INVOLUNTARY STERILIZATION: AN UNCONSTITUTIONAL MENACE TO MINORITIES AND THE POOR

I. INTRODUCTION

Interference with the procreative processes, with or without the consent of the subject, has been prevalent for some time in the United States. Surgical sterilization has been used (1) therapeutically, to treat illness or disease, or as a necessary incident of childbirth; (2) punitively, where sterilization of criminals and sex offenders is authorized by statute; (3) eugenically, particularly in the first sixty years of this century, to purge the population of mental defectives and other persons possessing socially undesirable qualities thought to be inheritable; and (4) socioeconomically, in recent times, primarily as a birth control technique.[1] With respect to the last two applications, recent years have seen a shift in emphasis (fostered by individuals, states and finally the Federal Government) from the use of sterilization as a eugenic device to a family planning method.[2] This development has resulted all too frequently in abuse of the poor and minorities, and has given rise to public concern regarding governmental invasion of the otherwise inviolable rights of privacy, bodily integrity and procreativity.[3] Notwithstanding their effects, purportedly voluntary birth control programs employing sterilization have been rationalized as a benefit to individual indigents (by restricting family size, thereby augmenting upward mobility) and to society (by limiting the number of dependent children, thereby reducing the cost of welfare programs). This Note will examine the competing individual and social interests and the constitutional objections surrounding the current use of involuntary sterilization.

Briefly, the Note develops four avenues of attack on involuntary sterilization statutes and practices. First, the Note analyzes privacy-due process arguments, which focus on the facial validity of involuntary sterilization, in terms of *what* it involves and *how* it is carried out, with an emphasis on the competing interests and factual (scientific) predicates for the employment of sterilization as a birth control device. Second, the discussion takes up equal protection-invidious discrimination arguments, which focus on the validity of coercive and involuntary sterilization statutes and practices as applied, with respect to *who* is affected. Third, the analysis turns to the validity of sterilization with respect to the thirteenth amendment, a perspective from which it appears that certain sterilization practices create a permanently stigmatized caste of unfortunates and may in effect constitute a form of contemporary genocide. Finally, the Note traces the development of regulatory safeguards in federally assisted family planning programs employing sterilization to determine their adequacy in light of the preceding framework.

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1. S. Brakel & R. Rock, The Mentally Disabled and the Law 207 (1971).
2. Id. at 217.
3. Minorities, particularly blacks, have expressed increasing concern that a form of incipient genocide may be on the rise. We Charge Genocide: The Crime of Government Against the Negro People (W. Patterson ed. 1970); S. Yette, The Choice (1971); Darity & Turner, Family Planning, Race Consciousness and the Fear of Race Genocide, 62 Am. J. Pub. Health 1454 (1972); Williams, Blacks Reject Sterilization—Not Family Planning, 8 Psychology Today, July 1974, at 26.

II. INVOLUNTARY STERILIZATION IN THE UNITED STATES

A. The Eugenic Rationale

Until the end of the last century sterilization was impractical for nonpunitive purposes because the only known method by which it could be accomplished was castration.[4] Near the end of the nineteenth century, however, three major events occurred which catalyzed the development of sterilization as one of the most widely employed forms of fertility control in the United States. Sir Francis Galton launched the eugenics movement in 1883,[5] Mendel's laws of heredity were rediscovered[6] and vasectomy and salpingectomy were developed as simple, relatively safe techniques for the prevention of procreation.[7]

Relying upon Mendel's work, which pertained only to the transmission of simple traits in plants, the early eugenicists espoused the theory that a wide variety of individual maladies and even social ills, such as poverty,[8] were eugenic (incurable) in nature and that the best solution was prevention by sterilization of the people suffering from these conditions.[9] Without sanction of law many involuntary eugenic sterilizations were performed, usually at reformatories and mental institutions, pursuant to the peculiar socioeconomic, moral and genetic theories of the attending physician or institutional superintendent.[10]

The first compulsory eugenic sterilization (CES) statute in America was enacted by Indiana in 1907.[11] By 1917 fifteen states had enacted similar laws,[12] although all such statutes which came before the courts prior to 1925, including Indiana's, were declared unconstitutional.[13] In 1925, the highest courts of Michigan[14] and Virginia[15] upheld CES for the first time in the United States. Both cases dealt with institutionalized mentally retarded persons.

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4. Brakel & Rock, supra note 1, at 207; G. Felkenes, Sterilization and the Law, New Dimensions in Criminal Justice 111, 117-18 (1968). See O'Hara & Sanks, Eugenic Sterilization, 45 Geo. L.J. 20 (1956).

5. See Brakel & Rock, supra note 1, at 207-08; Ferster, Eliminating the Unfit—Is Sterilization the Answer? 27 Ohio St. L.J. 591 (1966); Kindregan, Sixty Years of Compulsory Eugenic Sterilization: "Three Generations of Imbeciles" and the Constitution of the United States, 43 Chi.-Kent L. Rev. 123 (1966). Galton's eugenics program had a two-fold aim: "positive eugenics," the encouragement of the biologically fit to propagate, and "negative eugenics," the discouragement of reproduction of the "inferior." See Ferster, supra, at 592; Kindregan, supra, at 123. See generally Weigel & Tinkler, Eugenics and Law's Obligation to Man, 14 S. Tex. L.J. 361 (1973).

6. See Felkenes, supra note 4, at 118; Ferster, supra note 5, at 591.

7. See Brakel & Rock, supra note 1, at 207-08; Felkenes, supra note 4, at 119; Ferster, supra note 5, at 591.

8. See Felkenes, supra note 4, at 118; Ferster, supra note 5, at 592; Kindregan, supra note 5, at 123.

9. See Ferster, supra note 5, at 592.

10. Brakel & Rock, supra note 1, at 208; A. Deutsch, The Mentally Ill in America 370 (2d ed. 1949); Felkenes, supra note 4, at 119-21; H. Laughlin, Eugenical Sterilization in the United States 325, 352 (1922); Ferster, supra note 5, at 592.

11. Ind. Act 1907, ch. 215.

12. Ferster, supra note 5, at 591.

13. See, e.g., Williams v. Smith, 190 Ind. 526, 131 N.E. 2 (1921); Haynes v. Lapeer Cir. Judge, 201 Mich. 138, 166 N.W. 938 (1918); Smith v. Board of Examiners, 85 N.J.L. 46, 88 A. 963 (Sup. Ct. 1913).

14. Smith v. Command, 231 Mich. 409, 204 N.W. 140 (1925) (upholding Mich. Pub. Acts 1923, No. 285).

15. Buck v. Bell, 143 Va. 310, 130 S.E. 516 (1925), aff'd, 274 U.S. 200 (1927) (upholding Va. Pub. Acts 1924, ch. 394).

The foundation for most CES statutes in the United States was laid by the Supreme Court in *Buck v. Bell.*[16] The petitioner, Carrie Buck, a "feebleminded white woman" whose mother was also feebleminded and who had one similarly afflicted child, challenged the statute which authorized her sterilization on substantive due process and equal protection grounds. The Court, speaking through Mr. Justice Holmes, placed the state's interest above the petitioner's by accepting the "negative eugenics"[17] approach of the Virginia legislature:

> It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sanctions compulsory vaccination is broad enough to cover cutting the Fallopian tubes.[18]

In the ensuing ten years no fewer than twenty statutes similar to Virginia's were passed.[19] Presently, twenty-six states have eugenic sterilization laws which are involuntary in that they do not require the consent of the person to be sterilized.[20] In all but nine states CES laws apply only to persons confined to hospitals and mental institutions.[21] Despite increasing dissatisfaction with the scientific foundation for CES,[22] the influence of *Buck v. Bell*[23] continued until late 1973.[24] Estimates of the total number of persons sterilized annually both voluntarily and involuntarily, vary from one hundred thousand to two million.[25]

In light of modern developments in genetics and constitutional law, it appears that the analysis in *Buck* of the respective interests of the state and the person facing sterilization is inadequate. Regarding the interest of the state, the scientific validity of the eugenicists' justification for sterilization is open to serious question: contrary to the assumption made by the Court in *Buck* and the findings of the Virginia legislature, recent evidence shows that mental retardation can be caused by a variety of nongenetic factors such as prenatal infections, prematurity, birth trauma, childhood diseases, anoxia, dietary deficiencies, drug abuse and organic damage to the nervous system.[26] Further, in most cases the probability is slight that the genetic "matchups" necessary to produce many forms of mental deficiency or retardation will occur.[27] Finally, it is important to point out that about eighty-nine percent of inheritable mental

16. 274 U.S. 200 (1927).

17. See note 5 supra.

18. 274 U.S. at 207, citing Jacobson v. Massachusetts, 197 U.S. 11 (1905).

19. Note, Human Sterilization, 35 Iowa L. Rev. 251, 253 (1950).

20. See Sagall, Surgical Sexual Sterilization, 8 Trial, July-Aug. 1972, at 57, 58.

21. Id. It should be noted that in North Carolina, where most CES activity occurs, noninstitutionalized persons may also be sterilized. See text accompanying note 135 infra.

22. See text accompanying notes 26-29 infra.

23. 274 U.S. 200 (1927).

24. Since Buck v. Bell only five CES statutes have been declared unconstitutional. Brakel & Rock, supra note 1, at 208 n.22. See, e.g., Wyatt v. Aderholt, 368 F. Supp. 1382 (M.D. Ala. 1973); Brewer v. Valk, 204 N.D. 186, 167 S.E. 638 (1933); In re Hendrickson, 12 Wash. 2d 600, 123 P.2d 322 (1942).

25. Health Research Group, Study on Surgical Sterilization: Present Abuses and Proposed Regulations (Oct. 29, 1973) [hereinafter HRG Study]. The study was done by Bernard Rosenfeld, M.D., an obstetrician-gynecologist resident at Los Angeles County Hospital, Sidney M. Wolfe, M.D. and Robert E. McGarrish. The Health Research Group is a non-profit public interest group.

26. Ferster, supra note 5, at 615, citing Report and Plan for Action, Virginia Mental Retardation Planning Council 14 (1966). But see State v. Cavitt, 182 Neb. 712, 157 N.W.2d 171, aff'd on rehearing, 183 Neb. 243, 159 N.W.2d 566 (1968), appeal dismissed, 396 U.S. 996 (1970) (statute permitting sterilization without proof of inheritability of mental deficiency upheld; dismissal pursuant to Supreme Court Rule 60 no reflection on merits).

27. McWhirter & Weijer, The Alberta Sterilization Act: A Genetic Critique, 19 U. Toronto L.J. 424, 430 (1969).

deficiency is passed on by "normal" persons[28] and, with respect to the mentally ill as opposed to the mentally retarded, there is virtually no justification for sterilization pursuant to a eugenic rationale since mental illness is not generally inheritable and is responsive to modern forms of treatment.[29] With respect to the interest of the individual, it is very doubtful, given the importance of the right of procreation,[30] that a modern court would defer to a legislative finding that the eugenicists' theory embodied in a CES statute is valid.[31]

The success of an attack on a CES statute, however, need not turn on the invalidity of eugenics theories. Even if such theories were valid, as they arguably could be with respect to certain inheritable diseases such as Tay-Sacks and Huntington's Chorea,[32] strong constitutional objections to CES statutes can still be made: the state's interest in "improving" its population must be subordinated to the individual's right to privacy, to procreate and to preserve his bodily integrity.[33] The broader, hence more dangerous, noneugenical (i.e., socioeconomic) rationales for involuntary sterilization must be subjected to similar if not more stringent tests.

B. Alternative Rationales

Though the scientific basis for the eugenic rationale has been largely disproved in recent years, the vague language of many CES statutes continues to facilitate the sterilization of "undesirables." Accordingly, individuals may be sterilized whenever the appropriate hearing or probation officer, agency, hospital, institutional superintendent or judge determines sterilization to be in the "best interests of society"[34] or merely "advisable."[35] Thus the way remains open for sterilization on ostensibly eugenic grounds pursuant to a CES statute, but for entirely noneugenic purposes.[36]

Moreover, despite the erosion of the eugenic basis for sterilization, the notion of *fitness* as a prerequisite for procreation (based upon theories of moral and economic determinism rather than biological determinism) has been retained by those seeking to use sterilization as a weapon against indigents, welfare recipients and parents of

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28. Deutsch, supra note 10, at 373-74.

29. See Brakel & Rock, supra note 1, at 212.

30. See discussion of Skinner v. Oklahoma, 316 U.S. 535 (1942), in text accompanying notes 88-93 infra.

31. Cf. Buck v. Bell, 274 U.S. 200, 206-07 (1927).

32. The validity of the eugenicists' theory with respect to these diseases (and others such as Sickle Cell Anemia) would be reflected by the high probability that they could be eliminated through positive or negative eugenics within a realistic period of time, a dubious possibility. See text accompanying notes 26-29 supra; A. Montagu, Human Heredity, 302-03 (1963) (elimination of recessive traits); Attah, Racial Aspects of Zero Population Growth, 180 Science 1143, 1149 (1973) (elimination of minority races).

33. See criticism of Buck at note 90 infra, and the constitutional analysis of sterilization in Parts III, IV, V and VI infra. See generally Weigel & Tinkler, supra note 5. The state should at least bear the burden of proving inheritable mental deficiency, and such proof should be "beyond a reasonable doubt," given the fundamental interests affected by sterilization (see Part III infra) and the irrevocable nature of state action under a CES statute. See In re Winship, 397 U.S. 358, 363-64 (1970) (juvenile proceeding); In re Ballay, 482 F.2d 648 (D.C. Cir. 1973) (involuntary civil commitment); Matalik v. Schubert, 57 Wis. 2d 315, 204 N.W.2d 13 (1973) (involuntary civil commitment).

34. See, e.g., Ind. Ann. Stat. § 22-1601 (1964); N.C. Gen. Stat. § 35-36 (Supp. 1973); Utah Code Ann. § 64-10-1 (1968).

35. See, e.g., Del. Code Ann. Tit. 16 § 5701 (1953); Wis. Stat. Ann. § 46.12 (1957).

36. But see Wyatt v. Aderholt, 368 F. Supp. 1382 (M.D. Ala. 1973), where the court declared invalid the vague Alabama CES statute, Ala. Code Tit. 45, § 243 (1940), and Wyatt v. Aderholt, 368 F. Supp. 1383 (M.D. Ala. 1974), where the court substituted comprehensive standards for the sterilization of institutionalized defectives.

"illegitimate" children.[37] In the past two decades many overtly punitive compulsory, noneugenic sterilization (CNES) bills have been introduced in various state legislatures, though most died in committee or by floor vote. These proposals sought to provide for (1) the sterilization of one or both parents of two or more "illegitimate" children; (2) denial of child custody on the same grounds; (3) sterilization as a precondition to receipt of public aid; and (4) all of the above.[38] Various commentators have recognized the racial and socioeconomic biases underlying these bills.[39]

Although the most punitive proposals have not been enacted into law, sterilization has, nevertheless, been imposed upon the poor and minorities for purely socioeconomic reasons, without statutory authority or under statutes which provide only for *voluntary* sterilization (VNES).[40] The next section will explore this practice.

C. Abusive Practices in the Absence of Statutory Authority

1. *Sterilization Coerced by the Medical Community*

There has been a virtual epidemic of sterilizations in American teaching hospitals where the "pushing" and "hard selling" of sterilization has been directed almost exclusively to poor and minority women, many of whom agree to the operation only under duress.[41] Physicians' desires for surgical experience and increased fees are one explanation for the phenomenon.[42] Thus the more difficult, dangerous and profitable hysterectomy procedure is often urged upon poor and minority patients rather than the simpler tubal ligation technique.[43] Other motives play a part, although no additional income and little further experience is gained thereby.[44] Sterilization by way of "knife

37. See Ferster, supra note 5, at 617-20, 623; Jaffe, Public Policy on Fertility Control, 229 Sci. Am., July 1973, at 17 [hereinafter Jaffe, Fertility Control]; Jaffe, Family Planning, Public Policy, and Intervention Strategy, 23 J. Soc. Issues, Oct. 1967, at 145, 152-55 [hereinafter Jaffe, Family Planning]; Paul, The Return of Punitive Sterilization Proposals, 3 Law & Soc. Rev. 77, 78-106 (1968); Windle, Passage of Sterilization Legislation, 29 Pub. Op. Q. 306 (1965). In view of recent Supreme Court decisions regarding the rights of so-called illegitimate children, New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), it is doubtful whether the term has any utility other than to stigmatize children born out of wedlock.

38. See Jaffe, Family Planning, supra note 37, at 153-54; Paul, supra note 37, at 99. See also Morrison, Illegitimacy, Sterilization and Racism (A North Carolina Case History), 39 Soc. Serv. Rev., Mar. 1965, at 1, 2-5; Windle, supra note 37, at 311. In 1962 Virginia passed the nation's first voluntary noneugenic sterilization (VNES) statute when the compulsory noneugenic sterilization (CNES) proposal failed. North Carolina followed suit in 1963 after a CNES proposal failed in that state. See Paul, supra note 37, at 99.

39. See Jaffe, Family Planning, supra note 37, at 153-54; Morrison, supra note 38, at 2-5; Paul, supra note 37, at 99-106; Windle, supra note 37, at 308-11.

40. See Relf v. Weinberger, 372 F. Supp. 1196, 1199 (D.D.C. 1974), where the court stated its awareness of the peculiar susceptibility of indigents and public aid recipients to coercion and abuse regarding sterilization.

41. See HRG Study, supra note 25, at 8; Payne, Sterilization: Abuses by Doctors, Newsday, Jan. 2, 1974, at 4A [hereinafter Payne, Abuses]; Payne, Sterilization: Are Non-White Women Subjected to Discrimination, Newsday, Jan. 3, 1974, at 4A [hereinafter Payne, Discrimination]; N.Y. Times, Oct. 31, 1973, at 7, col. 1.

42. See HRG Study, supra note 25, at 8, 19.

43. See Payne, Discrimination, supra note 41, at 5A. Concerning the comparative dangerousness of hysterectomy as opposed to other birth control techniques, see HRG Study, supra note 25, at 12.

44. Dr. Richard Hausknecht, a New York City obstetrican-gynecologist, has remarked:

> Most [physicians] come from the upper one percent of the white American society. The only contact we have had with poor blacks and Puerto Ricans is as servants. So a vast majority

slipping" is often carried out on the nonconsenting,[45] and individual physicians have required sterilization as a precondition to the receipt of any obstetrical services whatever.[46] Information on alternatives has frequently been withheld, inducing uninformed consent.[47] The well-publicized case of the Relf children in Montgomery, Alabama,[48] where minors were sterilized without the consent of their parents under the auspices of an HEW-funded family planning agency,[49] prompted the promulgation of HEW's sterilization regulations[50] which have since been held invalid.[51]

The abuses described above, to the extent that they involve racial or socioeconomic biases, are perhaps the best contemporary examples of incipient genocide by private persons, often with public sanction, in the United States.[52]

2. *CNES: Judicial Abuses and Plea Bargaining*

Like physicians, judges have frequently exploited their unique position of authority to require sterilization, particularly for minorities and indigents, in the absence of statutory authorization and as a precondition for parole, probation or a lighter criminal sentence.[53] In most such cases, the limiting of welfare costs has been the express or implied judicial motive.[54] In other cases, a eugenic rationale has been

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> of doctors feel that blacks and Puerto Ricans are less worthy. When you superimpose the racism over the pressing desire for training, you arrive at the present situation.
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> [S]ome white obstetricians . . . think nothing at all of interfering with the procreative process of black and Puerto Rican women.

Payne, Discrimination, supra note 41, at 4A-5A.

Dr. Hausknecht's analysis is echoed by Dr. Bruce Hilton, Director of the National Center for Bioethics in Ridgefield, New Jersey: "We must face the fact that there are many whites who, consciously or not, see [involuntary] birth control as a way to save the white race from being overwhelmed." N.Y. Times, Aug. 1, 1973, at 27, col. 1.

45. See Ferster, supra note 5, at 605. It has been reported that the majority of black women whose babies were delivered at Sunflower City Hospital in Mississippi were sterilized without their knowledge. Paul, supra note 37, at 92 n.23.

46. See Relf v. Weinberger, 372 F. Supp. 1196, 1199 (D.D.C. 1974); N.Y. Times, July 22, 1973, at 30, col. 1; id., Aug. 1, 1973, at 27, col. 1. See also L.A. Times, Dec. 8, 1974, Part I, at 3, col. 5.

47. HRG Study, supra note 25, at 6, citing a National Institute of Health Survey.

48. Relf v. Weinberger, Civ. No. 1557-73 (D.D.C. Oct. 5, 1973) (class action dismissed without prejudice pending withdrawal and amendment of HEW sterilization regulations), consolidated with National Welfare Rights Organization v. Weinberger, Civ. No. 74-243 (D.D.C. Mar. 15, 1974), in Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974), appeals docketed, No. 1797, D.C. Cir., May 13, 1974, No. 1798, D.C. Cir., May 13, 1974, No. 1802, D.C. Cir., May 22, 1974. The appeals were consolidated on Oct. 24, 1974. See also Time, July 23, 1973, at 50; Newsweek, July 16, 1973, at 26. See generally Payne, Abuses, supra note 41; Payne, Discrimination, supra note 41.

49. Funded pursuant to the Public Health Service Act, 42 U.S.C. §§ 300 to 300a-3 (1970). See text accompanying notes 205-08 infra.

50. 39 Fed. Reg. 4729 (1974).

51. Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974). See text accompanying notes 216-18 infra.

52. For a definition and discussion of genocide, see Part VI infra.

53. See, e.g., In re Andrada (unreported) (Cal. Sup. Ct. 1964), cert. denied, 380 U.S. 953 (1965) (probation with sterilization versus prison for failure to make child support payment); In re Hernandez, No. 76757 (Santa Barbara Super. Ct. June 8, 1966) (condition of sterilization struck on appeal as beyond trial court's power); People v. Tapia, No. 73313 (Santa Barbara Super. Ct. July 7, 1965) (welfare fraud, reduced sentences and probation after both spouses submitted to sterilization). A discussion of *Andrada*, *Hernandez* and *Tapia* may be found in Paul, supra note 37, at 79 n.3, and in Ferster, supra note 5, at 609-13.

54. See, e.g., In re Simpson, 180 N.E.2d 206, 208 (Ohio P. Ct. 1962), a discussion of which may be found in Ferster, supra note 5, at 607-09; Note, Sterilization of Mental Defectives, 61

advanced for sterilization of nondefectives under CES statutes for underlying socio-economic purposes.[55] In some instances ostensibly eugenic sterilizations have occurred after authorizing statutes have been repealed or where no such statute existed,[56] and in at least one instance, sterilizations have continued under the authority of a law declared unconstitutional but not repealed by the legislature.[57]

One may choose to view such practices as mere isolated incidents or as evidence of widespread disregard for bodily integrity and human dignity.[58] More realistically, however, they appear to represent the exercise of racial and class prejudice at their worst by persons in positions of authority against individuals and classes least able to protect their health, safety and rights in American society.

III. DUE PROCESS AND FUNDAMENTAL INTERESTS: THE RIGHT OF PROCREATION

In 1942 the Supreme Court expressly recognized the right of procreation and held it to be a basic civil right in *Skinner v. Oklahoma*.[59] Since that time the Court's decisions regarding marital privacy, bodily integrity, abortion, the rights of pregnant women and, most recently, lower court decisions[60] on sterilization itself have added content to the right, have formulated standards of review for actions which threaten basic civil rights, and have created a new source for the fundamental right to procreate—the privacy penumbra.[61]

A. Privacy

In the landmark privacy case of *Griswold v. Connecticut*,[62] a physician affiliated with a planned parenthood center in Connecticut challenged the constitutionality of the state's anti-birth control statute.[63] In declaring the statute unconstitutional, the Supreme Court raised the "right to privacy" to the status of an independent right derived from a "penumbra" of specific constitutional rights.[64] Significantly, Justice Goldberg's concurring opinion, in which Chief Justice Warren and Justice Brennan joined, maintained that statutes which prohibit voluntary birth control are legally symmetrical with statutes which require compulsory birth control (such as CES and CNES laws), and that both types intrude upon the constitutionally protected rights of marital privacy.[65] In *Eisenstadt v. Baird*[66] this "zone of privacy" was enlarged to

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Mich. L. Rev. 1359, 1362 (1963); Note, Compulsory Sterilization of Criminals—Perversion in the Law; Perversion of the Law, 15 Syracuse L. Rev. 738 (1964).
Newsday, Jan. 2, 1974, at 5A.

55. See Neglect by the U.S.—Case in Point: 'I Wondered Why I Never Got Pregnant,' Newsday, Jan. 2, 1974, at 5A.

56. See, e.g., Wade v. Bethesda Hospital, 337 F. Supp. 671 (S.D. Ohio 1971); In re Simpson, 180 N.E. 2d 206 (Ohio P. Ct. 1962); Ex Parte Eaton (unreported) (Baltimore Cir. Ct. 1954), discussed in O'Hara & Sanks, supra note 4, at 39. But see Frazier v. Levi, 440 S.W.2d 393, 395 (Tex. Civ. App. 1969) (sterilization of mentally retarded persons beyond the statutory authority of the court).

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

58. Davis, Informed Consent: Asset or Liability, 1 J. Black Health Perspectives 30 (1974).

59. 316 U.S. 535, 541 (1942).

60. See, e.g., Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974); Wyatt v. Aderholt, 368 F. Supp. 1382 (M.D. Ala. 1973).

61. See text accompanying note 64 infra.

62. 381 U.S. 479 (1965).

63. Conn. Gen. Stat. Rev. §§ 53-32, 54-196 (1958).

64. The "penumbra" eminates from the first, third, fourth, fifth and ninth amendments. 381 U.S. at 484.

65. 381 U.S. at 496-97.

66. 405 U.S. 438 (1972).

include single persons. The Court affirmed the right of the individual to be free from unwarranted governmental intrusion into matters so fundamental as the decision whether to bear or beget a child.[67]

Justice Goldberg's symmetry analogy, however, did not consider that the decision to conceive a child has a potentially greater public impact than the decision not to procreate[68] and that the degree of public impact must be considered in assessing the strength of the privacy argument.[69] The greater the public impact of an individual's behavior, the less the individual may rely on constitutional privacy to protect the challenged activity. Accordingly, on strict privacy grounds alone sterilization per se is not necessarily unconstitutional, notwithstanding the fact that petitioners' actions[70] in both *Griswold* and *Eisenstadt* were given constitutional protection despite their cognizable public impact. Additional aspects of the individual's interest in procreation must therefore be explored. Such aspects include the quasi-privacy rights to bodily integrity and to freedom from interference in family matters, and the nonprivacy or "natural" right of procreation.[71]

B. Bodily Integrity

The right to bodily integrity is another basis for the right of procreation. Even this fundamental right is subject to limitation, however, since invasions of the body have been allowed under limited circumstances pursuant to the police power. In *Schmerber v. California*,[72] for example, the Supreme Court permitted a blood sample obtained involuntarily from an intoxicated driver to be used as evidence in a criminal prosecution. The Court was careful to restrict physical invasions to "minor intrusions into an individual's body under stringently limited conditions."[73] In *Jacobson v. Massa-*

67. Id. at 453 (citing Skinner v. Oklahoma, 316 U.S. 535 (1942); Stanley v. Georgia, 394 U.S. 557 (1969); Jacobson v. Massachusetts, 197 U.S. 11 (1905)). For further discussion of this right see text accompanying notes 84-87 infra. The terms "bear" or "beget" are used here to denote two distinct acts involved in procreation, namely giving birth and conception, respectively. Each act embodies distinct legal issues. See text accompanying notes 84-85 infra.

68. The public impact of private activity, if adverse, may give rise to a state interest in the restriction or limitation of such activity. Thus with respect to involuntary fertility control, the state may advance its interest in curbing overpopulation, reducing welfare expenses and limiting the number of mentally retarded and otherwise dependent adults and children. With respect to protecting the population from severe communicable diseases, the state clearly has an interest in promoting even involuntary vaccinations. Jacobson v. Massachusetts, 197 U.S. 11 (1905). Similar interests arise with respect to pornography. Stanley v. Georgia, 394 U.S. 557 (1969). The crucial issue is the manner in which the state interests are to be protected in light of fundamental individual rights critical to the survival of our free society. See note 71 infra.

69. See Stanley v. Georgia, 394 U.S. 557, 567 (1969), where the Court, in upholding the right of the individual to view obscene materials in the privacy of his own home, distinguished cases which involved either *public* distribution of obscene materials or the distinct probability of *public* injury. See also Note, On Privacy: Constitutional Protection for Personal Liberty, 48 N.Y.U.L. Rev. 670, 752-60 (1973).

70. The sale or distribution of birth control services, devices or counseling.

71. Here "bodily integrity" is distinguished from "strict" privacy because it encompasses actual physical invasions, a more fundamental violation of personal privacy than the "intellectual invasions" prohibited in *Stanley*. Bodily invasions, sterilization being one of the most severe forms, require a greater state interest justification even in the face of greater adverse public impact. See note 68 supra. Similarly, the right to noninterference in family matters (marital privacy) while more qualified than the bodily integrity aspect of privacy, still presents a stronger barrier to state or private interference than do the privacy rights recognized in *Stanley*. There are different degrees of fundamentalness. The right of procreation itself will be discussed in Part III D infra.

72. 384 U.S. 757 (1966).

73. Id. at 772. "The integrity of an individual's person is a cherished value of our society." Id.

chusetts[74] the Court upheld a statute which required, under penalty of a fine, vaccination against smallpox. However, the Court limited the justification for even this relatively minor bodily invasion to circumstances involving the "paramount necessity" of self-defense "against an epidemic of disease."[75]

The parallel rights to privacy and to bodily integrity arguably give rise to an individual's *right* to voluntary consent as a prerequisite to any substantial nonemergency invasion of his person, particularly in the case of sterilization.[76]

C. Marital Privacy

Freedom of personal choice in matters of marriage and family life, and in the decision whether to bear or beget children, is an additional aspect of privacy that is pertinent to a constitutional analysis of sterilization.[77] The right of the family as a social unit to exist free of state interference, while not expressly recognized in the United States Constitution,[78] has not gone unnoticed by the Supreme Court. In *Meyer v. Nebraska*,[79] the Court stated in dicta that "liberty" in the due process clause of the fourteenth amendment encompasses, *inter alia*, freedom from bodily restraint and the right of the individual to marry, establish a home and bring up children.[80] In *Loving v. Virginia*,[81] the Court invalidated the Virginia anti-miscegenation law and affirmed the right of persons to marry whomever they choose without threat of state interference: "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[82] As the Court suggested, procreation and marriage are practically congruent. Additionally, sterilization has been found to put single persons at a relative disadvantage in the seeking of spouses.[83]

Finally, with respect to the decision whether to bear or beget a child, the Court in recent years has taken the unequivocal position that freedom to choose *not* to beget a child cannot be arbitrarily infringed upon by the government.[84] This "negative" right of procreation, with respect to the choice not to bear a child, was reaffirmed in the abortion decisions culminating in *Roe v. Wade*.[85] The individual's right freely to decide to have children[86] and the correlative right to choose not to procreate, as expressed in *Griswold*, *Eisenstadt* and *Roe* raise similar constitutional considerations and should be accorded a high degree of protection with respect to the state interest or public impact required to justify their infringement.[87] The fundamental nature of the right of procreation leads more directly to this result.

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74. 197 U.S. 11 (1905).
75. Id. at 27.
76. See note 199 infra.
77. See note 71 supra.
78. This right is expressly recognized by the international community. See Part III E infra.
79. 262 U.S. 390 (1923).
80. Id. at 399. The Court held that the due process clause of the fourteenth amendment prevents states from forbidding the teaching of a foreign language to young students.
81. 388 U.S. 1 (1967).
82. Id. at 12, citing Skinner v. Oklahoma, 316 U.S. 535 (1942). See also Boddie v. Connecticut, 401 U.S. 371 (1971).
83. See the materials cited in note 173 infra.
84. See Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972).
85. 410 U.S. 113 (1973). See also People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).
86. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974). See also Skinner v. Oklahoma, 316 U.S. 535 (1942), and discussion in Parts III D and E infra.
87. See notes 68 & 71 supra. See also discussion in text accompanying notes 64-65 supra, regarding the legal symmetry between state prohibition of voluntary birth control and enforcement of compulsory birth control techniques.

D. The Right of Procreation

As noted previously, the Supreme Court recognized in *Skinner v. Oklahoma*[88] that procreation is an independent constitutional right. As such it stands outside the more recent privacy penumbra of *Griswold* and the analysis of symmetrical correspondence discussed earlier.[89] Moreover, *Skinner* limited *Buck* in two respects which relate directly to the development of equal protection and substantive due process since 1927. First, the Court implicitly accepted the rational relationship test applied in *Buck*, referring with approval to the one reasonable basis for CES discussed by Justice Holmes in the earlier case, namely, that CES allows the mentally retarded to be "returned to the world," thus opening the asylum to others.[90] The Court held that there was "no such saving feature" in *Skinner*, which involved a statute providing for the sterilization of certain classes of convicted felons but exempted others, the "white collar" felons.[91] Second, and most importantly, the Court rejected the rational basis test as the standard for judicial review in *Skinner*. Instead the Court turned to strict scrutiny because of the "fundamental" nature of the rights of marriage and procreation.[92]

Thus *Skinner* supports the proposition that procreation is a constitutionally protected right subject to limitation only upon a showing of compelling state interest.[93] Recent cases have affirmed this view. In *Cleveland Board of Education v. LaFleur*,[94] the Supreme Court considered whether a state could interrupt the employment of pregnant teachers without a case by case medical determination of the necessity therefor. The Court, in effect, applied a strict scrutiny analysis to the school board's regulations and held that they violated due process because they infringed upon the pregnant teachers' affirmative rights to have children:

> By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exer-

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88. 316 U.S. 535 (1942).

89. With respect to the sterilization statute at issue, the Court in *Skinner* stated:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race . . . .

316 U.S. at 541. Procreation as a "natural" law right was also expressed in pre-*Skinner* state court decisions; e.g., Smith v. Wayne Probate Judge, 231 Mich. 409, 415, 204 N.W. 140, 142 (1925); Smith v. Board of Examiners, 85 N.J.L. 46, 88 A. 963 (Sup. Ct. 1913), and has been treated as an independent right by courts on all levels since *Skinner*. See Cleveland Board of Educ. v. LaFleur, 414 U.S. 632 (1974); Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974); State v. Cavitt, 182 Neb. 712, 157 N.W. 2d 171, aff'd on rehearing, 183 Neb. 243, 159 N.W.2d 566 (1968), appeal dismissed, 396 U.S. 996 (1970).

90. Buck v. Bell, 274 U.S. 200, 208 (1927), cited in *Skinner*, 316 U.S. at 542. The *Buck* decision contained critical weaknesses quite apart from Justice Holmes' tacit acceptance of legislative findings as to the validity of now discredited eugenics theories. First, the Court's analogy between compulsory sterilization—which is of questionable benefit to both the individual and society—and compulsory vaccination—where the benefit to both is indisputable—is inappropriate. The degree of bodily invasion required in each case is not remotely analogous. Sterilization invades the fundamental rights of bodily integrity, marital privacy and procreation; compulsory innoculation invades only the first. The further analogy in *Buck* to the state's power to "call upon the best citizens for their lives" during wartime, 274 U.S. at 207, is even more tenuous than the analogy to vaccination, since sterilization even for eugenic reasons does not remotely involve the exigencies of self-defense required during wartime. See Brakel & Rock, supra note 1, at 213; O'Hara & Sanks, supra note 4, at 29-30.

91. 316 U.S. at 537, 542.

92. Id. at 541.

93. Conversely, *Buck*, in addition to its basic inconsistency with *Skinner*, is at odds with constitutional and international human rights developments since 1945. See Part III E infra.

94. 414 U.S. 632 (1974).

cise of these protected freedoms . . . [and] directly affect "one of the basic civil rights of man" . . . .[95]

In *Relf v. Weinberger*,[96] which invalidated the recently promulgated HEW sterilization regulations,[97] the court cautioned against governmental interference, directly or indirectly, with the "basic human right to procreate" and extended the *Skinner* analysis to include the protection of minors, mental incompetents and indigents dependent upon HEW-funded programs and projects.[98] Following Justice Douglas' lead in *Skinner*, Judge Gesell in *Relf* did not rest the right to procreation entirely on the privacy penumbra, but considered it a basic and fundamental human right in and of itself.[99]

The independent genesis of the right of procreation underlies its fundamental nature in the hierarchy of individual freedoms enjoyed by citizens of the United States, and, under traditional due process tests, would seem to give rise to the need for an extremely strong justification on behalf of the state for any involuntary interference with this fundamental individual interest.[100]

E. International Human Rights

The foregoing conclusion is further warranted because the right of procreation, even though not expressly recognized in the Constitution of the United States, is not merely a judicially created concept arising from "natural law due process,"[101] but rather is an internationally recognized *human* right, derived directly and necessarily from the rights of familial integrity which are codified in various international human rights instruments.[102]

Arguably, many of these instruments may not presently constitute domestically enforceable treaties. Some do not purport to be "treaties"[103] and a number of the conventions and covenants which could be termed "treaties" have not been ratified by the United States.[104] Other ratified instruments, such as the United Nations Charter (particularly Articles 55 and 56) and the Universal Declaration of Human Rights,[105] have been held domestically inapplicable (i.e., non-self-executory) in some cases, usually on grounds of vagueness.[106] Decisions on this point are in conflict,[107] how-

95. Id. at 640.

96. 372 F. Supp. 1196 (D.D.C. 1974).

97. 39 Fed. Reg. 4729 (1974); see text accompanying notes 207-18 infra.

98. 372 F. Supp. at 1201-02.

99. Id. at 1202.

100. A public emergency, the rationale required by the vaccination case, Jacobson v. Massachusetts, 197 U.S. 11 (1905), would be one such justification. See also Note, Governmental Control of Research in Positive Eugenics, 7 U. Mich. J.L. Ref. 615, 620 (1974).

101. A term coined by Justice Black in his dissenting opinion in Griswold v. Connecticut, 381 U.S. 479, 515-16 (1965), to identify and criticize "a judicial philosophy which would apply certain restrictions to the states beyond those protecting individual rights specifically enumerated in the Constitution." See Gray, Compulsory Sterilization in a Free Society: Choices and Dilemmas, 41 U. Cin. L. Rev. 529, 546 (1972).

102. See the various conventions, covenants and declarations cited in notes 113-15 infra.

103. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); American Declaration of the Rights and Duties of Man, Res. XXX, Pan American Union, Final Act of the Ninth International Conference of American States 38 (1948) (adopted by the Ninth International Conference of American States, held at Bogota, Colombia, March 30, 1948).

104. See note 117 infra.

105. G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

106. See, e.g., Hitai v. Immigration and Naturalization Service, 343 F.2d 466 (2d Cir. 1965); Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952).

107. See Kennedy v. Mendoya, 372 U.S. 144 (1963) (Universal Declaration of Human Rights applied); Sei Fujii v. State, 217 P.2d 481 (Cal. Dist. Ct. App. 1950), aff'd on other grounds, 38 Cal.

ever, perhaps because the Charter's human rights provisions, as well as those of the Universal Declaration, are more specific than the equal protection and due process clauses of the Constitution. Accordingly, the argument runs, these instruments should be cognizable by, if not binding upon, American courts without implementing legislation, especially since the Charter and the Universal Declaration were strongly supported and ratified by the United States.[108] The domestic utility of the human rights instruments generally is also restricted by conflicting views on the standing of individuals raising only international human rights claims in domestic courts.[109]

Although a detailed discussion of the problems inherent in the domestic application of the international human rights instruments is beyond the scope of this Note, it seems clear that strong arguments can be made that key international human rights instruments are, or may soon become, binding on courts in the United States.[110] Further, the mere existence of international law as a basis for the right of procreation may serve in close cases as a counter-argument to strict-constructionist objections to judicial enforcement of the unenumerated right of procreation and compel the liberal construction of domestic statutory and constitutional provisions which protect procreation.[111] Alternatively, international human rights provisions may serve to enforce a restrictive reading (if not voiding) of CES and CNES laws and close judicial scrutiny of private conduct which violates that right.[112] Therefore, a brief discussion of pertinent international human rights provisions concerning familial integrity is appropriate here.

Article 16 of the Universal Declaration of Human Rights[113] provides:

> 1. Men and women of full age—have a right to marry and to found a family.
>
> . . . .
>
> 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Nearly identical provisions appear in other international human rights instruments.[114]

2d 718, 242 P.2d 617 (1952); Namba v. McCourt, 204 P.2d 569 (Ore. 1949) (United Nations Charter binding on United States).

108. See Schachter, The Charter and The Constitution: The Human Rights Provisions in American Law, 4 Vand. L. Rev. 643, 651-52 (1951); Schluter, The Domestic Status of the Human Rights Clauses of the United Nations Charter, 61 Cal. L. Rev. 110, 141-43, 147, 155 (1973).

109. Compare 1 L. Oppenheim, International Law: A Treatise 289 (2d ed. 1912), with 1 L. Oppenheim, International Law: A Treatise 289 (8th ed. H. Lauterpacht 1955). See also Diggs v. Schultz, 470 F.2d 461 (D.C. Cir. 1972), cert. denied, 411 U.S. 931 (1973) (individuals have standing to challenge governmental actions which violate United Nations obligations); Comment, Diggs v. Schultz, 14 Va. J. Int. L. 185, 189-90 (1973).

110. See Schachter, supra note 108, at 651-52; Schluter, supra note 108, at 141-43, 147, 155.

111. In their concurring opinions in Oyama v. California, 332 U.S. 633 (1948), Justices Black and Douglas relied upon the Human Rights Provisions of the United Nations Charter as additional support for the invalidity of the California Alien Land Law. Id. at 649-50. Justices Murphy and Rutledge, in their separate concurring opinion, accorded equal weight to the Charter and the Constitution. Id. at 673. See Hurd v. Hodge, 334 U.S. 24, 34-35 (1948) (private contracts subject to federal policy "as manifested in . . . treaties . . . ."); Namba v. McCourt, 185 Ore. 579, 204 P.2d 569 (1949) (states bound by Charter's principles; discriminatory land ownership statute voided).

112. See Schachter, supra note 108, at 656-57; Schluter, supra note 108, at 154-62.

113. G.A. Res. 217A (III), U.N. Doc. A/810 at 71, 74 (1948).

114. See, e.g., American Declaration of the Rights and Duties of Man, Resolution XXX, ch. 1, art. VI, Pan American Union, Final Act of the Ninth International Conference of American States 38, 40 (1948) (adopted by the Ninth International Conference of American States, held at Bogota, Colombia, March 30, 1948); European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 8, 12, Council of Europe—European Convention on Human Rights—Collected Texts 4-5 (9th ed. 1974) (signed at Rome, Nov. 4, 1950, entered into force on

The Proclamation of Teheran[115] is illustrative of an international consensus regarding the rights of parents to be free from interference in the decision whether to bear or beget children. Article 16 provides:

> The protection of the family and of the child remains the concern of the international community. Parents have a basic human right to determine freely and responsibly the number and the spacing of their children.[116]

Significantly, the Teheran Proclamation makes specific reference to the Universal Declaration of 1948, and to two International Covenants of 1966 which contain similar provisions, indicating that these instruments embody a "common understanding" of basic human rights and thereby impose upon the international community "new standards and obligations to which States should conform."[117]

Virtually all comprehensive international human rights instruments contain specific familial rights provisions. Although none of these instruments clearly binds the United States to take affirmative action for their enforcement or implementation, the existence of a basis in international law for the right of procreation, like the non-privacy basis,[118] raises the public impact or state interest threshold in that it further augments the individual interest considerations in the due process-balancing test necessary to determine the facial validity of involuntary sterilization statutes and practices.[119]

IV. EQUAL PROTECTION: INDIRECT RACIAL AND ECONOMIC CLASSIFICATIONS

In its most recent decisions involving equal protection analysis, the Supreme Court seems to have accepted Mr. Justice Marshall's tripartite "sliding scale"[120] test

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Sept. 3, 1953); International Covenant on Economic, Social and Cultural Rights art. 10, G.A. Res. 2200A, 21 U.N. GAOR Supp. 16, at 49, 50, U.N. Doc. A/6316 (1966); International Covenant on Civil and Political Rights arts. 7, 23, G.A. Res. 2200A, 21 U.N. GAOR Supp. 16, at 52, 53, 55, U.N. Doc. A/6316 (1966); American Convention on Human Rights "Pact of San Jose, Costa Rica" art. 17, O.A.S. Treaty Series, No. 36, at 6, O.A.S. Official Records, OEA/Ser. A/16 (English ed. 1970).

115. U.N. Doc. A/Conf. 32/41 at 3 (1968) (adopted at the International Conference on Human Rights, Teheran, 13 May, 1968).

116. Id. at 4. CES and CNES could arguably be said to be applicable only to irresponsible persons—those who, by giving birth to dependent or illegitimate children, have demonstrated an inability to make the "responsible choice" to which they have a right. The implications of using irrebuttable presumptions as to parental irresponsibility to justify involuntary sterilization will be discussed in Part V infra.

117. U.N. Doc. A/Conf. 32/41 at 4 (1968). Although the Covenants on Economic, Social and Cultural Rights (art. 10, G.A. Res. 2200A, 21 GAOR Supp. 16 at 49, 50, U.N. Doc. A/6316 (1966)) and on Civil and Political Rights (art. 23, id. at 55), as of February 1972, had received only 15 of the 35 ratifications or accessions needed to give effect to the Covenants, Schluter, supra note 108, 111-12 n.8, the fact that they were approved by a majority in the General Assembly and subsequently by the Teheran Proclamation, which was in turn approved by a majority of nations in the General Assembly, indicates that the basic provisions remain internationally-respected human rights.

118. See Parts III B-D supra.

119. Generally, the persuasiveness of the International Human Rights instruments would seem to be greater with respect to sterilization practices in the United States than with respect to countries in which (1) less onerous means of birth control are not available and (2) the need for immediate population control is more clearly manifested. See J. Bhagwati, The Economics of Underdeveloped Countries 196-201 (1966).

120. See Dunn v. Blumstein, 405 U.S. 330 (1972). See also Justice Marshall's dissenting opinions in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Richardson

as an alternative to, and middle ground between, the strict scrutiny and rational relationship standards of the former "differential" approach.[121] Strict scrutiny is undertaken whenever a fundamental interest or a suspect classification is involved in the challenged legislative scheme. Fundamental interests have been dealt with previously under the due process heading;[122] their presence in a given statutory classification requires a strict scrutiny whether a due process or equal protection analysis is applied. Thus the presence of direct racial classifications in CES or CNES laws would render them facially unconstitutional,[123] would violate federal civil rights statutes[124] and would give rise to legitimate charges of genocide.[125] Of the groups directly affected by such laws, however, only institutionalized or mentally retarded persons are specifically mentioned in most compulsory sterilization statutes.[126] This classification was upheld in *Buck v. Bell*[127] and was not at issue in *Skinner v. Oklahoma.*[128] Racial minorities[129] as well as indigents, minors and incompetents,[130] however, are the victims of indirect CES and CNES statutory classifications.

A. Indirect Racial Classifications

Statutes which are not discriminatory on their face have nonetheless been struck down because of their discriminatory application. *Yick Wo v. Hopkins,*[131] for example, presents one of the most extreme instances of a statute's discriminatory effect. In *Hopkins* all applications by non-Chinese for business licenses pursuant to the challenged municipal ordinance were accepted, and all such applications by Chinese persons were denied, although the latter group outnumbered the former by 200 to 80. The Court held that racial discrimination could be the only explanation for the discrep-

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v. Belcher, 404 U.S. 78 (1971); Dandridge v. Williams, 397 U.S. 471 (1970). For a discussion of the "sliding scale" test, see Karst, Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula," 16 U.C.L.A.L. Rev. 716, 744-45 (1969); Note, Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1101-1102 (1969) [hereinafter Note, Developments]. But see Chicago Police Department v. Mosely, 408 U.S. 92 (1972), and Bullock v. Carter, 405 U.S. 134 (1972), where the Burger Court resorted to the two-tier approach, employed by the Warren Court. See, e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

121. See, e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (differential approach; strict scrutiny voided discriminatory election scheme); Reed v. Reed, 404 U.S. 71 (1971) (sliding scale approach; sex discrimination claim sustained without strict scrutiny). For a comprehensive discussion of recent developments in equal protection analysis see generally Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972); Karst, supra note 120; Note, Developments, supra note 120.

122. See Parts III A-D supra.

123. See Loving v. Virginia, 388 U.S. 1 (1967) (state anti-miscegenation law voided); Shelley v. Kraemer, 344 U.S. 1 (1948) (state support of private discrimination prohibited). See generally Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).

124. The Civil Rights Acts would be specifically violated. 18 U.S.C. §§ 241-42 (1970); 42 U.S.C. §§ 1981-83 (1970).

125. See Part VI infra.

126. See, e.g., Conn. Gen. Stat. Ann. § 17-19 (Supp. 1974); Miss. Code Ann. § 41-45-1 (1973); Va. Code Ann. § 37.1-156 (Supp. 1973).

127. 274 U.S. 200 (1927). But see Wyatt v. Aderholt, 368 F. Supp. 1382 (M.D. Ala. 1973).

128. 316 U.S. 535 (1942).

129. See Kennard, Sterilization Abuses, Essence, Oct. 1974, at 66; Payne, Discrimination, supra note 41, at 4A-5A, 15A; Slater, Sterilization: Newest Threat to the Poor, Ebony, Oct. 1973, at 150. Unfortunately, while racial classifications are easily suspect, proof of such legislative classification is somewhat difficult. Conversely, economic classifications are easier to demonstrate, but the courts are reluctant to consider economic distinctions as suspect. Cf. Dandridge v. Williams, 397 U.S. 471 (1970).

130. See Relf v. Weinberger, 372 F. Supp. 1196, 1199 (D.D.C. 1974).

131. 118 U.S. 356 (1886).

ancy.[132] Similarly, in *Gomillion v. Lightfoot*[133] the Court suggested that racial discrimination was the only logical basis for the challenged Tuskegee redistricting scheme.[134]

The same analysis applied where blacks and other minorities are disproportionately affected by state involuntary sterilization statutes leads to similar conclusions. The situation in North Carolina is the clearest example of such disproportionate application. In 1968, 290 sterilizations were authorized by the State's Eugenics Commission.[135] Of these, 188 or 65 percent involved blacks,[136] who constitute only 22 percent of the State's population.[137] Given the prevalence of medical and judicial abuses of sterilization,[138] it would be surprising if the North Carolina pattern did not represent the norm rather than the exception in those states still practicing CES or CNES.[139] In jurisdictions where such practices are documented, involuntary sterilization laws should be declared unconstitutional *as applied*, pursuant to the sliding scale equal protection analysis discussed earlier.[140]

B. Economic Classifications

In general, direct economic classifications are not clearly unconstitutional, particularly where no fundamental interests are affected.[141] Similarly, indirect economic classifications by themselves appear valid. In *San Antonio Independent School District v. Rodriguez*,[142] indigent and minority plaintiffs challenged the Texas scheme of financing public education through local property taxes. The Court emphasized the requirement of "absolute deprivation" of educational opportunity because the latter was considered less than a fundamental right.[143] Even if the notion of absolute deprivation were valid, however, it would not preclude strict scrutiny of a statute which subjected persons to involuntary sterilization solely because of their economic status,

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132. Id. at 373-74. See Norris v. Alabama, 294 U.S. 587 (1935).

133. 364 U.S. 339 (1960).

134. Id. at 347. Cases holding that the absence of blacks from juries in a state or county (despite the presence of qualified black candidates) presents a prima facie case of racial discrimination are further examples of discriminatory purposes underlying state statutes or practices which are inferrable from their effects. See Norris v. Alabama, 294 U.S. 587 (1935); Note, Developments, supra note 120, at 1099-1101.

135. The North Carolina Eugenics Commission (formerly the Eugenics Board) is established by N.C. Gen. Stat. §§ 35-43 to 46 (Supp. 1973).

136. Biennial Report of the Eugenics Board of North Carolina (1968). In 1968, the State ceased making racial breakdowns in its reports.

137. 1970 Census Report, 1 Char. of Pop. Part 35, North Carolina, Table 18, at 35-55.

138. See Part III supra.

139. For evidence of similar practices in other jurisdictions see Morrison, supra note 38, at 2-5; Paul, supra note 37, at 77-106; Windle, supra note 37, at 311.

140. See text accompanying note 120 supra. But see Jefferson v. Hackney, 406 U.S. 535 (1972), where the state welfare scheme was upheld despite impressive statistics tending to show racial discrimination, illustrating the Court's greater tolerance of potentially discriminatory schemes where government benefits are being sought. See, e.g., Richardson v. Belcher, 404 U.S. 78 (1971) (social security benefits); Dandridge v. Williams, 397 U.S. 471 (1970) (AFDC benefits). Compare this tolerance with the Court's historical willingness to find indirect discrimination where the government seeks to deprive individuals of pre-existing rights rather than government-created benefits. See Yick Wo v. Hopkins, 118 U.S. 356 (1886). Clearly the welfare-benefits rationale is inapplicable to sterilization cases, which involve fundamental interests.

141. Compare Shapiro v. Thompson, 394 U.S. 618 (1969) (fundamental interest found: travel), with Dandridge v. Williams, 397 U.S. 471 (1970) (no fundamental interest, nor right to AFDC benefits). But see Goldberg v. Kelly, 397 U.S. 254 (1970) (AFDC an "entitlement").

142. 411 U.S. 1 (1973).

143. Id. at 23-40. Justice Marshall strenuously opposed both notions in his dissent. Id. at 88-90, 97-130.

since sterilization itself entails the "absolute deprivation" of the right of procreation.[144]

On the other hand, wealth classifications have been considered suspect where fundamental interests or rights were imperiled by the statutory scheme.[145] The practical result of these rights-versus-benefits decisions is that the state cannot accomplish through bootstrapping what it is precluded from doing directly, namely, the deprivation of pre-existing fundamental rights through the imposition of eligibility requirements for its benefit programs. This principle clearly covers sterilization.

C. Least Onerous Alternative, Overclassification and Irrebuttable Presumptions

Admittedly, the state has an interest in limiting the costs of benefit programs such as AFDC. Statutes authorizing the sterilization of mentally retarded persons deemed incapable of supporting even mentally normal children have been upheld.[146] However, a statute providing for the CNES of all persons after the birth of their second child[147] would be suspect under the preceding due process analysis. The least constitutionally acceptable use of CNES is bootstrapping: conditioning the receipt of vital benefits (e.g. AFDC) on the deprivation of rights pursuant to a cost-savings rationale, thereby vesting state interest in such deprivations according to the degree of assistance provided to needy persons.

In the event, however, that some form of contraception were required as a prerequisite for government benefits, the technique selected must be the "least onerous alternative" to sterilization.[148] Under this principle, sterilization as a welfare prerequisite as well as state CES and CNES statutes should be struck down unless a strong showing is made that all voluntary birth control efforts which could have been attempted would have failed to achieve satisfactory results, and that less radical involuntary methods of contraception which could have been attempted, after failure of voluntary approaches, would have likewise failed.[149]

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144. Permanent or absolute deprivations of fundamental rights based solely on racial or economic reasons are also subject to attack on thirteenth amendment and (in the case of sterilization) genocide grounds. See Parts V and VI infra. Moreover, indigents as such are a "disadvantaged group" within the meaning of the sliding scale. See Karst, supra note 120, at 744-45; Note, Developments, supra note 120, 1101-02.

145. See, e.g., Bullock v. Carter, 405 U.S. 134 (1972) (voting); Boddie v. Connecticut, 401 U.S. 371 (1971) (marriage and divorce); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation). Wealth classifications, however, have been upheld where government-sponsored benefits are at stake. See, e.g., San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) (education); Ortwein v. Schwab, 410 U.S. 656 (1973) (welfare); James v. Valtierra, 402 U.S. 137 (1971) (public housing).

146. Ore. Rev. Stat. §§ 436.010 to -.150 (1971); Ga. Code Ann. §§ 84-931 to -936 (Supp. 1973). The Oregon Statute was upheld in Cook v. Oregon, 9 Ore. App. 224, 495 P.2d 768 (1972).

147. Such a population control measure has been suggested in Attah, supra note 32, and specifically proposed in Gray, Compulsory Sterilization in a Free Society: Choices and Dilemmas, 41 U. Cin. L. Rev. 529 (1972), and in Comment, Population: The Problem, The Constitution and a Proposal, 11 J. Fam. L. 319 (1971).

148. The "least onerous alternative" principle, the principle that the breadth of legislative abridgement must be viewed in light of less drastic means for achieving the same objective, originated in the economic regulation cases. Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951); Baldwin v. Seelig, Inc., 294 U.S. 511 (1935). It was extended to the civil rights field in Shelton v. Tucker, 364 U.S. 479 (1960), and has been applied to prohibit the involuntary sterilization of institutionalized persons. See Wyatt v. Aderholt, 368 F. Supp. 1383 (M.D. Ala. 1974). The concept was also present in the various opinions in Griswold v. Connecticut, 381 U.S. 479 (1965), and therefore may logically be applied to invasions of privacy, including sterilization. See Gray, supra note 147, at 565. See also San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 51 (1973); Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

149. See Kindregan, State Power over Human Fertility and Individual Liberty, 23 Hast. L.J. 1401 (1972); Paul, supra note 37, at 95 n.28.

The least onerous alternative principle is also applicable in a more general public policy context. The imposition of involuntary sterilization as a birth control device is irrational when it is considered that fertility rates vary inversely with income and education.[150] The promotion of these two factors by the state (in concert with anti-discrimination legislation and the reduction of unemployment) as alternatives not only to sterilization, but to the welfare system itself, would be consistent with both the least onerous alternative principle and with this society's equal opportunity precepts.[151]

The least onerous alternative becomes an issue in cases of overclassification (overbreadth)[152] arising from erroneous statutory presumptions.[153] In *Carrington v. Rash*,[154] for example, the Court overturned a Texas law denying military personnel the right to vote on the assumption that they were nonresidents. Statutes based on such "irrebuttable presumptions" must be given close scrutiny where fundamental interests are at stake.[155] The subjection of indigents, unwed mothers and mentally retarded persons to sterilization presupposes that all such persons will give birth to children who will be wards of the state for an indefinite period of time,[156] and thus also creates the likelihood of an overclassification. Accordingly, doctrines requiring that states more carefully define groups subject to involuntary birth control, and that states employ the least drastic method of contraception, require the same conclusion as that reached under the sliding scale analysis: involuntary sterilization in most cases is constitutionally unacceptable.

V. THIRTEENTH AMENDMENT: CASTE PROHIBITIONS

The thirteenth amendment has been successfully invoked in recent times to remove "badges" and "incidents" (e.g. stigmas) of slavery without respect to race where involuntary servitude is found,[157] and where public or, especially, private racial discrimination is found.[158] Involuntary sterilization for socioeconomic purposes (CNES) would seem to be repugnant to the thirteenth amendment to the extent that its usage defines, stigmatizes and treats the poor and minorities as inherently and permanently incapable of self-improvement and therefore subject to manipulation or elimination at the state's behest.

Sterilization as a method of controlling fertility came into use in America primarily for the purpose of eliminating genetic "disorders", where cure was hopeless and pre-

150. See Jaffe, Fertility Control, supra note 37, at 18. See also Attah, supra note 32, at 1149-50.

151. See Ferster, supra note 5, at 624.

152. See Eisenstadt v. Baird, 405 U.S. 438, 451 (1972).

153. With respect to judicial review, there appears to be little difference between a presumption and a legislative finding of fact. As a practical matter, "erroneous presumption" and "overclassification" can be considered judicial smokescreens for strict scrutiny. See Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441 (1973).

154. 380 U.S. 89 (1965).

155. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Vlandis v. Kline, 412 U.S. 441, 446 (1973). In *LaFleur* the Court rejected the presumption that "every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing." 414 U.S. at 644.

156. This presumption is also repugnant to the thirteenth amendment. See text accompanying notes 160-65 infra.

157. See Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966); Downs v. Department of Public Welfare, 368 F. Supp. 454 (E.D. Pa. 1973). See also Bailey v. Alabama, 219 U.S. 219 (1911); Flood v. Kuhn, 316 F. Supp. 271 (S.D.N.Y. 1970), aff'd, 443 F.2d 264 (2d Cir. 1971), aff'd, 407 U.S. 258 (1972) (compulsion is the key requirement for involuntary servitude).

158. See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413, 437-43 (1968) (housing); Gonzales v. Fairfax-Brewster School, Inc., 363 F. Supp. 1200 (E.D. Va. 1973) (education); Pennsylvania v. Local No. 542, 347 F. Supp. 268, 301 (E.D. Pa. 1972) (employment).

vention was the only answer.[159] With advances in the field of genetics, the rational and scientific grounds for CES have been eroded considerably. Similarly, with advances in alternative forms of fertility control, which can now be easily and inexpensively applied,[160] the justifications for the degree of intrusion into bodily functions and legal rights wrought by CNES have all but vanished.[161] Consequently the use of such a drastic and irreversible measure on individuals who do not have incurable defects but whose only crime or "malady" is poverty or race can only be a "logical extension of class and racially biased stereotypes which conceive the poor [and minorities] as statically and perversely irresponsible, childlike and animallike";[162] an irrebuttable presumption that certain groups are fundamentally incapable of self-improvement.

The modern tendency to blame the poor, rather than institutions, for problems of poverty,[163] and to use involuntary sterilization as an anti-poverty device, imposes upon the poor a stigma or "badge" of permanent inferiority in violation of the principles of the thirteenth amendment.[164] With respect to blacks, whom this amendment was originally, but not exclusively, designed to protect, the stigma does not exist as a result of some innate feature, but because of a presumption by others as to their character, intelligence and potential. Analogous presumptions prevail with respect to the use of sterilization as an anti-poverty device.[165]

The tragedy is that class mobility, ethnic heterogeneity and pluralism have traditionally been basic American social, economic and legal values (theoretically, at least). In recent welfare decisions, the Supreme Court itself has relied upon the notion that poverty is a nonstatic, remediable condition. In *Jefferson v. Hackney*,[166] for example, the Court rejected attacks on the Texas scheme for computing AFDC benefits, saying in part:

> [I]t was not irrational for the State to believe that the young are more adaptable than the sick and elderly, especially because the latter have less hope of improving their situation in the years remaining to them.[167]

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159. Ferster, supra note 5, at 619; see text accompanying note 9 supra.

160. See HRG Study, supra note 25, at 10-17, for a comparison of the relative costs, risks and dangers of various forms of fertility control. Further, less onerous voluntary methods, when available, have been very effectively utilized by lower income groups, which have shown a greater recent decline in birth rates than the middle class. Jaffe, Fertility Control, supra note 37, at 20-23.

161. See Parts II and III supra.

162. Jaffe, Family Planning, supra note 37, at 154.

163. Ferster, supra note 5, at 624; Jaffe, Fertility Control, supra note 37, at 23 n.57; Weigel & Tinkler, supra note 5, at 386-88.

164. A similar thirteenth amendment (stigma) argument was rejected by the Court in the Civil Rights Cases, 109 U.S. 3 (1883), where the "badge of slavery" notion was held inapplicable to private acts of discrimination, a view that has since been thoroughly rejected. See cases cited in note 158 supra.

165. See Jaffe, Family Planning, supra note 37. Presumptions as to a permanent and inherent incapacity for self-improvement in the poor and minorities, if embodied in CNES laws, are erroneous in an equal opportunity environment and render such statutes facially invalid under the present analysis. If for some reason these presumptions are upheld, it follows that social problems emanating from poverty and racism can be eliminated by reducing the poor and minority population involuntarily. See generally Attah, supra note 32; Gray, supra note 147. Such an approach has genocidal implications. See Part VI infra. Proponents of CNES, however, could argue that at worst they are guilty of paternalism: attempting to help the ignorant poor by limiting their family size. The coercive or involuntary and irrevocable methods used, however, expose and belie the benevolence argument. See note 196 infra.

166. 406 U.S. 535 (1972).

167. See also Goldberg v. Kelly, 397 U.S. 254 (1970), where Justice Black, in his dissenting opinion, stated, "The list of welfare recipients is not static." Id. at 272. Perhaps the Court in

Unlike the equal protection clause, which applies to any unreasonable classification irrespective of whether the class itself is static or temporary, the thirteenth amendment may be read to prevent and eliminate castes[168] or permanent and static classifications, and, it is submitted, private and legislative actions which give rise to same. Thus in *Jones v. Alfred H. Mayer Co.*,[169] the Court relied upon the 1866 Civil Rights Act,[170] which in turn was based upon the thirteenth amendment, to invalidate private housing discrimination which created and reinforced a permanent "badge of inferiority." Similarly in *Edwards v. California*,[171] where the Court held invalid a statute that made it a misdemeanor knowingly to bring an indigent nonresident into the state, Justice Douglas in his concurring opinion, which was joined by Justices Murphy and Black, said in part:

> [To allow] a State [to] curtail the right of free movement of those who are poor or destitute . . . would . . . introduce a *caste* system utterly incompatible with the spirit of our system of government. It would permit those who are stigmatized by a State as indigents, paupers or vagabonds to be relegated to an inferior class of citizenship.[172]

Procreation, if anything, is more fundamental than travel.

Persons who are involuntarily sterilized are severely stigmatized in that (1) they are forever deprived of the ability to procreate; (2) they are subject to harsh social disabilities as a direct consequence of sterility;[173] and (3) many suffer severe physical and emotional side and after effects, even death in rare cases.[174] In sum, involuntary sterilization for birth control (socioeconomic) purposes violates the thirteenth amendment because it involves (a) the creation of an irrebuttable *presumption* as to the caste of the victim, (b) the imposition of private or governmental *action* based upon such a presumption, and (c) a stigmatic *result*. Accordingly, victims of CNES have been relegated to a caste of permanent inferiority no less than if they were enslaved or condemned to a lifetime of involuntary servitude, and the existence of the underlying "presumption" in CNES laws, discussed earlier, renders them facially void under the thirteenth amendment.

VI. GENOCIDE

The employment of CNES as an anti-poverty device and the widespread abuses of sterilization in hospitals and in other institutions[175] appear genocidal in effect and

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Goldberg and *Jefferson* would have deemed the claim to welfare benefits a right had it considered poverty to be a permanent or static condition.

168. The traditional concept of caste is that of a society composed of "birth-ascribed, hierarchically ordered, and culturally distinct groups . . . ." Berreman, The Concept of Caste, 2 International Encyclopedia of the Social Sciences, 333, 334 (1968). As used herein, caste denotes permanent socioeconomic immobility and is therefore to be distinguished from class. See G. Myrdal, An American Dilemma 667-69, 674-75 (1964). Slaves were clearly a caste rather than a class under this definition.

169. 392 U.S. 409 (1968).

170. 42 U.S.C. § 1982 (1970).

171. 314 U.S. 160 (1941).

172. 314 U.S. at 181 (emphasis added). Mr. Justice Douglas relied on the fourteenth amendment.

173. See HRG Study, supra note 25, at 15, 16; Neglect by the U.S.—Case in Point: 'I Wondered Why I Never Got Pregnant', Newsday, Jan. 2, 1974, at 5A, 15A; Kennard, Sterilization Abuses, Essence, Oct. 1974, at 66, 85; Slater, Sterilization: Newest Threat to the Poor, Ebony, Oct. 1973, at 150, 151.

174. See HRG Study, supra note 25, at 12.

175. See Part II supra.

perhaps, as suggested by many observers,[176] in design also. The term has been defined as follows:

> [G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such:
>
> (a) killing members of the group;
> (b) causing serious bodily or mental harm to members of the group;
> . . . .
> (d) *imposing measures intended to prevent births within the group.*[177]

Under this definition, genocide clearly encompasses involuntary sterilization.[178] Further, even before the term was coined United States courts recognized that inherent in any sterilization statute is the danger of what would today be called genocide. In *Skinner v. Oklahoma*[179] the Court said:

> The power to sterilize, if exercised, may have subtle, far reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear.[180]

A domestic claim of genocide would probably be cognizable, if at all, only under the civil rights statutes[181] or the thirteenth and fourteenth amendments because (1) there is no common law or statutory basis in the United States for the crime of genocide; (2) the International Genocide Convention has not been ratified; and (3) even if it were ratified, its criminal law nature would seem to require domestic legislation to provide adequate standards and definitions, particularly with respect to the element of intent.[182] Genocide, nevertheless, is now an internationally recognized crime[183] and,

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176. See note 3 supra.

177. Convention on the Prevention and Punishment of the Crime of Genocide art. II, effective Jan. 12, 1951, No. 1021, 78 U.N.T.S. 277, 280 (embodying G.A. Res. 260A (III), U.N. Doc. A/810 at 174 (1948)) [hereinafter sometimes referred to as the "Genocide Convention"] (emphasis added). For other definitions of genocide, see 53 B.U.L. Rev. 574, 578-83 (1973). The Genocide Convention has not yet been ratified by the United States Senate, though 75 other nations have ratified it, despite the support of all administrations (except President Eisenhower's) since 1948. See Senate Committee on Foreign Relations Report supporting ratification of International Convention on the Prevention and Punishment of the Crime of Genocide, S. Exec. Rep. No. 92-6, 92nd Cong., 1st Sess. (May 4, 1971). One of the chief opponents to ratification has been Senator Ervin of North Carolina. See 118 Cong. Rec. 33865-66 (1972); S. Exec. Rep. No. 92-6, 92nd Cong., 1st Sess. (May 4, 1971). Interestingly, most involuntary sterilizations in the United States occur in North Carolina and the number of blacks affected is grossly disproportionate to their representation in the population. See text accompanying notes 135-39 supra.

178. Lemkin, Genocide as a Crime Under International Law, 41 Am. J. Int. L. 145, 147 (1947).

179. 316 U.S. 535 (1942).

180. Id. at 541. Pre-*Skinner* decisions also reflect judicial awareness of the vulnerability of minorities to genocide by sterilization. See, e.g., Smith v. Board Examiners, 85 N.J.L. 46, 52, 88 A. 963, 966 (Sup. Ct. 1913). Socioeconomic minorities are no less exempt from such abuses at the behest of a "legislatively represented majority" than their racial counterparts. See Skinner v. Oklahoma, 316 U.S. 353, 546 (1942) (Jackson, J., concurring).

181. Civil provisions: 42 U.S.C. §§ 1981-83 (1970). Criminal provisions: 18 U.S.C. §§ 241, 242, 245 (1970).

182. Article V requires domestic legislation for penal sanctions. The Genocide Convention, thus, is clearly not self-executory, unlike the international human rights instruments discussed in Part III E supra, which do not by their own terms require implementing legislation.

183. Convention on the Prevention and Punishment of the Crime of Genocide art. II, effective Jan. 12, 1951, No. 1021, 78 U.N.T.S. 277 (embodying G.A. Res. 260 A (III), U.N. Doc. A/810 at 174 (1948)); Lemkin, supra note 178.

under the evolving doctrine of customary international law, all nations would be obligated to prevent the occurrence and punish the perpetrators of genocide whether or not they were parties to the Convention.[184]

The course of conduct of the United States strengthens the rationale for applying the Genocide Convention to the United States pursuant to customary international law. The United States participated in the Nuremberg Trials, actively participated in the drafting and preparation of the Convention[185] and supported the General Assembly resolutions establishing and approving the Convention.[186] Further, the status of the United States as a nonparty *signatory* to the Convention may give rise to greater rights and obligations with respect to the Convention than would be imposed upon countries which had not signed the Convention.[187]

Accordingly, private persons in the United States, as well as states or even the Federal Government itself[188] could conceivably be charged with genocide in a domestic court of competent jurisdiction or in an international penal tribunal[189] in the event CNES welfare reform laws are passed or enforced, or in the event present involuntary sterilization practices are allowed to continue with covert legislative and judicial approval.

VII. FEDERALLY FUNDED STERILIZATIONS AND THE QUESTION OF CONSENT

A. The Legal Basis and Requirements

Section 6(c) of the Family Planning Services and Population Research Act of 1970[190] authorizes the Department of Health, Education and Welfare (HEW) to make grants to state and other public as well as private nonprofit entities to assist in the establishment and operation of family planning projects, to train personnel, to promote

184. Customary international law is based upon the common consent of nations extending over a period of sufficient duration to cause it to become "crystalized" into a rule of conduct. 1 G. Hackworth, Digest of International Law 1 (1940). Crystalization makes a conventional or contractual rule a norm binding on countries which are not parties to a given convention. North Sea Continental Shelf Cases, [1969] I.C.J. 4, 41. See also Reservations to the Genocide Convention, [1951] I.C.J. 15, 23. Crystalization requires that the particular provision be of a "fundamentally norm-creating character" and either substantial participation in the convention or a substantial period of compliance prior to the assertion of custom against a nonparty. North Sea Continental Shelf Cases, [1969] I.C.J. 4, 41-44. The Genocide Convention would seem to meet these requisites. "[T]he principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation." Reservations to the Genocide Convention, [1951] I.C.J. 15, 23. See also Barcelona Traction Power and Light Co., Ltd., [1970] I.C.J. 1, 32. See generally Schachter, supra note 108; Schluter, supra note 108.

185. See Lemkin, supra note 178, at 149-50.

186. See Schluter, supra note 108, at 123-24.

187. See Reservations to the Genocide Convention, [1951] I.C.J. 15, 28.

188. Convention on the Prevention and Punishment of the Crime of Genocide art. IV, effective Jan. 12, 1951, No. 1021, 78 U.N.T.S. 277, 280 (embodying G.A. Res. 260A (III), U.N. Doc. A/810 at 174, 175 (1948)), permits prosecutions against these classes of persons, including government officials and elected representatives.

189. Convention on the Prevention and Punishment of the Crime of Genocide art. VI, effective Jan. 12, 1951, No. 1021, 78 U.N.T.S. 277, 280-82 (embodying G.A. Res. 260A (III) U.N. Doc. A/810 at 174, 175 (1948)). Article IX provides that disputes concerning the responsibility of a state for genocide (or for conspiracy, incitement, or attempt to commit genocide, or for complicity in genocide as provided in Article III) shall be submitted to the International Court of Justice at the request of any party to such dispute. Id. at 282 (U.N. Doc. A/810 at 175).

190. 42 U.S.C. §§ 300 to 300a-6 (1970).

research and to make educational material available to the public.[191] The Act conveys the clear intent of Congress that all family planning efforts carried out with federal financial assistance are to be voluntary in nature.[192] In this respect the Act is not inconsistent with the various constitutional prohibitions against involuntary sterilization[193] but in fact demonstrates congressional sensitivity to the family planning needs of the poor.

Details of administration were left to HEW which to date has grappled unsuccessfully and sometimes recalcitrantly with the problem of defining and preserving the crucial point of distinction between voluntary and involuntary or coercive conduct.[194] Thus the central legal and practical issue to be resolved within the regulations is that of consent.[195] In retrospect it is clear that many of the previously discussed abuses supported by HEW funds could have been avoided had enforceable consent standards been in effect.[196]

The rapidly developing case law on the subject[197] indicates that consent to sterilization or other medical procedures must be given voluntarily, with knowledge of the likely consequences and alternatives, by a legally competent person.[198] If the prerequisites of voluntariness, knowledge and competency are met, the result is legally adequate or "informed" consent.[199] When strictly interpreted, these requirements would seem to preclude sterilization of minors and mental incompetents.[200] However,

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191. 42 U.S.C. §§ 300 to 300a-3 (1970).

192. 42 U.S.C. §§ 300a-5 (1970) states expressly that all services provided through the Act shall be voluntary and shall not be a prerequisite for any other service or benefit provided by the funded agency or individual. See also 42 U.S.C. §§ 602(a)(15)(c) and 708(a)(3) (1970). Sterilization as a family planning technique is neither excluded by nor expressly mentioned in the Act's general provisions. Abortion is specifically excluded. 42 U.S.C. § 300a-6 (1970).

193. See Parts III, IV, V and VI supra.

194. See text accompanying notes 205-23 infra. Assisting the poor and others to reduce or limit family size (by providing, *inter alia*, subsidized voluntary sterilization programs) as a means of enhancing socioeconomic mobility, is vastly different from forcing sterilization upon such persons in order to hold down the costs of a welfare system. Involuntary sterilization "invades rather than compliments the right to procreate." Relf v. Weinberger, 372 F. Supp. 1196, 1203 (D.D.C. 1974).

195. Consent is the device by which the physician is granted power to treat (i.e., sterilize) the patient and which is supposed to protect the patient from unwanted invasions of his person. Note, Informed Consent—A Proposed Standard for Medical Disclosure, 48 N.Y.U.L. Rev. 548 (1973) [hereinafter Note, Informed Consent Standard], citing Note, Restructuring Informed Consent: Legal Therapy for the Doctor-Patient Relationship, 79 Yale L.J. 1533, 1555 (1970).

196. See generally Relf v. Weinberger, 372 F. Supp. 1196 (D.D.C. 1974). Furthermore, under the least onerous alternative principle (see text accompanying notes 146-51 supra) sterilization should be employed only as a last resort even in HEW programs. See Wyatt v. Aderholt, 368 F. Supp. 1383, 1384 (M.D. Ala. 1974). Regarding Medicaid abuses, see materials cited in note 46 supra.

197. See Waltz & Scheuneman, Informed Consent to Therapy, 64 Nw. U.L. Rev. 628, 628 n.1 (1970); Note, Informed Consent Standard, supra note 195, at 548, 551-55.

198. Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972); Relf v. Weinberger, 372 F. Supp. 1196, 1201 (D.D.C. 1974); Wyatt v. Aderholt, 368 F. Supp. 1383, 1384 (M.D. Ala. 1974); Kaimowitz v. Michigan Dep't of Mental Health, 2 Prison L. Rep. 433, 476-77 (Mich. Cir. Ct. 1973).

199. The right to bodily integrity would seem to give rise to the complimentary right to informed consent. See Canterbury v. Spence, 464 F.2d 772, 780, 786 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972); Wilkenson v. Vessey, 110 R.I. 606, 624, 295 A.2d 676, 687 (1972). Privacy was the source relied upon in Kaimowitz v. Michigan Dep't of Mental Health, 2 Prison L. Rep. 433, 478 (Mich. Cir. Ct. 1973).

200. See Wyatt v. Aderholt, 368 F. Supp. 1383, 1384 (M.D. Ala. 1974) (prohibiting sterilization of institutionalized persons under the age of 21 years); Relf v. Weinberger, 372 F. Supp. 1196, 1202 (mental incompetents cannot consent to sterilization).

the first HEW regulations[201] and some cases[202] permitted the sterilization of such persons on the consent of relatives or others. While such indirect consent may be justified with respect to surgical procedures undertaken in an emergency[203] or to secure for the patient a purely medical benefit, it would seem most difficult to justify this form of 'consent' where termination of the right of procreation is involved.[204]

B. Critique of HEW Sterilization Regulations

The pertinent HEW sterilization regulations were first published in proposed form late in 1973,[205] largely in response to the severe criticisms directed at HEW's family planning programs and projects in reaction to the Montgomery and Aiken scandals of mid-1973.[206] More comprehensive permanent guidelines were issued in February 1974.[207] The regulations govern HEW program administration in two areas: (1) family planning services to the poor administered by the Public Health Service through State health agencies and public and private projects;[208] and (2) Medicaid and AFDC programs administered by the Social and Rehabilitation Service.[209] Though organized differently, the two sets of regulations are essentially the same. Accordingly, discussion herein will focus only on the PHS regulations.

The permanent guidelines, like the earlier version, permitted the sterilization of minors[210] and incompetents[211] even in the absence of parental consent,[212] and defined "informed consent" only in terms of knowledge and voluntariness.[213] These latter elements were to be ostensibly guaranteed through the provision of a mandatory consent form containing various requirements.[214] Absent, however, was a require-

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201. 38 Fed. Reg. 26459 (1973); id. at 26460.

202. See, e.g., Bonner v. Morgan, 126 F.2d 121, 122-23 (1941); Koury v. Follo, 272 N.C. 366, 158 S.E.2d 548, 555 (1968).

203. See Canterbury v. Spence, 464 F.2d 772, 788-89 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972).

204. See Relf v. Weinberger, 372 F. Supp. 1196, 1202 (D.D.C. 1974).

205. 38 Fed. Reg. 26459 (1973); id., at 26460.

206. Davis, Informed Consent: Asset or Liability, 1 J. Black Health Perspectives 30, 31 (1974); Payne, Abuses, supra note 41, at 4A; Slater, Sterilization: Newest Threat to the Poor, Ebony, Oct. 1973, at 150, 154.

207. 39 Fed. Reg. 4729 (1974).

208. Id. at 4732.

209. Id. at 4733.

210. Persons under age 18 could be sterilized pursuant to a Review Committee's recommendation. 42 C.F.R. § 50.203(c)(1), 39 Fed. Reg. 4732 (1974). The earlier proposed regulations set the age at 21. Proposed 42 C.F.R. § 50.303(a), 38 Fed. Reg. 26460 (1973).

211. Persons "legally incapable of giving informed consent" could be sterilized pursuant to a Review Committee's recommendation and a court's determination that "sterilization is in the best interest of the patient." 42 C.F.R. § 50.203(c)(2), 39 Fed. Reg. 4732 (1974). The composition and duties of the Review Committee were set forth at 42 C.F.R. §§ 50.205, 50.206, 39 Fed. Reg. 4732-33 (1974). Corresponding provisions in the earlier regulations were proposed C.F.R. §§ 50.303(a)(2) and 50.304, respectively, 38 Fed. Reg. 26460 (1973). No definition of "best interest" has been proposed, nor has HEW suggested the standard of proof to be employed in determining whether sterilization is in the best interests of a given patient. For a suggested standard, see note 33 supra.

212. 42 C.F.R. § 50.208(c), 39 Fed. Reg. 4733 (1974).

213. 42 C.F.R. § 50.202(f), 39 Fed. Reg. 4732 (1974). The earlier version did not define "informed consent." See proposed 42 C.F.R. § 50.303(b), 38 Fed. Reg. 26460 (1973).

214. The consent form was to have contained: (1) a fair explanation of the procedures; (2) a description of the attendant discomforts and risks; (3) a description of the expected benefits; (4) an explanation of alternate methods of family planning and notice of the irreversibility of the sterilization procedure; (5) an offer to answer any questions; and (6) an instruction that withdrawal of consent would not prejudice other benefits. 42 C.F.R. § 50.202(f), 39 Fed. Reg. 4732

ment that consent be *competent* and that the patient be given a comprehensive written *and* oral description of (or a short course about) alternative and less onerous methods of family planning.[215]

Accordingly, the final HEW regulations permitted sterilizations which in effect were involuntary, since minors and incompetents cannot as a general rule legally consent to medical operations or be held to contractual obligations.[216] Moreover, the regulations were potentially coercive, since competent adults were factually, though not legally, incapable of giving informed consent without a full written *and* oral disclosure of alternatives and of their right to forego sterilization without jeopardizing other government-sponsored benefits. On these grounds, the regulations were invalidated in *Relf v. Weinberger*,[217] where the court permanently enjoined the use of HEW funds for

> [t]he sterilization of any person who (1) has been judicially declared mentally incompetent or (2) is in fact legally incompetent under [state law] to give informed and binding consent to [sterilization] because of age or mental capacity . . . .[218]

HEW responded with interim regulations[219] which permit only the sterilization of persons giving "legally effective informed consent"[220] but which still do not provide expressly for both written and oral notice[221] of alternatives to sterilization and of its irreversibility, and clear assurances that refusal to consent will not jeopardize other benefits.[222] Consequently, although the ambiguities and potential for injustice created by permitting sterilizations without respect to legal capacity have perhaps been re-

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(1974). These consent criteria closely resembled HEW regulations concerning Protection of Human Subjects in government-sponsored experiments, except the latter required "[a] disclosure of any appropriate alternative procedures that might be advantageous for the subject." Proposed 45 C.F.R. § 46.3(c)(4), 38 Fed. Reg. 27882 (1973). Significantly the final informed consent guidelines governing HEW-funded human experimentation projects contain the following introductory statement:

> "Informed consent" means the knowing consent of an individual . . . so situated as to be able to exercise free power of choice without undue inducement or any element of force, fraud, deceit, duress, or any other form of constraint or coercion.

45 C.F.R. § 46.3(c), 40 Fed. Reg. 11854 (1975).

215. The HEW sterilization regulations provide for two methods of evidencing (assuring) informed consent. One such method is a "short form written consent document" signed by the patient and indicating that the basic elements of informed consent, see note 214 supra, have been presented to him. 42 C.F.R. § 50.202(f)(ii), 39 Fed. Reg. 4732 (1974). *Alternatively*, the regulations may be satisfied by the presentation to the patient of a "written consent document" detailing all of the informed consent elements unaccompanied by any oral explanation. 42 C.F.R. § 50.202(f)(i), 39 Fed. Reg. 4732 (1974).

216. See Restatement of Torts § 59 (1934); 43 C.J.S. Infants § 71 *et seq.* (1945); 17 C.J.S. Contracts § 133 (1963). See also Relf v. Weinberger, 372 F. Supp. 1196, 1202 (D.D.C. 1974) (citing the above authorities).

217. 372 F. Supp. 1196, 1202-03, 1204.

218. Id. at 1204. The court also declared the regulations arbitrary and unreasonable and ordered improved consent procedures to protect competent adults. Id. at 1204-05.

219. 39 Fed. Reg. 13872, 13887 (1974).

220. 42 C.F.R. § 50.203(b), 39 Fed. Reg. 13873 (1974). HEW continued in effect its prior moratorium (38 Fed. Reg. 20930-31 (1973)) on sterilization of persons under 21 as legally incapable of consenting thereto.

221. 39 Fed. Reg. 13873 (1974) (introductory comments). The alternative oral (short form) or written modes of disclosure contained in the invalidated regulations, see note 215 supra, were retained. 42 C.F.R. § 50.202(d)(7)(i) and (ii), 39 Fed. Reg. 13873 (1974).

222. See 42 C.F.R. §§ 50.202(d)(6) and 50.202(d)(7)(iii), 39 Fed. Reg. 13873 (1974).

solved, problems remain with respect to the factual capacity, or knowledge element, of competent adults.[223]

CONCLUSION

Involuntary sterilization is repugnant to the Constitution for a number of reasons. It is most clearly unconstitutional when used against the poor and minorities ostensibly as an inexpensive anti-poverty device. Such use invariably reflects a determination by the "legislatively represented majority"[224] that others are somehow less fit to propagate, a notion that is remarkably similar to eugenics theories once popular in this country and in Nazi Germany.[225] Moreover, such a presumption is inimical to traditional American legal, religious and social values concerning the worth of the individual, the desirability of an ethnically heterogeneous society, and most fundamentally, the belief that each human being and social class is capable of full development if given equal opportunity.

Given the constitutional problems inherent in involuntary sterilization, the widespread abuses of voluntary programs, the variety of state CES and CNES laws and practices, and the fact that "[t]he dividing line between family planning and eugenics is murky,"[226] it is clear that the public policy of this country should and must be opposed to any form of involuntary sterilization for birth control purposes, including the sterilization of persons who for any reason are unable to give informed consent. It is also clear that, notwithstanding the legitimate family planning needs of the poor, the Federal Government should tread lightly if at all in this area, for there are indications[227] that any federal scheme for involvement in coercive or involuntary sterilization will be given close scrutiny by the courts.

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223. See text accompanying notes 197-99, 213, supra. New HEW regulations designed to correct many of these deficiencies have not yet been published.

224. Skinner v. Oklahoma, 316 U.S. 535, 546 (1942) (Jackson, J., concurring).

225. See L. Whitney, The Case for Sterilization 254-55 (1934); Kindregan, supra note 5, at 139 n.83, 142-43.

226. Relf v. Weinberger, 272 F. Supp. 1196, 1204 (D.D.C. 1974).

227. Id. at 1203.