilization

²⁷³ *Id.* at 442. According to the traditional IQ scale, Rebecca was only mildly retarded, with an IQ between 50 and 60. *Id.* at 440.

²⁷⁴ *In re Sallmaier*, 378 N.Y.S.2d 989, 990 (Sup. Ct. 1976).

²⁷⁵ *Id.*

²⁷⁶ *See also In re P.S.*, where the court spent the majority of the opinion detailing P.S.’s physical and emotional problems. P.S. suffered from autism and mental retardation. 452 N.E.2d 969, 970 (Ind. 1983). She was institutionalized, and her physician testified that she would be “for the rest of her life.” *Id.* at 971. Because P.S. had strongly negative reactions to seeing her own blood, institutional authorities argued that she would not be able to cope with menstruation. *Id.* at 972. The court had no difficulty in finding that P.S. was in medical need of a hysterectomy. *Id.* at 976. Here, too, it is worth noting that at one time in her life, P.S.’s IQ had ranged from 55-65, indicating mild retardation, but her IQ dropped considerably as she aged, perhaps due in part to the fact that P.S. was tied in restraints and heavily medicated. *Id.* at 971-72. The Ruby case also involved parents petitioning for hysterectomies for their institutionalized children, but here the inability to care for personal hygiene was openly argued: “Susan cannot care for her own hygienic needs during menstruation, and it is highly unlikely that she will ever be able to do so” *Ruby v. Massey*, 452 F. Supp. 361, 363 (D.Conn. 1978) (footnote omitted). Although the other two girls in the case had not begun menstruation, the court concluded that it was “equally unlikely that either girl will be able to care for her own hygienic needs.” *Id.*

petitions that engenders a deeper respect for the bodily integrity of people with mental disabilities.

First, courts should consider staying out of this arena altogether. Several characteristics of the process militate in favor of this proposal. Petitioners, who are usually parents and other relatives, carry with them the loudest voice, the most credibility, and the aura of parental martyrs, skewing the process in their favor. Disturbingly, amici and other supporters on behalf of respondents are very rare in these cases. Court-appointed representation is often hollow, unconscionably failing to present arguments in opposition to the petition. Neither the interests of mentally disabled individuals nor those of the mentally disabled community in general are being advanced. Mentally disabled women themselves seldom appear in court, or if they do, are often unable to voice their own concerns. Current practice discourages healthy debate, or any debate at all in some cases, of what is in fact in the best interest of the individual. Therefore, the judicial system is an inappropriate arena for the resolution of reproductive rights issues involving mentally disabled women. Rather, these issues should be returned to the stage upon which they were first addressed, in the general assemblies of the states.

Second, in cases where a constitutional challenge is mounted, the courts must begin to apply the correct fundamental rights analysis, addressing all prongs of the test. Courts must devote more energy to examining the least restrictive means to prevent conception, both present means and what current research may show as plausible future contraceptives. Norplant is an example of a new alternative to sterilization for some women who would otherwise be subject to sterilization.²⁷⁷ The need for surgery to further the goals of these statutes becomes less supportable as technology refines contraceptive methods. Thus, the least restrictive means prong of the fundamental rights doctrine, if applied correctly, might not be met today in the case of inevitable sterilization (although Norplant arguably is not the least restrictive means for preventing conception). The argument that these statutes are constitutionally flawed because there are less intrusive and restrictive means for accomplishing state goals is one of the stronger arguments available to advocates for the rights of disabled women. This argument serves as a counterweight to the state's interest in sterilization.

Third, courts and legislatures that entertain involuntary sterilization petitions must address some very basic flaws in the process. Specifically, statutory and common law should require that a specific set of factors in favor of non-sterilization be considered by the court. Among these factors would be proof that the individual is capable of reproducing, the respondent's views on sexuality, reproduction, the possibility of marriage

²⁷⁷ Findlay, *supra* note 100 and accompanying text.

or other sexual relationships in the future, and the respondent's ability to utilize other forms of birth control. Moreover, courts must address the problem of respondents' ineffective counsel. Courts and legislatures should *require* that counter-arguments to sterilization be presented by competent counsel, as one statute already does.²⁷⁸

Finally, I encourage legislators and judges to consider a non-paternalistic approach to the individuals whose fate they are deciding. No action may be the best action when in doubt as to the emotional and physical impact of the sterilization decision on the disabled individual. Remember the thoughts of those sterilized in the sole survey which bothered to elicit their response. Consider these voices in your analysis; they may be the only voices you hear expressing the desire of disabled individuals to be left alone in their reproductive lives.

²⁷⁸ See *supra*, note 201 and accompanying text.