Estate of C.W.: A Pragmatic Approach to the Involuntary Sterilization of the Mentally Disabled

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I. INTRODUCTION

Ahhhh! Life at nineteen... carefree youthfulness, Bacchanalian week-ends, and unlimited free time. Life's biggest worries often amount to nothing more than performing well on an exam, getting a date for the weekend, or trying to adhere to this year's New Year's Resolution. STOP!!!!!!!!!!!
Now, imagine that you are nineteen years old and require three medications every day, without which you may die. Your only means of communication is a collection of noises that others have learned to interpret. You never have more than fifteen to thirty minutes to yourself because you are monitored on an hourly basis. You are prohibited from engaging in sexual relations with the opposite sex because the possibility of pregnancy could be fatal. An intercom has been installed in your bedroom to ensure that you have no male visitors (and to provide medical supervision). To most, this lifestyle seems like nothing short of a nightmare. To Catherine White, this is reality.

Catherine is a nineteen-year-old mute woman who, since infancy, has suffered from a moderately severe mental disability, grand mal epilepsy, cerebral palsy, and scoliosis. Her mental and physical disabilities are irreversible. Her I.Q. test results range between thirty and fifty on the Weschler Adult Intelligence Scale revised. Experts who have evaluated Catherine agree that she has the mental age of a three to five-year-old child.

Over the course of her life, Catherine has experienced over fifty seizures, some of which have lasted over sixty minutes. Any virus, infection, cold, or fluctuation in her body temperature may cause her to have a seizure. She is administered three drugs every day to control her epilepsy. Without medication, she could experience status epilepticus, causing her to seize repeatedly, and possibly die.

2. The name used in this article is fictitious, to protect Catherine's right to privacy.
3. Estate of C.W., 640 A.2d at 430.
4. Id.
5. Id.
6. Telephone Interview with Marta Engdahl, Esq., Attorney for Catherine’s mother (Feb. 20, 1995). The author would like to express his thanks to Ms. Engdahl for her assistance in the preparation of this article.
7. Estate of C.W., 640 A.2d at 430 (“Every day Catherine is administered three drugs, Phenobarbital, Dilantin, and Tegritol, sometimes in toxic doses, to control her epilepsy.”).
8. Id. “At one point in 1989, [Catherine’s] behavior became more aggressive and self-abusive. It was thought that her Dilantin level was too high and was possibly contributing to her behavior problem.” Id. Her neurologist consequently reduced her dosage of Dilantin. As a result, she began to experience a “severe seizure, and her dosage of medication had to be increased to a toxic level in order to stabilize her.” Id. Catherine had a seizure again. Her physician noted this episode as a reminder of how difficult it is to control Catherine’s epilepsy. Id.
Catherine could also suffer severe, life threatening trauma in the event that she became pregnant. Her epilepsy could cause a spontaneous abortion or premature birth. Testimony indicated that a pregnancy could also be psychologically traumatic for Catherine in the unlikely event that she could carry the pregnancy to term, and then have to be separated from the child due to her inability to care for it.

Because of the life-threatening dangers associated with pregnancy, Catherine’s mother chose to request permission from the Orphan’s Court to have a tubal ligation performed on her daughter. As required by

9. Estate of C.W., 640 A.2d at 432. Catherine could experience a combination of psychological and physiological trauma if she were to become pregnant. This instability could aggravate her already tenuously controlled condition. See generally ERNST NIEDERMEYER, EPILEPSY GUIDE: DIAGNOSIS AND TREATMENT OF EPILEPTIC SEIZURE DISORDERS 212 (1983) (explaining how pregnancy may aggravate seizure disorder); S. Koch et al., Obstetric Complications in Pregnancies of Epileptic Mothers and Their Obstetric Histories, in EPILEPSY, PREGNANCY, AND THE CHILD 91 (1982) (providing results of various studies indicating complications suffered by epileptics during pregnancy); C.M. Lander & M.J. Eadie, Plasma Antiepileptic Drug Concentrations During Pregnancy, 32 EPILEPSIA 257 (1991) (providing results of study confirming lower plasma antiepileptic drug ("AED") concentrations in epileptics during pregnancy which may, as direct consequence, expose patients with active epileptic disorders to heightened risk of increased seizure activity).

Catherine suffers from grand mal epileptic seizures which have lasted in excess of 60 minutes. Estate of C.W., 640 A.2d at 430. In some years of her life, Catherine has experienced over 50 seizures. Id. Such seizures are also termed "status epilepticus" because they are very prolonged. NIEDERMEYER, supra, at 78. For individuals who suffer status epilepticus grand mal seizures during pregnancy, mortality of the fetus is high and maternal mortality is considerable. Id. at 212. In one study of 29 patients with status epilepticus during pregnancy, 9 of the 29 patients died, and at least 14 of the 29 fetuses died in utero or shortly after birth. K. Teramo and V.K. Hiilesmaa, Pregnancy and Fetal Complications in Epileptic Pregnancies: Review of the Literature, in EPILEPSY, PREGNANCY, AND THE CHILD, supra, at 54. The life-threatening risks posed to Catherine in the event that she became pregnant were not in dispute. Telephone Interview with Marta Engdahl, supra note 6.

10. Estate of C.W., 640 A.2d at 430.

11. Id. In addition to the anxiety she would suffer as a result of being separated from her child, research indicates that there may be psychological problems associated with the pregnancy itself for a woman in Catherine’s position. Dieter Schmidt, The Effect of Pregnancy on the Natural History of Epilepsy: Review of the Literature, in EPILEPSY, PREGNANCY, AND THE CHILD, supra note 9, at 8 ("The fear of the potential risk of giving birth to a child with epilepsy, malformations, or functional defects may be overwhelming," "[t]he psychosomatics of pregnancy may contribute to the outcome of epilepsy during pregnancy," and the "[l]oss of sleep or pregnancy-induced changes in sleep physiology, anxiety-induced hyperventilation, or fatigue, may increase the seizure frequency.").

12. Brief for Appellee/Respondent at 3, Estate of C.W., 640 A.2d 427 (Pa. Super. 1994) (No. 91-2970). Catherine’s mother was quoted as saying, "[I] just wanted to see her
Pennsylvania law, Catherine’s mother sought appointment as her guardian with specific authority to consent to the sterilization procedure.\textsuperscript{13} The court of Common Pleas granted her such authority.\textsuperscript{14} This decision was subsequently affirmed by the Superior Court of Pennsylvania.\textsuperscript{15}

This note analyzes the constitutional implications of involuntary sterilization as applied to the mentally disabled, when sought strictly out of medical necessity. Part I discusses the case of \textit{Estate of C.W.} Specifically, it touches upon the common law sources which laid the groundwork for Pennsylvania’s best interests requirement for involuntary sterilization. Part I argues that the sterilization of Catherine was lawfully granted. Part II will, on a global level, trace the historical evolution of the eugenics movement from which the court’s current skepticism towards involuntary sterilization lies. Part III explains the current status of sterilization. Part IV outlines the evolution of the modern right to privacy, argues that the fundamental right to sexuality is implicit in both the right to privacy and in the First Amendment right to self-expression, and explains the right to habilitation. Part V argues that the court’s granting of authorization to perform the sterilization procedure served to justly uphold Catherine’s constitutional rights to privacy, sexuality, and habilitation. Finally, part VI concludes with a balancing test, which balances the state’s interest in protecting Catherine’s rights to privacy\textsuperscript{16} and procreational freedom against her mother’s interest in protecting Catherine’s rights to privacy, sexuality, habilitation, and life itself.

\[\text{[Catherine] have a life... I want to do the best I can to protect her from any problems happening in her life.} \text{" Id.}\]

13. 20 PA. CONS. STAT. ANN. § 5511 (1995). The court, upon petition and hearing and upon the presentation of clear and convincing evidence, may find a person domiciled in the commonwealth to be incapacitated and appoint a guardian or guardians of his person or estate. \textit{Id.}


16. The right to privacy which the state asserts on Catherine’s behalf relates to her freedom from bodily intrusion. Alternatively, the right to privacy asserted by her mother is the right for Catherine to be let alone, free from invasive state interests controlling her well-being.
II. GENERAL OVERVIEW: *ESTATE OF C.W.*

A. *Catherine's Background*

Since the age of twelve, Catherine has lived in a community living arrangement ("CLA")\(^{17}\) because she had become increasingly difficult to care for at home.\(^{18}\) In view of her potential proximity to other males living in the CLA,\(^{19}\) her overly affectionate nature,\(^{20}\) and her heightened sexual awareness,\(^{21}\) there exists a strong likelihood that Catherine could become sexually involved and become pregnant.\(^{22}\) In the event that she did become pregnant, her epileptic condition could very well put her and her fetus into a life-endangering situation.

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17. Community living arrangements such as the one where Catherine lives are intended to provide a cooperative or structured small group living arrangement that is part of the community, as opposed to an institutional system closed off from the community. *See generally HANDBOOK OF MENTAL RETARDATION* (Johnny L. Matson & James A. Mulick eds., 2d ed. 1991) [hereinafter HANDBOOK].

18. *Estate of C.W.*, 640 A.2d at 431 (stating that while at home, Catherine sometimes refused to eat or take medications and she often disrupted rest of family).

19. Brief for Appellee/Respondent at 6, *Estate of C.W.* (No. 91-2970). At one time, there were three male residents living in the CLA whose ages ranged from 17 to 22. *Id.*

20. *Id.* at 5-6. Testimony indicated that Catherine is particularly affectionate, even with strangers. Because she has been so sheltered through her developmental years, she has learned to trust everyone with whom she comes into contact. She believes that everyone is as caring as her parents and family, so consequently assumes that they are her true friends. *Id.* After conducting an interview of Catherine, the trial judge said that Catherine "willingly hugged everyone in the room including people whom she had never met." *Estate of C.W.*, 640 A.2d at 431. She was described by the judge to be "extremely suggestible, compliant, and anxious to please." *Id.*

21. Brief for Appellee/Respondent at 4, 5, *Estate of C.W.* (No. 91-2970). Catherine is "sexually interested" and "aggressive physically and sexually with other people." *Id.* at 5. More than one witness testified that Catherine appears "to crave physical contact with others." *Estate of C.W.*, 640 A.2d at 434. A psychologist who examined Catherine indicated that she was "keenly aware of her sexuality and femininity and uses both whenever possible, even where inappropriate." *Id.* The record also indicated that "there had been increased kissing involvement" between Catherine and her boyfriend. *Id.* A doctor who performed a physical examination of Catherine revealed that "she did not have an intact hymen." *Id.*

22. *Estate of C.W.*, 640 A.2d at 434 ("The record supports the trial court's finding that [Catherine] might be willing to engage in voluntary sexual intercourse."); *see also* discussion *supra* notes 20-21 and accompanying text.
Therefore, out of medical necessity, Catherine's mother wished to undertake whatever means necessary to protect her daughter from becoming pregnant. While many different contraceptives were initially considered—barrier methods such as an IUD or diaphragm, hormonal treatments such as Depo-Provera, or the birth control pill, and a tubal ligation—medical testimony indicated that, in light of her tenuously controlled epilepsy, the safest available option for Catherine was to undergo a laparoscopic tubal sterilization.

B. Procedural Requirements and Holding

Pennsylvania courts follow the precedent set by a 1982 case, In re Terwilliger, which established Pennsylvania's standards governing the process through which a guardian is granted specific authority to consent to the involuntary sterilization of a mentally disabled person. After Terwilliger, courts require that the burden of proof rests on the party seeking the approval of the authorized procedure. Courts additionally require that the party prove, through clear and convincing evidence, that such an operation is in the "best interests" of the mentally disabled person. Once the petition for authorization is filed with the court, the judge appoints a guardian ad litem who is responsible for asserting and defending the rights of the individual at trial. After the guardian has been appointed, the court must find the following: first, that the individual lacks the capacity to make a decision about the sterilization and that the incapacity is unlikely
to change in the near future, and second, that the person is capable of reproduction. Once these findings have been made, the court proceeds to its ultimate determination which is whether the sterilization is in the woman's best interests. The Orphan's Court appointed the mother as guardian, and the case was appealed to the Pennsylvania Superior Court, which held that the best interests of Catherine required that her mother be appointed guardian with authority to consent to the tubal ligation procedure.

C. Best Interests Determination

Pennsylvania, like many other states, has never had a statute governing the process through which one may receive authorization for the involuntary sterilization procedure. Instead, the decision rests entirely with the judiciary. The court's power to render such a decision stems from the common law doctrine of parens patriae, which enables it to

32. Terwilliger, 450 A.2d at 1383.
33. Id.
34. See id.

[I]t must be established that sterilization is the only practicable means of contraception, i.e., all less drastic contraceptive methods, including supervision, education and training are unworkable and detailed medical testimony must show that the sterilization procedure requested is the least significant intrusion necessary to protect the interests of the individual.

Id. (citations omitted).


38. Id.
39. Id.

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protect those individuals within the state who, because of a legal disability, are incapable of protecting themselves. In making the decision whether to authorize an involuntary sterilization procedure, the court may only consider the best interests of the incompetent, and not that of the parents, guardian, or society.  

Perhaps the most influential case to utilize the "best interests" test was In re Grady. In Grady, it was emphasized that in spite of the disabled person’s lack of input during the decision-making process, the court’s decision was "designed to further the same interests she might pursue had she the ability to decide for herself." The court further provided that its role was not that of an interpreter, but rather a surrogate. To help facilitate the best interests determination, the court provided the following guidelines to be considered:

1) The possibility that the disabled person can become pregnant.

2) The possibility that the incompetent person will experience trauma or psychological damage if she becomes pregnant or gives birth, and, conversely, the possibility of trauma or psychological damage from the sterilization operation.

3) The likelihood that the individual will voluntarily engage in sexual activity or be exposed to situations where sexual intercourse is imposed upon her.

4) The inability of the disabled person to understand reproduction or contraception and the likely permanence of that inability.

5) The feasibility and medical advisability of less drastic means of contraception, both at the present time and under foreseeable future circumstances.

6) The advisability of sterilization at the time of the application rather than in the future. . . .
7) The ability of the incompetent person to care for a child, or the possibility that the person may at some future date be able to marry and, with a spouse, care for a child.

8) Evidence that scientific advances may occur within the foreseeable future which will make possible either improvement of the individual’s condition or alternative and less drastic sterilization procedures.

9) A demonstration that the proponents of sterilization are seeking it in good faith and that their primary concern is for the best interest of the incompetent person rather than their own or the public’s convenience.46

This non-exhaustive list of factors to be considered was adopted by the Pennsylvania Superior Court in *Terwilliger* to comprise part of its “best interests” test, and was subsequently relied upon in the *Estate of C.W.*47 The most heavily debated point in the case was whether the sterilization of Catherine was the “only practicable means of contraception.”48 As provided in *Terwilliger*, this determination is reached through the use of a “least restrictive means” test, which requires that “all other contraceptive alternatives be found unworkable.”49

**D. Sterilization as the Least Restrictive Means of Contraception**

The “least restrictive means” test requires an evaluation and comparison of the net benefits associated with each available alternative to determine which is the most practicable. The contraceptive options under initial consideration included barrier methods such as the intra-uterine device (“IUD”) or diaphragm, and hormonal methods such as Depo-Provera or oral contraceptives. Evidence indicates that the health risks associated with these contraceptives are non-existent with a tubal ligation procedure.

An IUD poses such potential risks as the perforation of the uterine wall, pelvic inflammatory disease, cramping pain, spontaneous expulsion, heavy bleeding between periods, and pregnancy failures.50 The IUD must also

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46. *Id.* at 483.
48. *Id.* at 433.
49. *In re Terwilliger*, 450 A.2d at 1383.
50. JEFFREY S. VICTOR, HUMAN SEXUALITY: A SOCIO PSYCHOLOGICAL APPROACH 49 (1980).
be replaced every year.\textsuperscript{51} The necessity of an annual medical procedure is more intrusive than the single procedure which would be necessary if Catherine underwent a tubal ligation.\textsuperscript{52} A diaphragm was not seriously considered because it would require a high level of motivation and cognitive understanding on the part of Catherine.\textsuperscript{53} Hormonal treatments such as Depo-Provera have been linked with cervical cancer after prolonged use.\textsuperscript{54} Other reported problems with the use of this product include irregular bleeding and a higher risk of breast cancer.\textsuperscript{55} Furthermore, while the physical variations caused by the product may pose little, if any, danger to healthy people, Catherine, as a severe epileptic, would be subjected to a considerably higher risk of destabilization, grand mal seizures, and potential status epilepticus.\textsuperscript{56} Finally, oral contraceptives such as the birth control pill increase the risk of liver cancer and may increase the risk of breast and cervical cancer.\textsuperscript{57} The hormonal changes normally induced by the pill may also pose additional dangers to Catherine’s already barely manageable epileptic condition.\textsuperscript{58}

\begin{itemize}
\item \textsuperscript{51} Estate of C.W., 640 A.2d at 438.
\item \textsuperscript{52} Id.
\item \textsuperscript{53} William S. Rowe & Sandra Savage, Sexuality and the Developmentally Handicapped 51 (1987). Catherine’s intellectual level was that of a three to five-year-old. See supra note 6 and accompanying text.
\item \textsuperscript{54} Patricia Bailey & Joseph Sanfillipo, Contraception in the Adolescent, in Contraception 105 (1993). In a case controlled study conducted in Latin America, cervical cancer risks appeared to be associated with prolonged use. Short-term use of this product appears to be associated with a lower incidence of cervical cancer. Id.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} Brief for Appellee/Respondent at 38, Estate of C.W. (No. 91-2970). Catherine’s epilepsy is tenuously controlled. Telephone Interview with Marta Engdahl, Esq., Attorney for Catherine’s mother (February 27, 1995). Her medical condition is so fragile, that the slightest cold, or change in body temperature could cause her to have seizures. The severity of Catherine’s epileptic condition was not a matter of dispute. Id.
\item \textsuperscript{57} Malcolm C. Pike & Darcy V. Spicer, Oral Contraceptives and Cancer, in Contraception 67 (Donna Shoupe, et al. eds., 1993). While there are many types of oral contraceptives, the side-effects associated with the one referred to in the accompanying text have been linked with the use of “combination-type” oral contraceptives which are the most commonly used. Each pill contains both an estrogen and a progestin. Id. The alternative pill, the “minipill,” contains progestin only. Id. at 95.
\item \textsuperscript{58} Catherine’s mother was primarily concerned with potential drug interactions with her other medication and how they could detrimentally affect Catherine’s health. Telephone Interview with Marta Engdahl, Esq., Attorney for Catherine’s mother (Aug. 11, 1995). See Martha J. Morrel, Hormones and Epilepsy Through the Lifetime, Epilepsia 33 (Supp. S49-61 1992).
\end{itemize}
By comparison, the tubal ligation procedure carries with it minimal, if any, danger to Catherine’s health.59 “Physicians as a group are generally in favor of sterilizing developmentally disabled individuals and often encourage the operation.”60 A recent study found that women who have had tubal sterilizations were two-thirds less likely to develop ovarian cancer than other women.61 Ovarian cancer kills 12,000 women in the United States every year.62 Only thirty-nine percent of women who become afflicted with ovarian cancer will survive more than five years.63 This provides a compelling argument for women who are sure that they do not want to have children.64 Even before this study was conducted, however, another study which was designed to gauge women’s satisfaction after having undergone the tubal ligation procedure revealed that ninety percent

Hormones influence brain function from gestation throughout life and may affect the seizure threshold by altering neuronal excitability. Estrogen enhances and progesterone diminishes neuronal excitability experimentally. . . . Hormonal effects in the CSN [Central Nervous System] also depend on the region of the brain in which the hormone acts. Sites of action for most steroid hormones include the hypothalamus and limbic cortex, providing a mechanism for modulating behavior and endocrine function. Seizure patterns may change at certain life stages, perhaps as a result of alterations in hormones. . . . In some women, fluctuations in hormones over the menstrual cycle appear to increase seizure vulnerability, probably reflecting changes in relative amounts of estrogen and progesterone.

Id. at S49.

59. See Rowe & Savage, supra note 53, at 47. The side effects for tubal ligation are reportedly negligible. There may be minor post-surgery discomfort. Id.; see also Haavik & Menninger, II, supra note 26, at 109 (“Complications of the operation are rare but include hemorrhage, complications of general anesthesia, electrocoagulation burns, and perforation of the uterus, bowel, and occasionally other organs.”). One study of 2000 tubal sterilizations reported a complication incidence of 3.9%, with hemorrhage being the most frequent complication. Id. at 110.

60. Haavik & Menninger, II, supra note 26, at 113. A survey of 652 professionals and parents of retarded children revealed that 83.8% either favored or strongly favored voluntary sterilization for mentally disabled persons. Id. at 114.


62. Id.

63. Id.

64. See id. (“Several doctors said [] that the new study presents a powerful argument for the operation if a woman is sure she will not want to have children in the future.”). Dr. Robert C. Wallach, director of gynecologic oncology at the New York University School of Medicine, reportedly said, “I’m very happy that we have this potential preventative measure for one of the worst diseases we treat.”” Id.
were satisfied with their operation and would elect to repeat it if they had to do it over again. In the unlikely event that Catherine’s mental or physical condition changes, and she can experience childbirth in the absence of the aforesaid risks, the sterilization may be reversed.

E. The Dissenting Opinion

Justice Johnson, writing for the dissent, focused his attack on the majority’s conclusion that Catherine’s sterilization was the least restrictive means of contraception available to her. Citing our country’s history of the eugenic sterilization of mentally disabled persons, the dissent emphasized the need to impose the least restrictive alternative test. Adhering to the “clear and convincing” standard, Justice Johnson stated that the evidence failed to show that the tubal ligation procedure was in Catherine’s best interests. In stating that the court “may only consider the best interests of the incompetent... [and] not the interests or convenience of that individual’s parents, guardian, or of society,” Justice Johnson unveiled his skepticism towards the majority’s interpretation of the best interests test. He reminded the court that its best interests determination was not to be based on a balancing test of the pros and cons associated with the various contraceptives. Instead the court must find that other

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65. Haavik & Menninger, II, supra note 26, at 113. The sample was taken from 147 women who received counseling two to three months before sterilization. Five percent of the women indicated that they would not repeat the operation, and five percent were uncertain. Id.

66. See Victor Gomel, Tubal Reconstruction: Reversal of Female Sterilization By Microsurgery, in FEMALE STERILIZATION 85, 85 (1980) (“Microsurgery offers the best chance for a successful reversal of sterilization and a normal intrauterine pregnancy resulting in a live birth.”). Studies have shown that the procedure is reversible 80.8% of the time. Id.


68. See infra part III.

69. Estate of C.W., 640 A.2d at 441 (Johnson, J., dissenting).

70. Id. at 442 (Johnson, J., dissenting). He based his opinion, in part, on the possibility that new or safer methods of contraception may be available in the future. He also rejected the argument that the mere chance of side effects associated with other alternative contraceptives was a sufficient basis for rejecting a less intrusive method in favor of sterilization. Id. at 444 (Johnson, J. dissenting). While medical testimony indicated that other contraceptives had potential side affects, or potentially negative interactions with Catherine’s anti-epileptic medication, this was not proven with certainty. Id. (Johnson, J., dissenting).

71. Id. at 440 (Johnson, J., dissenting).

72. Estate of C.W., 640 A.2d at 445 (Johnson, J., dissenting).
contraceptives have been proven unworkable, and that the sterilization procedure is the least significant intrusion necessary to protect Catherine’s best interests.73 Finally, he accused the majority of neglecting to address Catherine’s constitutional rights, specifically, her right to bodily integrity and reproductive autonomy.74

III. THE ORIGIN OF INVOLUNTARY STERILIZATION AS A PRODUCT OF THE EARLY EUGENICS MOVEMENT

The term eugenics was coined by Sir Francis Galton who, in 1883, defined it as the “study of the agencies under social control that may improve or impair the racial qualities of future generations either physically or mentally.”75 Eugenics encompassed two different classifications—positive and negative—with essentially the same objective.76 Positive eugenics encouraged procreation between mates who shared the most desirable genetic traits.77 This was assumed to ensure that future offspring would be blessed with the optimal genetic makeup. Negative eugenics was concerned with “curbing the fertility” of those who were predicted to bear undesirable offspring.78 Included in this group were the mentally ill, the mentally and physically handicapped, degenerates, and the diseased.79 One of the tools of negative eugenics was compulsory sterilization.80

Predicated on Social Darwinist Herbert Spencer’s “survival of the fittest” doctrine, the eugenics philosophy was designed to engineer a better, more capable society.81 The objective was to spread the message that undesirable human traits were, in fact, “hereditary, and that good citizens had a duty to promote the reproduction of fit stock and to discourage or prevent reproduction of the unfit.”82 Further, “[t]he eugenists believed that

73. Id. (Johnson, J., dissenting).
74. Id. at 441.
77. Id.
78. Id.
80. TROMBLEY, supra note 76, at 2.
81. Id. at 5.
82. Id. at 11.
slow evolutionary progress was in the natural order of things,” and such progress was halted by society’s efforts to protect “the socially inadequate from extinction.”

The controversy started with Charles Darwin’s *On the Origin of Species*, which theorized that the idea of natural selection was not always “natural,” and was sometimes the result of man’s interference with nature. Though Darwin’s viewpoints expressed in his book were not based on any scientific evidence, they were influential nevertheless, because of his sound reputation. In 1900, the laws of heredity developed by Austrian monk Gregor Mendel helped further lay the groundwork for the Eugenics movement. Mendel’s research on the crossbreeding of peas resulted in the discovery that inherited traits were actually inherited in the form of a pair of determiners (later called genes), one from each parent. What scientists today characterize as dominant and recessive genes originated from Mendel’s research. Mendel hypothesized that it may be possible to predict one’s genetic composition based on the dominant and recessive gene pools of one’s parents. These discoveries were thought to have provided society with a justification for considering the use of compulsory sterilization as a means of cleansing the gene pool.

One of the earliest proponents of compulsory sterilization was Dr. Robert Rentoul. His theory of sterilization was legitimized on a medical and social basis. Because it was assumed that diseases, idiocy, and socially deviant characteristics were inheritable, sterilization was argued to be an efficient means to eliminate the possibility of the affliction of such traits on future offspring. During the period from 1912 to 1916, several books


84. CHARLES DARWIN, *ON THE ORIGIN OF SPECIES* (1859).

85. Trombley, *supra* note 76, at 5. Darwin’s concept of “natural selection” served as the genesis for Spencer’s subsequent “survival of the fittest” doctrine. Id.

86. Id.

87. Id. Few eugenists were actually trained geneticists. Id.


89. Id.

90. Id.

91. See generally id. (providing a detailed explanation of Mendelian genetics).


Adler theorized that mental retardation was largely hereditary, and was the root of social evils. Estimates of the number of cases of retardation which were attributable to heredity ranged to ninety percent and greater. While no conclusive modern research has been performed in this area, several studies have attempted to identify the likelihood that mental retardation may be passed down to one’s offspring. Three studies in particular indicated that, in the event that one or both parents are mentally disabled, the likelihood that the offspring will inherit the condition is roughly eleven percent.

In the earlier part of the twentieth century, however, society was ultimately convinced that mental disabilities were inheritable and the “mother of crime, pauperism and degeneracy.” It was said that:

The feebleminded are a parasitic, predatory class, never capable of self-support or of managing their own affairs. They cause unutterable sorrow at home and are a menace and danger to the community. Feebleminded women are almost invariably immoral, and if at large usually become carriers of venereal disease or give birth to children who are as defective as themselves. ... Every feebleminded person, especially the high-grade imbecile, is a potential criminal, needing only the proper environment and opportunity for the development and expression of his criminal tendencies.

“Involuntary” or compulsory sterilization found its beginning as a punishment for convicted criminals, rather than as strictly a eugenic

94. See DEUTSCH, supra note 75, at 358, 359 (naming some of most celebrated publications, including: CHARLES B. DAVENPORT & FLORENCE H. DANIELSON, THE HILL FOLK (1912); ARTHUR H. ESTABROOK, THE JUKES IN 1915 (1915); ARTHUR H. ESTABROOK & CHARLES B. DAVENPORT, THE NAM FAMILY (1912); ELIZABETH S. KITE, THE PINEYS (1913); and MARY S. KOSTIR, THE FAMILY OF SAM SIXTY (1916)).
95. Id. at 357.
96. HANDBOOK, supra note 17, at 286.
97. Id. The following studies established a likelihood of 11% that a child will inherit a mental disability from his parent if one or both are mentally disabled: Brandon, 1957; Scally, 1968; Shaw & Wright, 1960. Id. When one parent is mentally disabled and there is already one mentally disabled child in the family, the recurrence risk rises to nearly 20%. Id.
98. Id.
99. DEUTSCH, supra note 75, at 359.
100. Id. at 359-60 (citations omitted).
measure. In 1855, the Kansas Territorial Legislature legalized the castration of any black or "mulatto" convicted of rape, attempted rape or kidnapping of a white woman. Towards the end of the nineteenth century, the European theory of "degeneration" or "eugenics" found its way to the United States.

Prior to 1900, however, support for sterilization was quite limited. Surgical procedures like castration resulted in asexualization, disturbing the hormonal balance, and various other psychological and physiological effects. These undesirable side effects forced those who supported such measures to justify them on the basis of their punitive or therapeutic value in addition to their eugenic benefits. Along with the discovery of less intrusive surgical procedures came a more powerful justification for sterilization to be used for solely eugenic reasons. Dr. Harry Sharp's discovery of the vasectomy as a safe, inexpensive and quick medical procedure revolutionized eugenic thinking. The procedure did not affect the libido, despite its ultimate aim of preventing fertilization. Between 1899 and 1907, Sharpe performed 465 compulsory sterilization operations

101. See Trombley, supra note 76, at 49-50; see also Landman, supra note 79, at 51 (explaining that history includes various cultures who used compulsory sterilization for one reason or another).

Apostate Jews, who dared revert to Judaism, were in the Middle Ages castrated; negros in the pre-Civil War days were castrated at times as a punishment or as a method of developing more sturdy workers; Mohammedans frequently castrated young boys for purposes of maintaining their harems; and the choir boys in the Roman Catholic Church during the Middle Ages, until forbidden by Pope Leo XIII, were made eunuchs before puberty so that they might retain their soprano voices as they grew to adulthood. The ancient peoples—such as the people of the Bible, the Egyptians, the Assyrians, the Chinese, the Hindus, the Greeks, the Persians, and the Romans—castrated their captives, criminals, and slaves for penal purposes.

Id.

102. See Trombley, supra note 76, at 49.

103. Id.

104. Cynkar, supra note 83, at 1429.

105. Id.

106. Id.

107. Id. (explaining various types of sterilization including the salpingectomy—cutting and tying the Fallopian tubes—and the vasectomy—cutting and tying the vas deferens). These procedures require comparatively minor surgery and have none of the side effects of castration. Id.

108. See Trombley, supra note 76, at 50.

109. Id. (explaining Sharp's view that "each man 'is in no way impaired for his pursuit of life, liberty and happiness, but is effectively sterilized'".).
on male inmates at the Indiana State Reformatory. Sharpe’s perceived success in eugenics served as a prelude for its ultimate legislation.

"Probably the first explicitly eugenic legislation in the [United States] was Connecticut’s 1896 law preventing marriage to, or sexual relations with, the eugenically unfit." The first American eugenic sterilization bill, introduced in 1897 by the Michigan legislature, was never enacted. On April 9, 1907, Indiana became the first state to enact legislation which allowed compulsory sterilization of the feebleminded. Other states were quick to follow. One of the best examples of how determined some states were to carry out such laws is reflected by the sterilization laws of Kansas, first passed in 1913. Kansas’ first sterilization law made it a crime for any managing officer of a state institution to fail to recommend the sterilization of any inmate unfit to procreate. Any officer failing to do so was fined up to $100, or imprisoned up to thirty days, or both.

The 1924 passing of Virginia’s sterilization statute is of particular significance because it was the first statute of its kind to ultimately be deemed constitutional by the Supreme Court of the United States. The Virginia law was written in such a way so as to avoid any constitutional infractions. "The [Virginia] legislature did not intend sterilization to be a punitive measure, but rather [as] a measure in 'the best interests of the

110. Id.
111. Id.
112. Id.
113. TROMBLEY, supra note 76, at 51. The statute allowed for the procedure to be performed if it was determined that there was no probability of the victim's mental improvement. Id.
114. Id. Washington enacted a compulsory sterilization law for convicted criminals in 1909. Id.; see also HARRY H. LAUGHLIN, EUGENICAL STERILIZATION IN THE UNITED STATES (1922). California was the third state to enact legislation for compulsory sterilization in April of 1909. TROMBLEY, supra note 76, at 51. Its motive was primarily eugenic, and partly punitive. Connecticut followed with its compulsory sterilization statute passed in August, 1909. It, too, was primarily eugenic. Nevada approved a sterilization statute in March, 1911. Iowa passed legislation in March, 1911; New Jersey in April, 1911, North Dakota in March, 1913. Id. at 65. Several other states followed suit. Id.; see also HARRY H. LAUGHLIN, THE LEGAL STATUS OF EUGENICAL STERILIZATION 7 (1930) [hereinafter LAUGHLIN, LEGAL STATUS] (stating that by January 1, 1930, 23 different states had enacted eugenical sterilization statutes of one type or another).
115. TROMBLEY, supra note 76, at 65.
116. Id.
117. Id.
118. LAUGHLIN, LEGAL STATUS, supra note 114, at 7.
119. Cynkar, supra note 83, at 1436.
In April of 1927, the landmark case of *Buck v. Bell* was argued before the Supreme Court of the United States. In that case, the superintendent of the State Colony for Epileptics and Feebleminded for the state of Virginia, had requested and performed a sterilization procedure on Carrie Buck. Buck was believed to be a mentally disabled daughter of a mentally disabled woman, both of whom lived in the same institution. The proponents of eugenics and compulsory sterilization used the Bucks as a confirmation of their theories of heredity. Carrie's mother had registered a mental age of less than eight on the Stanford-Binet-Simon test, while Carrie had a mental age of nine.

120. *Id.* (quoting, in part, 1924 VA. ACTS ch. 394).
121. 274 U.S. 200 (1927).
122. *See LANDMAN, supra* note 79, at 97.
123. Subsequent literature revealed that Carrie Buck was not mentally ill or retarded. *See* Stephen J. Gould, *Carrie Buck's Daughter*, 2 CONST. COMMENTARY 331, 336 (1985) (quoting a letter received from Paul A. Lombardo of the School of Law at the University of Virginia).

As for Carrie, when I met her she was reading newspapers daily and joining a more literate friend to assist at regular bouts with the crossword puzzles. She was not a sophisticated woman, and lacked social graces, but mental health professionals who examined her in later life confirmed my impressions that she was neither mentally ill nor retarded.

124. *LANDMAN, supra* note 79, at 97.
125. *Id.* at 98; *see also* HANDBOOK, supra note 17, at 286 (discussing the statistical probability of mentally disabled parents birthing mentally disabled offspring). The Stanford-Binet is one of the most commonly used instruments for evaluating intellectual functioning in the mentally disabled. It seeks to identify patterns of intellectual functioning which it then compares to other individuals' of the same age. *See* THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW 229 (Michael Kindred et al. eds., 1976) [hereinafter Kindred].

[Intelligence] [t]est performance might indicate differences in mental capacity among [people] who "have had an equal opportunity to learn certain types of cognitive, linguistic and mathematical skills and to acquire certain types of information; if they were equally motivated to learn these skills and to acquire this information; if they are equally motivated to exert themselves in a test situation and equally familiar with the demands of the test situation; if they were equally free of emotional . . . and biological . . . difficulties which might interfere with their performance."

*Id.* (citations omitted).
Their relationship as parent/child served to show that mental disabilities were transmitted genetically, and could be prevented through sterilization.

At trial, Buck’s attorney argued that Virginia’s sterilization statute was a violation of Carrie Buck’s constitutional right of “bodily integrity,” and consequently a deprivation of “life” without due process of law. He also attacked the statute on the ground that it violated the equal protection component of the Due Process Clause of the Fifth Amendment. In an eight-to-one decision, the Court supported the sterilization statute.

The lone dissenter, Justice Butler, neglected to provide a written opinion. Speaking for the majority, Justice Holmes held that the procedural aspects of the statute satisfied the due process arguments and that the uniform application of the statute to all members of the class of mentally disabled people in state institutions complied with equal protection. Justice Holmes said of Carrie Buck:

“[H]er welfare and that of society will be promoted by her sterilization.”

... 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. Three generations of imbeciles are enough.

Currently, the holding in Buck v. Bell has not been overturned. Nonetheless, most scholars suggest that the case would be overruled, if presented to the Supreme Court of the United States today. Having established the historical context of compulsory sterilization, this casenote will proceed to analyze the C.W. case on a factual and constitutional basis, arguing that the operation was required out of medical necessity and ultimately served to uphold Catherine’s constitutional rights. As shall be seen, the aforementioned eugenic or punitive justifications for the procedure are nonexistent in this case.

126. Cynkar, supra note 83, at 1447 (citations omitted).
127. Id. (citations omitted).
129. See Cynkar, supra note 83, at 1450.
130. Id.
131. Buck, 274 U.S. at 207 (citations omitted).
132. See Cynkar, supra note 83, at 1456.
IV. THE MODERN STATUS OF STERILIZATION

Currently, there are ten states which still have compulsory sterilization statutes. Just twenty years ago, there were over twice as many such statutes. Some jurisdictions have banned the sterilization of the mentally disabled altogether. There are three factors which have helped shape society's current sterilization laws: "the discrediting of the eugenic theory, the development of the constitutional doctrine of reproductive privacy, and the changing conception of mental retardation." With the erosion of the scientific community's support for eugenics came society's rejection as well. Elizabeth Scott notes: "[r]eports of widespread sterilization in Nazi Germany led to increased criticism of eugenic sterilization laws." By the 1960s, involuntary sterilization was often deemed an unjustified intrusion by the state on an individual's liberty and privacy. Moreover, the evolution of the constitutional right of reproductive privacy has spawned a greater interest among lawmakers to


134. Estacio, supra note 37, at 417.


136. See Scott, supra note 135, at 809.

137. Id.

138. Id. at 811.

139. Id. The right to reproductive privacy in the 1960s and 1970s has affected the constitutional analysis of sterilization laws. Id. n.17. Because the eugenic sterilization laws infringed a fundamental right to privacy and procreation, the laws are subjected to strict scrutiny and must be narrowly tailored to the means they seek to achieve. This contrasts to the rationality review previously used by the court in Buck v. Bell, 274 U.S. 200 (1927). Scott, supra note 135, at 811.
address the reproductive rights of the mentally disabled.\textsuperscript{140} It is well established that normal adults and mature minors are entitled to avoid unwanted pregnancies via contraception or sterilization.\textsuperscript{141} There is a consensus within the legal community that mentally disabled persons are entitled to the same right of reproductive privacy as normal people.\textsuperscript{142} This relatively newfound sense of legislative acceptance for the mentally disabled reflects changes in society's attitudes as well.\textsuperscript{143} As a result, today's programs for the mentally disabled strive to encourage the person to live as independently and self-sufficiently as possible.\textsuperscript{144} This is formally recognized as "normalization."\textsuperscript{145}

"Normalization," or "habilitation" refers to the "mainstreaming" of mentally disabled individuals.\textsuperscript{146} The constitutional right to habilitation for the mentally retarded was first articulated in the landmark case of \textit{Wyatt v. Stickney},\textsuperscript{147} in 1972.\textsuperscript{148} The court held that a mentally retarded person had an ""inviolable constitutional right to habilitation.""\textsuperscript{149} The term was originally intended to describe the bundle of constitutional rights which belonged to mentally disabled persons who were confined to institutions.\textsuperscript{150} Though the Supreme Court of the United States has not yet recognized habilitation as a constitutional right,\textsuperscript{151} the right is grounded in the legal doctrines of substantive due process, equal protection guarantees, and the constitutional prohibition of cruel and unusual punishment.\textsuperscript{152}

Today's laws concerning involuntary sterilization are designed to protect the interests of the mentally disabled rather than those of society.\textsuperscript{153} There are primarily two types of tests used when a state considers permitting an involuntary sterilization procedure, the substituted judgment

\begin{itemize}
\item \textsuperscript{140} \textit{Id.} at 812.
\item \textsuperscript{141} \textit{Id.} at 813.
\item \textsuperscript{142} \textit{Id.}
\item \textsuperscript{143} \textit{Id.} at 814.
\item \textsuperscript{144} \textit{See Scott, supra note 135, at 815.}
\item \textsuperscript{145} \textit{Id.}
\item \textsuperscript{146} \textit{See Brief for Appellee/Respondent at 8, Estate of C.W., 640 A.2d 427 (Pa. Super. 1994) (No. 91-2970).}
\item \textsuperscript{147} 344 F. Supp. 373 (M.D. Ala. 1972), \textit{aff'd in part, rev'd in part sub nom. Wyatt v. Aderholt}, 503 F.2d 1305 (5th Cir. 1974).
\item \textsuperscript{148} \textit{Kindred, supra note 125, at 385.}
\item \textsuperscript{149} \textit{Id.} at 400 (quoting \textit{Wyatt}, 344 F. Supp. at 390).
\item \textsuperscript{150} \textit{Id.} at 386-87.
\item \textsuperscript{151} \textit{Id.; cf. Youngberg v. Romeo, 457 U.S. 307, 331 (1982) (holding that mentally disabled persons have a fundamental right to minimally adequate training).}
\item \textsuperscript{152} \textit{Kindred, supra note 125, at 390.}
\item \textsuperscript{153} \textit{See Scott, supra note 135, at 807.}
\end{itemize}
Both tests proclaim to preserve the rights of self-determination of the mentally disabled. The substituted judgment test is frequently used in cases where the individual was, at one time, competent to make decisions. It allows a court to render a decision consistent with that of the patient, were she competent to do so. In its consideration, the court will examine any evidence which tends to indicate the individual's intent. The difficulty with the substituted judgment test is that the court cannot always infer the patient's intent. Consequently, most courts have relied on the best interests test.

Courts which use the best interests standard are motivated by the interests of the person who is mentally disabled and perhaps not competent to make a well-informed decision. Of the two tests, the best interests standard accommodates itself to the particular needs of the individual, as opposed to the substituted judgment test which arbitrarily attempts to guess whatever the individual's preference may be. For the foregoing reasons, most states use the best interests test in determining whether or not to grant authority to perform the involuntary sterilization procedure.

Due to the problems of consent, lack of implementation of the laws, and a growing movement supported by civil libertarians, the incidence of reported sterilization has fallen in the last several years. In addition, the 1974 decision of Relf v. Weinberger, prohibiting the use of all federal funds for the sterilization of minors or incompetent persons, further stagnated the number of sterilization procedures. The cumulative result
of this has been the limited accessibility of sterilizations for many women who want them.164

V. ANALYSIS

A. The Right to Privacy Cases

The genesis of the Supreme Court's recognition of the constitutional right to privacy dates back to 1891 in the case of Union Pacific R. Co. v. Botsford,165 where Justice Gray stated: "No right is held more sacred or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others. . . ."166 He continued, "The right to one's person may be said to be a right of complete immunity: to be let alone."167

In 1927, Justice Brandeis alluded to the right to privacy in his famous dissent in Olmstead v. United States.168 In the dissenting opinion, Justice Brandeis argued that the makers of the Constitution "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations."169 He continued to say that the makers of the constitution "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."170

In a succession of modern cases beginning with the landmark case of Griswold v. Connecticut,171 the Supreme Court explicitly recognized the fundamental right to privacy. In Griswold, the Court struck down a Connecticut statute which prohibited the use, distribution, and exchange of knowledge concerning contraceptives.172 Justice Douglas, delivering the opinion of the Court, stated that the statute exerted a "destructive impact" on the right to marital privacy.173 The Court's recognition of the fundamental right to marital privacy was legitimized as the derivative of several

164. See HAAS & MENNINGER, II, supra note 26, at 108.
165. 141 U.S. 250, 251 (1891).
166. Id. at 251.
167. Id.
168. 277 U.S. 438 (1928) (Brandeis, J., dissenting).
169. Id. at 478 (Brandeis, J., dissenting).
170. Id. (Brandeis, J., dissenting).
171. 381 U.S. 479 (1965).
172. Id. at 485.
other fundamental constitutional guarantees. The Court explained that these various guarantees have “penumbras formed by emanations from those guarantees that help give them life and substance.” The penumbras which collectively generate the marital right to privacy include: the right of association in the First Amendment; the prohibition against the quartering of soldiers in any house in time of peace without the consent of the owner, in the Third Amendment; the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, in the Fourth Amendment; the self-incrimination clause of the Fifth Amendment; and a part of the Ninth Amendment which provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

Seven years later, the Supreme Court of the United States extended Griswold to apply to unmarried individuals in Eisenstadt v. Baird. The Court held that a statute prohibiting the use and distribution of contraceptives to unmarried individuals was violative of the Equal Protection Clause because the same type of prohibition was deemed unconstitutional as applied to married persons. The Court stated that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”

In 1973, in perhaps one of the most controversial cases of the century, Roe v. Wade, the Court held that the right of privacy is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” The Court held that a woman has a fundamental right to get an

174. Id.
175. Id. at 484.
177. 405 U.S. 438 (1972).
178. Id. at 453.
179. Id.
181. Id. at 153. The Court’s support for Roe appears to be waning. In 1992, in Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992), the Court rejected Roe’s trimester framework which placed the fetus’ viability at or near the last trimester. Due in part to advances in medicine, and to a more conservative court, the new “pregnancy timeline” is solely a function of the pre and post viability of the fetus. Viability, defined as the point at which the fetus is presumed to be capable of a meaningful life outside of the mother’s womb, is also the time at which its interest becomes sufficiently compelling so as to warrant protection under the Constitution. Roe, 410 U.S. at 160. The state may prohibit an abortion after the fetus becomes viable, provided that it does not endanger the health of the mother. Id. at 163. Due to scientific advancements, viability occurs earlier than
abortion prior to viability of the fetus, and subject to restrictions after viability. ¹⁸²

Again in 1973, the Court in Doe v. Bolton¹⁸³ held that the "right [to privacy] includes the privilege of an individual to plan his own affairs, for, 'outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he please-

Having established the constitutional backdrop against which Catherine's right to privacy lies, this note will proceed to argue that there exists an unenumerated fundamental right to sexuality, implicit in the Constitution.

B. The Fundamental Right to Sexuality

1. Right to Privacy Theory

Sexuality itself has been defined to encompass many concepts: male-
ness/femaleness, sensuality, sense of self, ego, perception of self in relationship to the world and to others, and expressing or receiving an expression of sexual interest.¹⁸⁵ The activity of sex is perhaps the world's oldest recreational activity.¹⁸⁶ The average American adult has sex fifty-seven times a year, and over ninety-seven percent of adults have had intercourse at least once.¹⁸⁷ Nevertheless, the Supreme Court of the United States has never explicitly recognized the constitutional right to sexuality, or sexual expression.¹⁸⁸ However, the Ninth Amendment has been interpreted to establish that United States citizens have certain

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¹⁸² Id. at 164.
¹⁸⁴ Id. at 213 (quoting Kent v. Dulles, 357 U.S. 116, 126 (1958)).
¹⁸⁶ Note, Constitutional Barriers to Civil and Criminal Restrictions on Pre-and Extramarital Sex, 104 Harv. L. Rev. 1660, 1660 (1991) [hereinafter Constitutional Barriers].
¹⁸⁷ Constitutional Barriers, supra note 186, at 1660-61.
fundamental rights, even though unenumerated in the Constitution. The right to sexuality should be recognized as a fundamental constitutional right because it is both implicit in the rights to privacy and First Amendment self-expression, and inherent within the meaning of "life, liberty, and the pursuit of happiness." Thus, Catherine's constitutional right to sexuality will continue to be violated, even though permission to perform the tubal ligation procedure may be denied.

The Supreme Court of the United States' decision in *Griswold v. Connecticut* was the beginning of the process by which the Court, over a period of twenty years, would carve out an expansive body of sexual privacy law. The Court held that a state cannot prohibit married couples from receiving information about contraceptive devices because it would violate the couple's right to marital privacy. The Court's ruling logically implies that non-procreative sexual intercourse is inherent within the institution of marriage, and therefore protected under the doctrine of marital privacy. This carries with it the inevitable presumption that each married individual is entitled to freely engage in sexual relations with his or her spouse free from state interference. The Court, reflecting the unexpressed wishes, needs, and desires of the populace, has expressed the right to sexuality in a seemingly camouflaged asexual manner. The specific language in the opinion does everything but come out and say that the state may not interfere with a couple's right to sexual expression. For example, Justice Douglas stated that the law, "operates directly on an intimate relation of husband and wife. . . ." One's imagination need only go so far in considering the implications of the phrase "intimate relation." While Justice Douglas does not literally state that the law interfered with the couple's right to have sexual intercourse, it is illogical to exclude this interpretation from among the limited possibilities. Even if the phrase refers to something exclusively cerebral or spiritual, this does not negate the fact that sexual expression is another mode of intimate relation between husband and wife.

In his concurring opinion, Justice Goldberg stated that the law prohibiting contraceptives dealt with "a particularly important and sensitive

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193. *Id.* at 482.
area of privacy—that of the marital relation and the marital home."\textsuperscript{194} Though vague, the nature of his language indicates the Court's persistent tendency to circuitously express this constitutional right to sexuality. Justice Goldberg then quoted Justice Harlan's dissenting opinion in \textit{Poe v. Ullman},\textsuperscript{195} stating:

Adultery, homosexuality and the like are sexual intimacies which the [law] forbids . . . but the intimacy of husband of wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected.\textsuperscript{196}

This language reflects the Court's endorsement for non-procreative sexual expression between husband and wife, but a rejection of sexuality in other contexts. It also underscores the extent to which the Court serves as a "moral mouthpiece" for society—manifesting attitudes and behavior which society deems appropriate through its rulings.\textsuperscript{197} Ironically, eight years later, \textit{Griswold} was cited in the case of \textit{California v. LaRue}\textsuperscript{198} where Justice Marshall, in his dissent, stated: "I have serious doubts whether the State may constitutionally assert an interest in regulating any sexual act between consenting adults."\textsuperscript{199}

\textit{Griswold} was subsequently extended to apply to unmarried persons as well as married persons, in \textit{Eisenstadt v. Baird}.\textsuperscript{200} Justice Brennan's opinion in \textit{Eisenstadt} probably generated more confusion about sexual

\begin{itemize}
  \item 194. \textit{Id.} at 495 (Goldberg, J., concurring).
  \item 195. 367 U.S. 497, 553 (1960).
  \item 196. \textit{Griswold}, 381 U.S. at 499 (quoting \textit{Poe}, 367 U.S. at 553 (Harlan, J., dissenting)).
  \item 197. In Bowers v. Hardwick, 478 U.S. 186 (1986), the issue concerned the constitutionality of a sodomy statute as applied to homosexuals. In upholding the statute, Justice White explained that fundamental rights deserving constitutional protection must be ""Implicit in the concept of ordered liberty,"" \textit{id.} at 191 (quoting \textit{Palko v. Connecticut}, 302 U.S. 319, 325 (1937)), or ""Deeply rooted in our Nation's history and tradition,"" \textit{id.} at 192 (quoting \textit{Moore v. City of East Cleveland}, 431 U.S. 503 (1977)). While the Court upheld the statute five to four, Justice Blackmun, in his dissenting opinion, states his contention that the statute was unconstitutional by touting the mental health community's newfound acceptance for homosexuality within the area of mental health: ""Despite historical views of homosexuality, it is no longer viewed by mental health professionals as a 'disease' or disorder."" \textit{Id.} at 203 n.2.
  \item 198. 409 U.S. 109 (1972).
  \item 199. \textit{Id.} at 132 n.10 (Marshall, J., dissenting).
  \item 200. 405 U.S. 438 (1972).
\end{itemize}
privacy for the unmarried than any other Supreme Court opinion. Such is the case because Justice Brennan never clarified whether the Court’s ruling was based on the notion of associational intimacy as implied in Griswold, or solely on the right of one’s accessibility to contraceptives.

In Eisenstadt, the Court struck down a statute which prohibited the use of contraceptives among unmarried persons, on the basis of the Equal Protection Clause of the Fourteenth Amendment. The Court held that the need to distribute contraceptives is just as great among unmarried persons as it is for married ones. One can reasonably infer that the corollary to the right of accessibility to contraceptives necessarily translates into the right to engage in non-procreative intercourse, both for married and unmarried persons. Through the incorporation of Stanley v. Georgia, and Skinner v. Oklahoma, the Court constructed an individual right to privacy strong enough to be applied against other regulations which prohibited abortion, fornication, and homosexual conduct.

202. See Griswold, 381 U.S. at 479.
203. Eisenstadt, 405 U.S. at 443.
204. Id. at 450.
205. See Doe v. Duling, 603 F. Supp. 960, 966 (E.D. Va. 1985) ("Necessarily implicit in the right to make decisions regarding childbearing is the right to engage in sexual intercourse."); see also Constitutional Barriers, supra note 186, at 1664 ("The privacy right recognized in Griswold and Baird was not merely the right to use contraceptives; without the corresponding right to engage in sexual intercourse such a right would be meaningless," and "[t]he interest protected in these cases is the right to have sex free of governmental control and to do so with or without contraceptives."). Bowers v. Hardwick, 478 U.S. 186, 216-18 (1986) (Blackmun, J., dissenting) (stating, "prior cases make [it] . . . abundantly clear . . . [that] individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment," and "The essential ‘liberty’ that animated the development of the law in cases like Griswold, Eisenstadt, and Carey surely embraces the right to engage in nonreproductive, sexual conduct that others consider offensive or immoral.").
206. 394 U.S. 557 (1969). While based on the First Amendment, the Court held that the mere private possession of obscene material by an adult may not made criminal by the state. Id. at 568.
207. 316 U.S. 535 (1942). On the basis of equal protection, the Court struck down a statute which allowed for the sterilization of persons convicted three times for felonies showing "moral turpitude," but which did not apply to other "white-collar" crimes like embezzlement. Id.
208. See LEONARD, supra note 191, at 25.
In 1986 the Court, in *Bowers v. Hardwick*,
upheld an anti-sodomy statute as applied to homosexuals. In so ruling, the Court held that prior privacy cases could not be construed to confer a right to homosexual behavior. The Court fell one vote shy of deciding that the Constitution provided an unenumerated fundamental right to homosexual conduct.

Writing for the dissent, Justice Blackmun emphasized that the case was not about homosexual conduct, per se, but rather, the "'right to be let alone.'" His particular characterization of the matter at issue enabled him to persuasively argue that the right to sexuality is implicit in the right to privacy. Justice Blackmun reminded the Court "'that a certain private sphere of individual liberty [should] be kept largely beyond the reach of government.'" He stated that "sexual intimacy is a 'sensitive, key relationship of human existence, central to family life, community welfare, and the development of [the] human personality.'" Further, "the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to . . . be the heart of the Constitution's protection of privacy."

Justice Powell, who voted with the majority in *Bowers*, later conceded that he may have made a mistake. He stated, "[w]hen I had the opportunity to reread the opinions a few months later, I thought the dissent

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210. The statute provided that "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." *Bowers*, 478 U.S. at 188 n.1 (citing GA. CODE ANN. § 16-6-2(a) (1984)).
211. *Id.* at 189.
212. *Id.* at 194. *But see* Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1993) (holding that criminal statute prohibiting consensual homosexual activity violates fundamental right of privacy).
214. *Id.* at 199 (Blackmun, J., dissenting).
215. *Id.* (Blackmun, J., dissenting) ("I believe we must analyze respondent Hardwick's claim in the light of the values that underlie the constitutional right to privacy.").
216. *Id.* at 203 (Blackmun, J., dissenting) (quoting Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986)).
217. *Id.* at 205 (Blackmun, J., dissenting) (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 63 (1973)).
had the better of the arguments."The ramifications of his admission are too far-reaching for the purposes of this discussion. Of paramount relevance, however, is that the decision would have entitled sexual activity between consenting adults to protection under the Constitution. As Justice Blackmun stated in the dissenting opinion, "[w]hat the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others." Arguably, it also would have laid to rest the confusion underlying the Court's holding in Eisenstadt. In holding that the Constitution confers protection upon sexual activity between consenting adults, it discounts the theory that Eisenstadt merely stood for the right to accessibility to contraceptives; instead, it lends credence to the view that Eisenstadt stood for the right to associational intimacy.

The notion of sexuality as a constitutional right has been addressed on a state level as well. The Supreme Court of Pennsylvania, in Commonwealth v. Bonadio, held that a statute prohibiting "deviate sexual intercourse" was unconstitutional. The court rejected the argument that the state was empowered to enact the statute vis-à-vis its Tenth Amendment police power. Instead, it ruled that the statute's only purpose, which was to regulate the private conduct of consenting adults, exceeded the valid bounds of the state's police power, and infringed upon the individual's constitutional rights to equal protection. In limiting the state's ability to unduly interfere with the constitutional rights of its citizens, the court cited the philosopher John Stuart Mill, who once said:

[T]he sole end for which mankind are warranted, individually, or collectively, in interfering with the liberty of action of any of their number, is self-protection . . . [T]he only purposes for which power can be rightfully exercised over any member of a civilised community, against

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220. Id. (quoting Mr. Justice Powell in telephone interview as he elaborated on his regretted ruling).
221. Bowers, 478 U.S. at 206 (Blackmun, J., dissenting).
222. See supra notes 201-02 and accompanying text.
224. Id. at 49. The statute defines deviate sexual intercourse as, "sexual intercourse per os or per anus between human beings who are not husband and wife, and any form of sexual intercourse with an animal." Id. at 49 n.1 (citing 18 PA. CONS. STAT. ANN. § 3101 (1973)).
225. Id. at 50.
226. Id. at 49-50.
227. Bonadio, 415 A.2d at 50.
his will, is to prevent harm to others. His own good, either physical or moral is not a sufficient warrant.\textsuperscript{228}

Perhaps one of the most telling of all sexuality cases that fall within the framework of the privacy doctrine is the Supreme Court of New Jersey case of \textit{State v. Saunders}.\textsuperscript{229} In \textit{Saunders}, the court struck down an anti-fornication\textsuperscript{230} statute, holding that it was unconstitutional.\textsuperscript{231} The court held that sexual activities between consenting adults are protected within the right to privacy.\textsuperscript{232} The premise for the court's ruling was that a decision to engage in consensual sexual activity was at least as intimate and personal as those involving decisions on whether to use contraceptives.\textsuperscript{233} Of particular significance in \textit{Saunders}, was the introduction of behavioral and social science data to establish the psycho-sexual significance of non-marital intercourse, and the frequency and acceptance of such behavior.\textsuperscript{234} An expert witness\textsuperscript{235} had testified that:

\begin{quote}
the sex drive is instinctive, and is, a biologic force that is a central factor, not only in personality development, but also at the practical office level of treating problems. . . . When this drive is involuntarily proscribed, guilt and anxiety problems can arise and frequently create residual problems many years later.\textsuperscript{236}
\end{quote}

\footnotesize
\begin{itemize}
    \item \textsuperscript{228} Id.
    \item \textsuperscript{229} 381 A.2d 333 (N.J. 1977).
    \item \textsuperscript{230} Fornication is defined as: "sexual intercourse other than between married persons."
    \item BLACK'S LAW DICTIONARY 653 (6th ed. 1990).
    \item \textsuperscript{231} \textit{Saunders}, 381 A.2d at 339.
    \item \textsuperscript{232} Id.
    \item \textsuperscript{233} Id. at 340. \textit{Saunders} was not the first state court to hold that fornication was protected by the right to privacy. \textit{See also} State v. Pilcher, 242 N.W.2d 348, 359 (1976). In \textit{Pilcher}, the Supreme Court of Iowa held that a statute barring acts of sodomy between consenting adults of the opposite sex was unconstitutional because it invaded their fundamental right to privacy. \textit{Id}. Similarly, in \textit{Shuman v. City of Philadelphia}, 470 F. Supp. 449, 459 (1979), the court held that private sexual activity between consenting adults is within the zone of privacy protected from unwarranted government intrusion. \textit{Id}.
    \item \textsuperscript{235} Richard Green, the expert witness who testified in \textit{Saunders}, authored the law review article from which the accompanying text was taken. \textit{See also} RICHARD GREEN, \textit{SCIENCE AND THE LAW} (1992) (discussing many issues involving the relationship between sexuality and the Constitution from legal, as well as psycho-sexual and medical perspectives).
    \item \textsuperscript{236} Green, \textit{supra} note 234, at 229-30.
\end{itemize}
Justice Bedford, the trial judge in Saunders, later commented that while the impact of this testimony was minimal in his ruling, the nature of the evidence could be useful in these types of cases.\(^{237}\) Justice Schreiber, a New Jersey Supreme Court Justice who wrote the concurring opinion in Saunders, stated in an interview after the case that his decision was primarily based on the notion of privacy.\(^{238}\) He said, “if [sexual] conduct is such that it doesn’t affect anybody else, no third person is affected, or the state isn’t affected, then we’re getting into the zone of privacy.”\(^{239}\)

The advancement and consideration of this type of evidence in other lower level court decisions could profoundly affect the future of the modern privacy doctrine. To the extent that such evidence leads to analogous rulings in other courts, the Supreme Court of the United States may have incentive and support to re-evaluate its position concerning privacy law as it relates to the notion of sexual expression between consenting adults.

2. First Amendment Right to Self-Expression Theory

The concept of sexual expression has found its way to the Supreme Court in other contexts as well, notably that of the First Amendment. Over the past twenty years, the Supreme Court of the United States has ruled on the constitutionality of various regulations on nude dancing.\(^{240}\) In California v. LaRue,\(^{241}\) the Court held that live nude dancing may be entitled to constitutional protection under the First and Fourteenth Amendments under certain circumstances.\(^{242}\) Justice Brennan, in his dissent, stated that “nothing in the language or history of the Twenty-First Amendment authorizes the states to use their liquor licensing power as a means for the deliberate inhibition of protected, even if distasteful, forms of expression.”\(^{243}\) Justice Marshall, in his dissent, said that “once it is recognized that movies and plays enjoy prima facie First Amendment protection, the standard for reviewing state regulation of their component parts shifts dramatically.”\(^{244}\) Marshall’s statement implies that sexual expression, which would be protected under the First Amendment within the context of

\(^{237}\) Id. at 231.
\(^{238}\) Id. at 232.
\(^{239}\) Id.
\(^{242}\) Id. at 118.
\(^{243}\) Id. at 123 (Brennan, J., dissenting).
\(^{244}\) Id. at 130 (Marshall, J., dissenting).
artistic expression in a play or painting, for instance, may be entitled to similar constitutional protection in other contexts.

Eight years later, in *Schad v. Mount Ephraim*, the Court struck down a zoning ordinance which prohibited the existence of all nude dance clubs. The Court held that nude dancing is not without its First Amendment protections from official regulation. Because the zoning ordinance was held violative of the First Amendment right to self-expression, it was reviewed under higher scrutiny which required the zoning ordinance to be narrowly tailored to advance a sufficiently substantial government interest. The Court held that the ordinance was overbroad, and not based in furtherance of a substantial government interest. Justice White, delivering the opinion of the court, stated that "'Nudity alone' does not place otherwise protected material outside the mantel of the First Amendment." Ten years later, the Court was again confronted with the constitutionality of nude dancing in *Barnes v. Glen Theater*. Until *Barnes*, however, the Court had not explicitly clarified whether nude dancing was protected expression. In *Barnes*, the Court held, in a five to four decision, that a statute proscribing totally nude dancing was not violative of the First Amendment. Specifically, the Court held that nude dancing, though expressive conduct, "falls within the outer perimeters of the First Amendment." In arriving at its decision, the Court relied on the test estab-

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246. *Id.*
247. *Id.* at 66.
248. *Id.* at 68.
249. The statute was held overbroad because it excluded all types of live entertainment, including non-obscene nude dancing that is otherwise protected by the first amendment. *Id.* at 76.
250. The court rejected Mount Ephraim’s claim that permitting the live entertainment would have conflicted with its plan to create a commercial area that caters only to the immediate needs of its residents. *Schad*, 452 U.S. at 72. It also concluded that Mount Ephraim lacked any evidence in support of its claim that live entertainment posed problems otherwise avoidable by other permitted uses. *Id.* at 73. Finally, the court held that there was no evidence for the borough's contention that live entertainment was incompatible with the uses which were already permitted by the borough. *Id.* at 75.
251. *Id.* at 66.
253. See *Leading Cases*, supra note 240, at 287.
255. *Id.* at 566.
lished in *United States v. O'Brien*, which has been applied to regulations imposed upon symbolic speech. The Court stated that a regulation will be upheld under *O'Brien* "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Chief Justice Rehnquist concluded that the purpose of the statute was to "protect societal order and morality," and that was within the state's Tenth Amendment police power to regulate for the public health, safety, and morals of the state. Chief Justice Rehnquist concluded by holding that the statute indeed furthered a substantial government interest, and that this interest was unrelated to the suppression of free expression because the dancers were still permitted to express erotic messages provided that they wore pasties, and G-strings.

Writing for the dissent, Justice White argued that the statute was content based, and only served to prohibit nudity that fell within the specific context of nude dancing. As a content based statute, it warranted strict scrutiny. Justice White proceeded to argue that the majority had fallen prey to its subjective biases in rejecting nudity when it occurs in strip bars, but protecting it if within a ballet:

> While the entertainment afforded by nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who . . . wants some "entertainment. . .".

Justice White stated the element of total nudity in this type of dancing served to elicit "emotions and feelings of eroticism and sensuality among the

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257. *Id.* at 377.
259. *Id.* at 569.
260. *Id.*
261. *Id.* at 571.
262. *Id.* at 589 (White, J., dissenting).
spectators. Finally, Justice White stated that "generating thoughts, ideas, and emotions, is the essence of communication."

The dissenting opinion in *Barnes*, falling one vote shy of the majority, lends support to the view that sexuality, as a form of self-expression, should be entitled to constitutional protection under the First Amendment. If four Justices of the Supreme Court of the United States agree that nude dancing in strip bars is worthy of constitutional protection, it is hard to reconcile how the act of intimacy as a means of expressing love, togetherness, and one's sexual identity, between two consenting adults, is not worthy of as much protection. To be sure, the potentially negative secondary effects stemming from nude dancing bars are non-existent with private sexual relations between consenting adults. With the exception of sex crimes such as rape, sexual assault, child sexual abuse, or public acts of nudity, the government has no legitimate interest to advance. To the extent that any given sexual act does not infringe on the participants’ or other persons’ rights, it should not be subject to the state’s Tenth Amendment police power.

Sigmund Freud once said that "sex is not something we do, it's something we are." Sexuality has been defined to be everything that has to do with being a man or woman. Said to be inextricably woven with one's personality, the concept of one's sexual identity encompasses three components. "The first is the core awareness of belonging to one of two categories of persons—male or female." This component

264. *Id.* at 592 (White, J., dissenting).
265. *Id.* (White, J., dissenting).
266. See *Renton v. Playtime Theatres*, 475 U.S. 41, 54 (1988) (holding that zoning ordinance designed to reduce concentration of nude dancing bars was rational means for state to reduce crime and protect property values).
268. *Id.*
269. *Id.* at 3.
270. See *GREEN*, supra note 235, at 51.
271. *Id.; see also* RONALD A. LATORRE, SEXUAL IDENTITY 15 (1979). This belief is largely dependent on both the person's perception of his or her body image and on the messages received from significant others. *Id.* This is arguably the most important subcategory because it is mainly subconscious and can affect the development of other areas. *Id.* One's physical gender does not necessarily translate into a congruent sense of self. Some individuals are so discontent with having been born male or female, that they eventually undergo a sex change. See *GREEN*, supra note 235, at 52. They are known as "transsexuals." The notion of transsexuality serves to emphasize the degree to which one's sense of maleness or femaleness can be independent of and override one's physical make-up. To the extent that it is a function of one's mind as opposed to the body, it lends support to
“permeat[es] nearly all behavior.” Studies have indicated that the emergence of this characteristic occurs as early as thirteen months of age. The second component relates to the core of one’s gender—masculinity and femininity. One’s sense of masculinity or femininity is also manifested early. Masculine and feminine behavior generally develop together with the self-concept of maleness or femaleness. The third component concerns sexual orientation. One’s sexual identity—the selection of male or female sexual partners, or sexual orientation—is so profound that it is commonly used to actually define the person.

the argument that one’s sexual identity or sense of sexuality is inherently cognitive, and not just merely a physical response. As such, it should be protected to the same extent as other forms of self-expression. No psychological or physiological explanation has been offered to conclusively resolve why some males and females are transsexual. Id. at 102.

272. GREEN, supra note 235, at 51.

273. Id. The age at which this feature becomes psychologically integrated is not known with 100% certainty, but some evidence suggest that the recognition of two classes of humans based on gender, occurs as early as thirteen months. Id.

274. See id. at 52; see also JANET T. SPENCE & ROBERT L. HELMREICH, MASCULINITY & FEMININITY, THEIR PSYCHOLOGICAL DIMENSIONS, CORRELATES, & ANTECEDENTS 4 (1978) (“Men and women are typically assumed to possess different temperamental characteristics and abilities—distinctive sets of attributes whose existence is used to justify the perpetuation of the society's role structure or whose inculcation is believed to be necessary if members of each sex are to fulfill their assigned functions.”). Evidence suggests that sex-role differentiations are highly shapeable. Id. at 5. Various environmental factors including political, sociological, and economic forces have been determined to play a part in the shaping of one’s sense of masculinity or femininity. Id. To the extent that this is mental and not physical, and to the extent that it is manifested through one’s sexuality, it lends additional support to the argument that sexual expression is a form of cognitive expression, and should, consequently, be entitled to First Amendment protection. See also Susan R. Walen & David Roth, A Cognitive Approach, in THEORIES OF HUMAN SEXUALITY, supra note 186, at 335. In one longitudinal study, a pair of identical twins was observed for research concerning gender development. One infant, due to an accident at circumcision, lost his penis. He was reared as a girl, and his brother was reared as a boy, each successfully developed a different gender role. See GREEN, supra note 235, at 51.

275. GREEN, supra note 235, at 51.

276. Id. at 52; see also LATORRE, supra note 271, at 26 (“By the age of four or five years, almost every child says that when he grows up he will be a parent of the appropriate sex [i.e. daddy if he is a boy and mommy if she is a girl].”). Children as young as three have been found to make fairly accurate distinctions between male and female types of activities. GREEN, supra note 235, at 52.

277. GREEN, supra note 235, at 53.

278. Id. at 53. Cf. Bowers v. Hardwick, 478 U.S. 186, 205 (1985) (Blackmun, J., dissenting) (“The court recognized in Roberts, 468 U.S., at 619, that the ‘ability independently to define one’s identity that is central to any concept of liberty’ cannot truly be exercised in a vacuum; we all depend on the ‘emotional enrichment from close ties with others.’”)

https://nsuworks.nova.edu/nlr/vol20/iss3/17
The foregoing psychological construct lends support to the argument that sexuality is a physical product of sophisticated cognitive processes. The various components or stages of psycho-sexual development all underscore the extent to which one’s sexuality is a function of the mind as opposed to the body. In essence, it is a manifestation of one’s inner self, identity, and emotions. Nonetheless, one must be careful not to dismiss it as an exclusively cerebral function. A number of noted psychologists have incorporated sexuality into hierarchical models of development, where it is classified as a human need, in the absence of which psychological problems may ensue.

As a manifestation of one’s emotions, feelings, identity, self, gender, and sense of eroticism, sexuality is the embodiment of human self-expression at the most fundamental level. Similar to art, speech, and other forms of expression, sexuality is worthy of First Amendment protection. To the extent that it involves consenting adults and does not infringe on another person’s rights, it is no less a form of communication than any other, and should be treated as such.

C. Right to Habilitation

In Wyatt v. Stickney, the court held that mentally disabled persons who are confined to institutions have a constitutional right to “adequate and effective treatment.” The court mandated a list of minimum constitu-

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279. See, e.g., Walen & Roth, supra note 275, at 335 (exploring various cognitive theories for sexuality and sexual development); see also, Igor S. Kon, A Sociocultural Approach, in THEORIES OF HUMAN SEXUALITY, supra note 186, at 280 (“Human sexuality is not a simple biological given and cannot be explained solely in terms of reproductive biology or in terms of instinctive behavior.”).

280. See RICHARD M. LERNER, CONCEPTS AND THEORIES OF HUMAN DEVELOPMENT 310-18 (1986) (describing Erikson’s eight stages of personality development, a psychological life cycle model, within which sexuality plays integral part); see also Lisa A. Serbin & Carol H. Sprafkin, A Developmental Approach, Sexuality from Infancy Through Adolescence, in THEORIES OF HUMAN SEXUALITY, supra note 186, at 163 (explaining how various cognitive, social, and affective phenomena involved in sexuality are interrelated throughout the developmental process).


282. Id. at 390. In support of its holding, the court cited a resolution entitled: “Declaration on the Rights of the Mentally Retarded.” Id. Adopted by the General Assembly of the United Nations on December 27, 1971, the resolution read in, pertinent part: “[t]he mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation, and guidance as will enable him to develop his ability and maximum potential.” Id. at 391.
tional standards for adequate habilitation of the mentally retarded. Of notable relevance was the right to a "humane psychological and physical environment." Specifically, the standards require that "residents shall have a right to dignity, privacy and humane care," and that "the institution shall provide, under appropriate supervision, suitable opportunities for the resident's interaction with members of the opposite sex."

In Youngberg v. Romeo, the Supreme Court of the United States held that mentally disabled persons have constitutionally protected liberty interests to reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and "such [minimally adequate] training as may be required by these interests." In Youngberg, a mentally disabled man who had been committed to a state institution, was involuntarily restrained for extended periods of time as a result of his violent behavior. The Court remanded the case to the district court to balance the patient's liberty interest with the state's interest, so that they might determine whether the physical restraints imposed on the patient were excessive, and whether they fell short of the minimally adequate standards of habilitation to which the patient was constitutionally entitled.

VI. APPLICATION

A. Catherine's Right to Privacy

While in the community living arrangement, Catherine is under constant supervision. Some testimony indicated that she is checked every ten minutes. While it is necessary to monitor Catherine's precarious medical condition, this degree of oversight was also explained to be "primarily to prevent sexual activity." This implies that the overriding

283. The court defined "habilitation" as: "[t]he process by which the staff of the institution assists the resident to acquire and maintain those life skills which enable him to cope more effectively with the demands of his own person and of his environment and to raise the level of his physical, mental and social efficiency." Id. at 395.

284. Wyatt, 344 F. Supp. at 395 app. A.
285. Id. at 399.
286. Id.
287. Id.
289. Id. at 324.
290. Id. at 310.
292. Id.
293. Id. at 10.
concern is that Catherine may become pregnant.\textsuperscript{294} However, a number of sexually related incidents were cited in the record to have occurred despite this unrelenting supervision.\textsuperscript{295} On one occasion, while visiting Catherine at her group home, her mother noticed a young man standing outside Catherine’s door while she was undressing.\textsuperscript{296} Another time, a male resident who lived in the group home was seen leaving Catherine’s bedroom, and she was found in bed crying, with her nightgown raised.\textsuperscript{297} These incidents underscore the inadequacy of her supervision, and raise the concern of how many incidents may have gone undetected.

Finally, medical testimony indicates that Catherine’s hymen is not intact and she does not have a virginal tract.\textsuperscript{298} This fact, together with Catherine’s overly affectionate nature,\textsuperscript{299} clearly indicates that, short of a live-in guardian, no amount of supervision could adequately guarantee her complete sexual abstinence.

This type of unceasing supervision imposed on Catherine constitutes an ongoing infraction on her fundamental constitutional right to privacy. Common to all of the aforesaid right to privacy cases is the inherent right to be let alone.\textsuperscript{300} Yet, because of the fear that Catherine may become pregnant, she never has more than ten minutes free from intrusion.\textsuperscript{301} The sterilization procedure would eliminate the possibility that Catherine could ever become pregnant, and there would be no need for the constant interference with her right to privacy. Her right to privacy would be restored to the extent that her supervision was not medically necessary.\textsuperscript{302} No contraceptive could provide this guarantee without causing harmful side effects.\textsuperscript{303}

\textsuperscript{294} See supra part II.A.
\textsuperscript{295} See supra part II.A.
\textsuperscript{296} Brief for Appellee/Respondent at 10, Estate of C.W. (No. 91-2970).
\textsuperscript{297} Id. Catherine indicated that the male resident had touched her breasts and hips.
\textsuperscript{298} Id. at 4.
\textsuperscript{299} See supra notes 20-21 and accompanying text.
\textsuperscript{300} See supra part V.A. The precise parameters for the right to privacy have never been defined. Consequently, the Supreme Court is afforded greater flexibility in its interpretation and application of the concept. Though Griswold, Eisenstadt, Roe and Bolton do not explicitly recognize the right to be let alone, it is implicit in the right to privacy.
\textsuperscript{301} Brief for Appellee/Respondent at 9, Estate of C.W. (No. 91-2970).
\textsuperscript{302} Id. at 9-11.
\textsuperscript{303} See supra part II.D.
B. Catherine's Right to Sexuality

It has been said that "sexual activity for the mentally handicapped—whether heterosexual, homosexual or masturbation—is abhorrent to people, even though there is enlightened clamor for understanding the handicapped at home and in the community."304 Historically, the prevalent view has been that mentally disabled persons "should not be allowed to engage in any sexual activity whatsoever."305 The time has come for society to recognize that, as human beings, mentally disabled persons are entitled to develop, express, and enjoy their sexuality to the same extent as anyone else.306 Catherine is no exception. Up to this point in her life,307 she has been deprived of her fundamental right to sexuality. She has had neither the opportunity to decide whether to engage in sexual relations, nor the ability to express herself sexually if she so wished.308

It is known that developmentally disabled persons "need more opportunities to learn how to relate appropriately in social and sexual situations."309 Under the appropriate level of guidance and direction, Catherine should, to the extent that she is able, be permitted to enjoy a sexual relationship with a male whose level of intellectual functioning approximates her own. This would preserve her fundamental right to

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305. HAUVIK & MENNINGER, II, supra note 26, at 8.
306. Id.
307. That is, up until the time of Catherine's sterilization.
308. Due to Catherine's cognitive limitations, no exploration was made into whether she could in fact consent to sexual activity. See Telephone Interview with Marta Engdahl, supra note 58. Catherine's sexual partners could potentially face criminal charges pursuant to 18 PA. CONS. STAT. ANN. 3121(4) (Supp. 1995) ("A person commits a felony of the first degree when he engages in sexual intercourse with another person not his spouse . . . who is so mentally deranged or deficient that such person is incapable of consent."); see also 18 PA. CONS. STAT. ANN. 311(c)(2) (Supp. 1995), which provides:
   Ineffective consent—Unless otherwise provided by this title or by the law defining the offense, consent does not constitute consent if: . . . it is given by a person who by reason of . . . mental disease or defect . . . is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense[.]"
Id. This note will not address the ramifications of Catherine's ability or inability to consent. Though it is certainly worthy of further consideration, it exceeds the scope of this discussion.
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sexuality, and minimize the possibility of her being infected by a sexually transmitted disease, and/or being sexually exploited.310

C. Catherine’s Right to Habilitation

As a result of the deprivation of Catherine’s right to privacy and sexuality, her right to habilitation is undermined as well. As held in Wyatt, Catherine has a constitutional right to a humane psychological environment.311 One may inevitably conclude that, without the tubal ligation, Catherine is not living in a humane psychological environment. With the exception of the evening, when Catherine goes to sleep, she never has more than ten or fifteen minutes to herself. While this is necessary to prevent Catherine from becoming pregnant, it could nevertheless be avoided if she were permitted to be sterilized. Even if one does conclude that such treatment is not inhumane, it still invariably frustrates her right to privacy, as provided within the context of habilitation.

Catherine’s lack of opportunity to engage in sexual relations further undermines her right to habilitation.312 The essence of habilitation is “making available to mentally retarded patterns and conditions of everyday life which are [as] close as possible to the norms and patterns of the mainstream of society.”313 Implicit in the concept of habilitation or normalization is the recognition that the mentally disabled are sexual beings.314 Without the tubal ligation, Catherine is not free to engage in a healthy intimate relationship. As provided in Wyatt, Catherine should have the opportunity to interact with members of the opposite sex.315

310. If Catherine was not given the appropriate level of guidance and supervision, there would exist the danger of sexual abuse by males who were functioning at higher intellectual levels. There would also exist potential health problems with respect to the transmission of sexual diseases. By requiring Catherine, and her mate, to be subject to some degree of supervision or guidance in the beginning of their relationship, the potential onset of health related problems would be minimized.


312. See discussion supra note 282 (describing the creation of the “Declaration on the Rights of the Mentally Retarded”); see also Wyatt v. Stickney, 344 F. Supp. 373, 381 (M.D. Ala. 1972) (holding that mentally ill persons who are confined to institutions have a constitutional right to “adequate treatment,” including “suitable opportunities for the patient’s interaction with members of the opposite sex”). Subsequently, in Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), the Court extended its prior holding to apply to the mentally disabled as well as the mentally ill. Id.

313. ROWE & SAVAGE, supra note 53, at 10.

314. See HAAVIK & MENNINGER, II, supra note 26, at 8.

Finally, the Court in *Youngberg* held that a court must show deference to the judgment exercised by qualified professionals with respect to the particular issues of habilitation.\(^{316}\) Sufficient psychological evidence exists to lend support to the contention that the deprivation of Catherine's privacy and sexuality interests restricts her healthy psychological development, thereby undermining the chief objective of habilitation.\(^{317}\)

**VII. CONCLUSION: BALANCING TEST OF CATHERINE’S CONSTITUTIONAL RIGHTS**

The world’s historic fascination with eugenics\(^ {318}\) demands an inquiry into any potential infractions on Catherine’s constitutional rights which may result from the sterilization procedure. In *Youngberg*, the Supreme Court applied a balancing test consisting of the mentally disabled person’s various liberty interests weighed against the legitimate interests of the state.\(^ {319}\) The Court stated that “[b]ecause the facts in cases of confinement of mentally retarded patients vary widely, it is essential to focus on the facts and circumstances of the case before the court.”\(^ {320}\) This type of pragmatic approach ensures that the Court’s decision is narrowly tailored to the particular needs of the mentally disabled person. The court must be careful not to lose its objectivity as a result of the temptation to compensate for its historical prejudices against the mentally disabled.\(^ {321}\) In a case such as this, it is particularly important for the court to use the “totality of the circumstances” approach because the sterilization procedure was sought strictly out of medical necessity. Catherine’s mental disability was only one factor to be considered among many.

With that in mind, we may proceed by first identifying the various interests involved. The state’s interests include the following: first, the protection of Catherine’s right to privacy with respect to the decision of whether to undergo the sterilization; and second, the preservation of her right to procreate. Pitted against the state’s foregoing interests is Catherine’s mother’s interest in protecting her daughter’s following constitutional rights: first, her right to privacy with respect to her right to be let alone; second,

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317. See *supra* notes 283-87 and accompanying text.
318. See *supra* part III.
319. *Youngberg*, 457 U.S. at 324.
320. *Id.* at 319 n.25.
321. See *supra* part III.
her right to sexuality; third, her right to adequate habilitation; and fourth, her right to continuation of life.\(^{322}\)

We may begin by examining the state’s interest in protecting Catherine’s right to privacy. Her privacy interests have been invaded to the extent that the permission to perform the operation may be issued absent her consent. In analyzing Catherine’s rights to privacy, it is vital to do so in light of her mental disability. Because of Catherine’s level of cognitive functioning, it is necessary for her mother and others who care for her to aggressively assert her best interests for her. To the extent that she is unable to care for herself or make well-informed decisions, they have a duty to compensate by acting as surrogate decision makers.\(^{322}\) As a result of Catherine’s disability, her life is necessarily regulated and protected by those around her.

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322. In Roe v. Wade, 410 U.S. 113 (1973), the Court held that during the second trimester of pregnancy, the state may protect its interest in the mother’s life and health, by regulating an abortion procedure in ways that are reasonably related to same. \(\textit{Id.}\) at 163-64. The Court further held that during the third trimester, the state must allow the mother to abort her viable fetus if it is for the purpose of preserving her life or health. \(\textit{Id.}\) at 165-66. Four years later, in Carey v. Population Servs. Int’l, 431 U.S. 677 (1977), the Court upheld its ruling in \textit{Roe}, which held that, even after viability, the state may not regulate or proscribe abortion if it interferes with the mother’s right to life or health. \(\textit{Id.}\) at 686. In providing that the mother’s right to life supersedes that of her viable fetus, the Court has revealed its primary interest in taking whatever means necessary to protect a woman’s right to continued life and health. \(\textit{Id.}\) While \textit{Roe} and \textit{Carey} involved different scenarios than this case, they are analogous because of the overriding interest in protecting a pregnant mother’s maternal life and health. However, Catherine’s mother is not afforded the liberty to wait until her daughter becomes pregnant, because of Catherine’s fragile epileptic condition. Rather, her mother must ensure that her daughter avoids the potentially irreversible, life-endangering situation which could arise, were she to become pregnant. To the extent that a potential pregnancy could put Catherine into a life-endangering situation, her mother has an interest in protecting her daughter’s right to continued life by way of the tubal ligation procedure. The right to life itself is arguably the most fundamental of all constitutional rights. A decision to deny Catherine’s mother the authorization to permit Catherine’s sterilization would trivialize Catherine’s right to life, and consequently, leave her and those who cared for her in constant peril.

323. \textit{See} Scott, supra note 135, at 841. Some mentally disabled persons are not competent to make reproductive decisions for themselves. A decision about sterilization made on behalf of an individual in this category violates no interest in reproductive autonomy; when a person is incapable of making her own decision, others must determine whether sterilization is in her best interest. \ldots\) The desirability of the procedure may depend on nonreproductive considerations such as medical risks and benefits, human dignity, privacy, and family continuity. \ldots\)

\(\textit{Id.}\)
In *Cruzan v. Missouri Department of Health*, the Supreme Court of the United States held, in a five to four decision, that the parents of a woman who had fallen into a persistent vegetative state as a result of a car accident, had the right to exercise their daughter's constitutional right to refuse continued artificial nutrition and hydration procedures if there was clear and convincing evidence to indicate that their daughter would have chosen to, were she so able. The Court’s decision indicates that a showing of clear and convincing evidence regarding an incompetent person’s intent may permit a guardian to assert her rights for her. While this may be characterized as a substituted judgment, it is predicated exclusively on the best interests of the disabled person who is incapable of asserting his or her own rights.

In this case, while the facts may be different, the ultimate objective is the same—to protect the best interests of Catherine who is incapable of making such a determination on her own. *Cruzan* implicitly stands for the proposition that a guardian may assert the best interests of his or her child in the event that the child is incapable of doing so. Consequently, Catherine’s mother should be permitted to make certain types of decisions for her despite her theoretical lack of consent, because it is in her best interest. The overriding concern for Catherine’s life dwarfs the *de minimis* privacy intrusion which she would suffer as a result of the tubal ligation procedure.

Catherine’s right to procreate must be precisely defined in view of her medical predicament. It cannot be emphasized enough that the tubal ligation procedure was strictly being sought as a means through which Catherine’s mother could protect her daughter’s right to continuation of life. The laparoscopy should therefore be considered in the same light as any other medically necessary procedure. As stated earlier, one must resist the temptation to analyze the issue within the central context of Catherine’s mental disability. Her mental disability was not the motivation for the procedure. Her medical condition was. Catherine’s mental disability only becomes relevant to the extent of its limitation on her autonomy, her

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325. *Id.* at 284-85.
326. *See id.*
327. *See supra* part II.C.
328. *See A. JEFFERSON PENFIELD, FEMALE STERILIZATION BY MINILAPAROTOMY OR OPEN LAPAROSCOPY 7-9 (1980).* The tubal ligation procedure is relatively simple. It consists of a belly-button size incision through which the Fallopian tubes are burned or cut to prevent the ova from entering the uterus. *Id.*
heightened dependability on those around her, and the distorted context of the fundamental rights which have been consequently implicated.

The potential life-endangering risks facing both Catherine and her fetus, were she to become pregnant, necessarily place her right to procreate in a different light than that of a healthy woman who has no such risks. In *Cruzan*, Justice Brennan, writing for the dissent, argued that the state’s proclaimed interest in protecting the incompetent person’s right to life, which was being artificially sustained, was abstract. He stated that because of the person’s irreversible vegetative state and the fact that such a person is incapable of thought, emotion or sensation, the state’s interest in protecting that life is quite different from protecting that of a healthy person. Catherine’s right to procreate is also abstractly defined because of the virtual impossibility that she could ever carry her pregnancy to term. As a result, the state’s interest in protecting her right to procreate becomes lessened accordingly, especially when considered against Catherine’s other fundamental rights which would be upheld as a result of the tubal ligation, such as her rights to privacy, sexuality, habilitation, and life.

While it is highly improbable that Catherine’s mental or physical condition will change, the theoretical ramifications of her sterilization and their relationship to her fundamental right to procreate should nevertheless be addressed. In the event that Catherine was empowered to rear a child, she would have a number of options available to her. First, she could adopt. This would enable her to avoid the physical complications associated with pregnancy. Second, she could have the effect of the operation surgically reversed. Alternatively, she could give birth through the use of in vitro fertilization.

To the extent that Catherine is entirely dependent on those around her, the need to salvage any degree of freedom which she may otherwise have, should prevail over any accompanying de minimis infractions which she may incidentally suffer. The tubal ligation procedure would remove the

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329. 497 U.S. at 272 (Brennan, J. dissenting).
330. *Id.* at 313-14, 317 (Brennan, J., dissenting).
331. See PENFIELD, supra note 328, at 98. Catherine’s fallopian tubes could be reconstructed to give her the capability to become pregnant again, by either minilaparotomy or open laparoscopy. The success rate for the reversal of the tubal ligation procedure is approximately 82%. *Id.*
332. A procedure in which ova are removed from the woman’s ovaries and fertilized in a petri dish using a donor’s sperm. The fertilized egg is then transferred into the woman’s uterus. *Id.*
threat of pregnancy, and consequently eliminate the need for the relentless privacy infractions which Catherine continuously endures. To the extent that her supervision is not medically necessary, Catherine could finally have the opportunity to be let alone in peace to think, to muse. She would also gain the opportunity to enjoy a sexual relationship with someone of the opposite sex. While these rights are oftentimes taken for granted by most, they are long-awaited, and far overdue freedoms for Catherine. With them, she would no longer be left to simply “exist” with the constant threat of death looming over her.

After twenty-six years, Catherine could finally begin to live life as a human being.

Robert Randal Adler333