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Susan L. Bloom

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A WOMAN'S RIGHT TO VOLUNTARY STERILIZATION*

INTRODUCTION

In recent years increasing attention has been focused upon the issue of a woman's right to exercise control over her body. While this issue has arisen most visibly in the controversies over abortion laws, the area of contraception presents equally troublesome conflicts.

The present and future population crisis having been long predicted, the time is ripe for full consideration of all contraceptive alternatives. Yet despite general acceptance of birth control, legal impediments still surround certain contraceptive practices. Voluntary sterilization is such a method.

It has been estimated that each year 100,000 Americans elect voluntary sterilization as a method of birth control. Because the operation is relatively simple, inexpensive, and productive of reliable contraceptive results, this number is rising. Reexamination of the legal considerations regarding voluntary sterilization thus seems timely.

It is crucial at the outset to delineate the concept of voluntary sterilization as it is used throughout this comment, and to contrast other types of sterilization which are beyond this comment's scope. "Voluntary sterilization has come to mean a willing sterilization for whatever personal reasons for contraception the patient may have." This concept is also identified as "elective sterilization." In contrast, sterilization intended to prevent conception for medical reasons (usually to preserve the health of the woman) is referred to as thera-

* The author wishes to express her indebtedness to Jeremiah S. Gutman, Esq., New York, N. Y. whose work provided the inspiration for the development of this topic.
   I think I may fairly make two postulata.
   First, That food is necessary to the existence of man.
   Secondly, That the passion between the sexes is necessary and will remain nearly in its present state.
   These two laws, ever since we have had any knowledge of mankind, appear to have been fixed laws of our nature, and . . . we have no right to conclude that they will ever cease to be what they now are . . .
   Population, when unchecked, increases in a geometrical ratio. Subsistence increases only in an arithmetical ratio.

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Eugenic sterilization seeks to prevent the transmission of certain undesirable hereditary traits, such as feeblemindedness and insanity. Some states have, in the past, enacted statutes requiring sterilization as a punishment for sex crimes and certain other criminal offenses; these statutes have been categorized as punitive sterilization. The distinctions among the various types of sterilization have occasionally been ignored in practice. For example, the statutes of two states use the term “voluntary sterilization” to refer to “eugenic sterilization.”

Although the principal focus of this comment is on states not having statutes concerning voluntary sterilization, such as New York, an understanding of the subject will be enhanced by a look at the current statutory situation throughout the United States. Only one state prohibits sterilization except for medical necessity. Four states specifically provide for voluntary sterilization: Georgia, North Carolina, Oregon, and Virginia. Forty-five states thus lack prohibiting

5. Wolf, supra note 3.
6. Id.

In recent years several of these laws have been declared unconstitutional on the grounds that they called for “cruel and unusual punishment.” Such statutes which are still in effect in other states are therefore presumed to be unenforceable and obsolete.

10. Ga. Code Ann. §§ 84-931 to -935.2 (Supp. 1971). These provisions make a sterilization lawful when the following conditions are met: operation must be performed by licensed physician, person requesting sterilization must be at least 21 and legally married, informed consent of person requesting sterilization and spouse must be obtained. Compliance with these conditions immunizes physicians from civil and criminal liability except in cases of negligence. The Georgia provisions do not require any objecting hospital to admit a patient for sterilization. Without further clarification of the term “objecting,” the Georgia statutes would seem to create a situation similar to that in states in which there are no statutes. The 1971 statutory version has resulted in confusion of terminology. See id. § 84-933; see also supra, note 8 and accompanying text.
11. N.C. Gen. Stat. §§ 90-271 to -275 (Supp. 1971). Unique features of the North Carolina law include a mandatory thirty-day waiting period and a provision for operation on an unmarried minor (which necessitates written consent of minor plus petition of parents or guardian to juvenile court). A 1971 amendment substituted “18” for “21” as the standard for ability to independently consent. The North Carolina statute does have a consultation requirement similar to that of Georgia. It does not, however, have a nonrequirement section for hospitals.
12. Ore. Rev. Stat. § 455.305 (1971) provides: “A person may be sterilized by appropriate means upon his request and upon the advice of a physician licensed by the State Board of Medical Examiners.”

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or enabling legislation. The ability to deal with voluntary sterilization problems in a state lacking statutes on the subject should therefore carry far-reaching implications.

In the absence of a state statute specifically permitting voluntary sterilization, the decision to allow such procedures has most often been made by hospital committees. The question arises, then, whether a woman may challenge the denial of access to a hospital for the performance of a voluntarily sterilization after her physician has considered her personal reasons and her medical history and has agreed to perform the operation. It is posited that a woman has a fundamental right to choose voluntary sterilization as an alternative method of contraception. While this operation will rarely be chosen as the contraceptive method of first choice, its availability in cases of reasonable personal and medical considerations should not be impaired.

I. Medical Considerations and Attitudes

Recognized individual motives for voluntary sterilization include failure rates of other contraceptive measures; inconvenience of contraceptives resulting in failure to employ them properly; and side effects of birth control pills.\(^1\)\(^4\) Statistics and factors in the failure of older birth control methods (rhythm, condom, intravaginal chemical contraception, diaphragm) have received attention in the medical literature.\(^1\)\(^5\) Intrauterine devices (IUDs) with low failure rates may nonetheless be undesirable, due to complications ranging from mild cramps and bleeding to uterine perforation.\(^1\)\(^6\) Although the birth control pill is the most desirable of contraceptive methods when judged on the basis of failure rate, extensive research has revealed side effects and contraindications to use.\(^1\)\(^7\) As a result of problems with other means


\(^4\) Comment, supra note 4, at 417.


of birth control, it is therefore felt that permanent surgical sterilization, rather than temporary fertility control, is desirable for a portion of the female population.\textsuperscript{[18]}

Psychologically, the resulting benefits of a voluntary sterilization may be enormous. A positive retreat from anxiety may be enjoyed as a result of the procedure.\textsuperscript{[19]}

In fact, voluntary sterilization can and does contribute to mental health; by helping to keep the population increase in line with developing resources; by reducing the anxiety caused by fear of unwanted pregnancies; by preventing children from being born to irresponsible parents with resultant neglect and social ills . . . . All this can be accomplished without unfavorable psychological effects and with a high ratio of satisfaction.\textsuperscript{[20]}

An often-urged reason against female voluntary sterilization is that male sterilization is preferable. Yet, women are better adjusted psychologically to sterilization operations than are men.\textsuperscript{[21]} This factor should receive recognition in formulating standards for access to sterilization operations.


. . . In these instances, particularly when the couple consider that their family is complete, sterilization is a boon and a release from much tension and inconvenience.

19. DeLee, Voluntary Sterilization, 54 INT. SURG. 304, 308-09 (1970). The author draws an "exact parallel" between a country bogged down by a too-rapidly growing population and a family burdened with the same pressures. "The same stresses and unhappiness occur within the family unit as within an overcrowded country when this occurs." Id.


(M)en are often emotionally unstrung by the surgery. Confusing fertility, virility and masculinity, otherwise indolent husbands feel compelled to lift weights, wear crew cuts, jog, and flex their muscles to demonstrate their equality with men who can still impregnate their wives.

Women, on the other hand, are much more sensible from a psychological point of view. They do not usually confuse the feminine role with reproductive capacity after they have given birth to a number of children.

\textit{Id. See also, J. FA-WECTT, PSYCHOLOGY AND POPULATION} 57 (1970).

A psychiatric consultation requirement has been suggested when the patient is too young, has few children or has had psychiatric problems, prior to voluntary sterilization. See Wolf, supra note 3, at 123. While such a consultation may be indicated in certain cases, the individual's private physician should be equipped to recognize those cases that warrant psychiatric referral. This would seem particularly true in light of the
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Surgical methods of female sterilization have become increasingly simple and safe.\textsuperscript{22} Choice of a method of sterilization will depend on a number of factors.\textsuperscript{23} Meanwhile, the demand for voluntary sterilization may be underestimated. A 1964 study\textsuperscript{24} showed that 8 percent of women who had reached the age of 40 had been rendered infertile; 4 percent by necessary gynecological operations, and 4 percent by deliberate sterilization. The "necessity" of some of the gynecological surgery appeared questionable.\textsuperscript{25}

A consideration of the policy statements of nationally organized groups of physicians regarding voluntary sterilization is valuable in that these statements tend to reflect the contemporary thought of the medical profession's mainstream.\textsuperscript{26} Most hospital policies today follow the guidelines of the American College of Obstetricians and Gynecologists (A.C.O.G.).\textsuperscript{27} Although the guidelines have recently been

\begin{itemize}
  \item increasing emphasis on, and awareness of, behavioral sciences in the medical school curriculum.
  \item See, e.g., Overstreet, \textit{Female Sterilization}, in \textit{Manual of Family Planning and Contraceptive Practice} 404 (M. Calderone ed. 1970); Guttmacher, supra note 17, at 684.
  \item See Overstreet, supra note 22, at 413-15 which lists the relevant factors: (1) the patient's age; (2) her general medical status; (3) her wishes and those of her husband; (4) whether the procedure is puerperal or interval; (5) the dependability (low failure rate) and complexity (concurrent and post sterilization risks); (6) the gravity of indications for sterilization; (7) whether sterilization of the husband is perhaps preferable and whether it can be depended upon; (8) whether delivery is abdominal or vaginal; (9) the presence or absence of pelvic, especially uterine, disease; (10) whether pelvic surgery is otherwise gynecologically indicated; and (11) type of anesthesia. It has been suggested that women in a high-risk group for future gynecologic disease (carcinoma of the cervix, in particular) might be better served were hysterectomy chosen as a method of sterilization rather than tubal ligation. See Haynes & Wolf, \textit{Tubal Sterilization in an Indigent Population}, 106 Am. J. Obst. & Gynec. 1044 (1970).
  \item Cited in Overstreet, \textit{Permanent Contraception: Sterilization General Considerations}, in \textit{Manual of Family Planning and Contraceptive Practice} 389-90 (M. Calderone ed. 1970). "The 'necessity' of many of the [gynecological operations] is often principally the desire for contraceptive sterilization." \textit{Id}. The above finding raises the possibility that reasons of dubious medical necessity are being used to circumvent restrictive hospital sterilization committees.
  \item Id.
  \item Id. at 390.
  \item Id. at 391. The American College of Obstetricians and Gynecologists used to have the following criteria for voluntary sterilization:
    
    Sterilization is permissible in any woman 25 years of age, who has or will have five living children at the termination of the present pregnancy. Also, any woman 30 years of age, who has or will have four living children at the termination of this pregnancy. Also, any woman 35 years of age, who has or will have three living children.
  \item Id. at 392-93.
\end{itemize}

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liberalized, the residual influence of medical traditions is reflected in the perpetuation of the customary age-parity formula which restricts voluntary sterilizations to older women or to young women with many children. A fair appraisal of the widespread use of age-parity formulas suggests that they are entrenched more by custom than by enlightened scientific knowledge.

Aside from medical evidence and peer group pressures, fear of legal consequences, whether real or imagined, may have resulted in restrictive regulations regarding voluntary sterilization. It thus seems important to explicate the potential criminal and civil liability of the physician arising out of sterilization operations, with an emphasis on the majority of states in which there is no voluntary sterilization statute.

The only possibly relevant provisions of general criminal law are those concerning mayhem and assault and battery. According to one court, "[t]he concept of mayhem at common law was forcibly and violently depriving another of the use of such members of the body as might render him less able to defend himself, or to annoy his adversary." The applicability of a definition of mayhem so general as to include injury to women through sterilization has been disclaimed. The inclusion of voluntary sterilization under assault and battery has also been rejected.

The American Medical Association's Law Department has stated that voluntary sterilization, "until declared illegal by the legislature or the courts in the physician's State, is largely a matter of individual

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28. Id. at 393. The 1969 A.C.O.G. Standards of Obstetric-Gynecologic Hospital Services requires only that "each hospital must establish its own regulations concerning sterilization." Id.
29. Id.
30. In general, a situation which will, in all probability, further the health, happiness, and opportunity for any family, especially where other methods of contraception have failed or are considered undesirable, may be considered a justifiable indication.

31. Where such a statute exists, procedures in accordance with the terms of the statute exculpate the physician from civil and criminal liability. See discussion in supra notes 10-13.
34. See Mackay & Edey, supra note 32; cf. Christensen v. Thornby, 192 Minn. 173, 174-75, 255 N.W. 620, 621-22 (1934).
conscience and principle." One commentator has made the astute observation that sex laws which make "sins" into "crimes" "are completely at variance with the realities, and even the ethics, of our lives today." Notwithstanding the misleading treatment of physician involvement with contraception as a subtopic under Criminal Law in legal research volumes, the physician's fear of criminal consequences in states without relevant prohibitory legislation is imaginary.

With regard to civil liability of physicians, it should be stressed that a sterilization operation requires no greater justification than do other surgical procedures. The physician is subject to liability for negligence and for failure to obtain an informed consent from the patient and spouse. Employment of generally accepted legal standards of professional health care will vitiate civil liability for voluntary sterilization operations.

II. THE COMPETING INTERESTS: HOSPITAL REGULATIONS V. THE RIGHT TO (MARITAL) PRIVACY

It may be worthwhile at this juncture to consider the competing interests of hospital-formulated policies and the personal right of choice regarding contraceptive method. As one commentator has noted: "Even in states with enabling legislation, there is a danger that the availability of voluntary sterilization might be limited by restrictive hospital regulations." In most hospitals, the doctor whose pa-

37. Pilpel, Sex vs. the Law, 23 J.A.M.W.A. 179, 184 (1968).
38. See Sulloway, The Legal and Political Aspects of Population Control in the United States, in POPULATION, EVOLUTION AND BIRTH CONTROL 244 (G. Hardin ed. 1964); see, e.g., 12 Am. Jur. 2d 367 (referring the reader interested in researching sterilization to Criminal Law volume); but cf. 35 A.L.R.3d 1441 (annotation on legality of voluntary nontherapeutic sterilization).
39. See supra note 9 and accompanying text.
tient desires a sterilization operation must submit a request to the sterilization committee. The latter is usually a combined therapeutic abortion-sterilization committee, an arrangement which unfortunately confuses the moral problems of the two procedures. It has been documented that requests based on socioeconomic considerations take longer to pass through the sterilization committees than requests based on medical considerations. However, experts argue that socioeconomic indications should be sufficient to justify sterilizations.

The mere expression of desire by a concerned couple to have one of them sterilized should be heeded and respected by the physician. This feeling, when based upon sound thinking, can be reason enough to abide by the request, though upon probing, one can almost always elicit some logical psychological or other reason for this request.

Concern over the population explosion makes a more liberal approach appropriate. Moreover, it is even dubious whether generally accepted moral standards are opposed to voluntary sterilization. The most promising recognition of socioeconomic indications as a reasonable basis for voluntary sterilization is the recent United States district court memorandum opinion in a woman's suit against a hospital for injunctive and declaratory relief. Damages were granted for the refusal to permit her doctor to perform a voluntary sterilization and the defendant hospital's motion for summary judgment was denied.

44. Forbes, supra note 21, at 562. Although one would suspect that such joint committees are now defunct in New York State by virtue of the new liberalized abortion law, it is safe to assume that medical traditions including underlying morals die slowly. See supra notes 28-29 and accompanying text; see also Hardin, Censorship Within the Medical Profession, in POPULATION, EVOLUTION AND BIRTH CONTROL 242 (G. Hardin ed. 1964) which contains a memorable line: "I wish it could be said that the medical profession was uniformly in the vanguard of the progression toward dignity in human reproduction—but, of course, it was not." Id. For an example of one such committee, see generally Savel & Perlmutter, Therapeutic Abortion and Sterilization Committee, 80 AM. J. OBST. & GYNEC. 1192 (1960).

45. See Savel & Perlmutter, supra note 44.

46. DeLee, supra note 19, at 306.

47. White, supra note 30. See Lockhart, Surgical Control of Population, 66 TEXAS MED. 24 (1970) who advances the following problems as directly related to population excess: poverty, crime, violence and pollution.


[Plaintiff] contends that the hospital's committee on sterilization made a value choice involving moral and religious considerations.

... In each case when surgery was not recommended, the minutes disclose that the patient desired the operation for socioeconomic rather than medical reasons. The meaning of these social and economic considerations involves a question of fact. A trial is necessary.

Id.
A fundamental right to voluntary sterilization derives from a right to personal privacy as formulated in *Griswold v. Connecticut*. The *Griswold* decision offers a due process prototype to oppose the authority of a hospital to formulate its own regulations. A possible equal protection argument will be treated later in this comment. In *Griswold*, the Executive Director of the Planned Parenthood League of Connecticut and its medical director, a licensed physician, were convicted as accessories for giving married persons contraceptive information in violation of the Connecticut anti-contraceptive statute. The Connecticut statute was held to infringe upon the right of marital privacy, and the Connecticut court decision upholding the statute's constitutionality was reversed.

Justice Douglas, writing for the Court, first held that appellants, the clinic director and physicians, had standing to raise the constitutional rights of married people with whom they had a professional relationship. Douglas then spoke of the spirit of the first amendment as encompassing the right infringed. He based his holding on a theory of penumbras created by the Bill of Rights by analogy to the first, third, fourth, fifth and ninth amendments. Finally, in recognizing a right of marital privacy, Douglas' opinion for the Court expanded the content of rights within the due process clauses of the fifth and fourteenth amendments.

In a concurring opinion Justice Goldberg argued that it is a violation of the ninth amendment to contravene an unenumerated fundamental right. However, one authority has noted that this theory is not supported by historical analogy. An important feature of the

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50. 381 U.S. 479 (1965).
51. See infra notes 114-24 and accompanying text.
52. 381 U.S. at 480.
53. Id. at 481.
54. Id. at 482.
55. Id. at 483. Douglas' opinion has been viewed favorably because it is grounded in analogy justified by texts of the first eight amendments, and is thus opposed to arbitrariness in method. Franklin, *The Ninth Amendment as Civil Law Method and Its Implications for Republican Form of Government: Griswold v. Connecticut; South Carolina v. Katzenbach*, 40 Tul. L. Rev. 487, 490 (1966).
56. 381 U.S. at 486; see Franklin, *supra* note 55, at 490.
58. 381 U.S. at 485-92.
59. Id. at 490. See the Goldberg formulation of the ninth amendment argument, *id.* at 485-92; see generally Emerson, *supra* note 57.
60. See Franklin, *supra* note 55, at 489. The author states that Goldberg's legal method is arbitrary because the sources of determination may be entirely subjective and secretive.
Goldberg opinion is his emphasis on the state's failure to establish an overriding state interest in the area of birth control.61

Justice Harlan filed a concurring opinion which is notable for its clarity and simplicity. The main thrust of the Harlan opinion is that the incorporation doctrine may not be used to restrict the reach of the fourteenth amendment. "The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom."62

The classic enunciation of the right to individual privacy was formulated by Justice Brandeis in his dissenting opinion in Olmstead v. United States:63 "[E]very unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."64 Although such a comprehensive definition of the right has yet to be adopted,65 the Griswold decision does expand privacy rights in the area of birth control. The case has been read by at least one judge as a broad command to protect the privacy and intimacy of family life.66 It seems critical that "the Court tied marital privacy and access to information together into a single bundle of rights."67 Increasingly, the individual and social interest in marital and family security by means of contraception is being recognized.68 Future judicial developments

61. Although the Connecticut birth-control law obviously encroaches upon a fundamental personal liberty, the state does note show that the law serves any "subordinating [state] interest which is compelling" or that it is "necessary ... to the accomplishment of a permissible state policy." 381 U.S. at 497-98. It is the author's opinion that this facet of the Goldberg opinion will have greater significance than his ninth amendment analysis.

62. 381 U.S. at 500. Harlan relies in part on the selective incorporation doctrine of Palko v. Connecticut, 302 U.S. 319 (1937) wherein the test posed is "that liberty is something more than exemption from physical restraint, and that even in the field of substantive rights and duties the legislative judgment, if oppressive and arbitrary may be overridden by the courts." Id. at 327.

63. 277 U.S. 438, 471 (1928).

64. Id. at 478. This extension of the scope of the fourth amendment has been suggested as an aftermath of Griswold. See note 65 infra.

65. Griswold led to the suggestion that interpretation of fourth amendment rights should not be confined to criminal law and extends into the area of personal privacy. See Hufstedler, The Directions and Misdirections of a Constitutional Right of Privacy, 26 Record of N.Y.C.B.A. 546, 557 (1971).


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may be influenced by such empirical evidence as the new definition of the right to individual privacy which has emerged as a result of an intensive study.69

While the fundamental right to (marital) privacy is not absolute, the state must show a compelling interest to infringe upon it.70 One judge has written, "[G]overnmental regulation of marital intimacy . . . seriously threatens the institution of marriage and . . . such governmental action is invalid unless there is great justification for it."71 Following this line of reasoning, a Texas court recognized certain possible state interests concerning a widely debated right of personal autonomy, the right to abortion.72 However, the court granted declaratory relief from the unconstitutionally vague and overbroad Texas abortion statute, stating that such "legislation . . . must address itself to more than a bare negation of that right."73

In addition to cases strengthening the factual holding of Griswold, a series of abortion cases have expanded the decision by analogy.74 The California Supreme Court in People v. Belous75 reversed a physician's conviction under the former "medical necessity only" California abortion statute and called the right involved in abortion "the woman's right to life . . . because childbirth involves risks of death."76 The court found the nonenumeration of this right in either the United States or California Constitutions to be no impediment to its existence.77 The District of Columbia abortion statute case, decided

69. "[The right to individual privacy is] the right of the individual to decide for himself, with only extraordinary exceptions in the interests of society, when and on what terms his acts should be revealed to the general public." Westin, Science, Privacy, and Freedom: Issues and Proposals for the 1970's, 66 Colum. L. Rev. 1003, 1031 (1966).

70. See supra note 61 and accompanying text; see also Hufstedler, supra note 65, at 562.

71. Hufstedler, supra note 65, at 559.

72. The following state interests were recognized: (1) interest of state in seeing abortions performed by competent persons; (2) state interest in seeing abortions performed in adequate surroundings; (3) concern over the "quickened fetus." Note, 2 Texas Tech. L. Rev. 99, 103 (1970).

73. Roe v. Wade, 314 F. Supp. 1217, 1224 (N.D. Tex. 1970), appeal docketed, No. 70-18, U.S. Oct. 6, 1970, juris. postponed, 402 U.S. 941 (1971). Due to the lack of Supreme Court clarification on the constitutionality of abortion laws, decisions in the state courts have varied. Hopefully this area will be clarified in the near future since the Supreme Court has docketed appeals on cases involving abortion laws. See notes 75-83 infra and accompanying text.

74. Discussion of the abortion cases also seems appropriate in light of the widespread practice of joint sterilization-abortion hospital committees. See supra note 45 and accompanying text.


76. Id. at 963, 458 P.2d at 199, 80 Cal. Rptr. at 359.

77. Id., 458 P.2d at 200, 80 Cal. Rptr. at 360.
at about the same time,\textsuperscript{78} found the right as part of a right to privacy and postulated that such a right "may well include the right to remove an unwanted child at least in early stages of pregnancy."\textsuperscript{79} A federal district court in Wisconsin spoke of the "medical necessity" abortion statute in that state as an unconstitutional invasion of a woman's right to refuse to carry an unquickened embryo.\textsuperscript{80} In addition, a substantial constitutional question was found on the right to abortion in a challenge to the Georgia statute.\textsuperscript{81} In those cases in which the state abortion statute has been totally or substantially upheld, a woman's fundamental right to determine whether to bear children before pregnancy has nevertheless been recognized.\textsuperscript{82} Thus, since Griswold, courts have finally come to realize that a woman's right to control her own reproductive organs is of fundamental importance to her.\textsuperscript{83}

Griswold has also received support from recent cases involving contraception laws. For example, in Baird \textit{v.} Eisenstadt,\textsuperscript{84} which involved an anti-contraception display law, the court held that the statute was in conflict with fundamental human rights. In \textit{People v. Baird},\textsuperscript{85} a statute which prohibited the sale of contraceptives except by physicians was upheld, the court deferring to the legislature for change in this area. These two cases may be readily distinguished on the ground

\begin{itemize}
  \item \textsuperscript{78} United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969).
  \item \textsuperscript{79} \textit{Id.} at 1035.
  \item \textsuperscript{83} Lucas, \textit{Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes}, 46 N.C.L. Rev. 730, 776 (1968).
  \item \textsuperscript{84} 429 F.2d 1398 (1st Cir. 1970), \textit{aff'd}, Eisenstadt \textit{v.} Baird, 405 U.S. 438 (1972). The Court of Appeals for the First Circuit took notice that the statute in question was drafted with what the legislature believed to be "the precise accommodation necessary to escape the Griswold ruling." 429 F.2d at 1401. \textit{See Note}, 84 \textit{Harv. L. Rev.} 1525, 1529-33 (1971). \textit{See also} notes 127-28 \textit{infra} and accompanying text.
  \item \textsuperscript{85} 47 Misc. 2d 478, 262 N.Y.S.2d 947 (Dist. Ct. Nassau County, 1965).
\end{itemize}
that the court found a demonstrable state interest in the latter, but not in the former.\textsuperscript{86}

Since voluntary sterilization is a recognized method of birth control, it falls squarely within the protection of the \textit{Griswold} decision. This proposition has been accepted by one California court which upheld the legal validity of voluntary sterilization.\textsuperscript{87} A recent federal decision, \textit{McCabe v. Nassau County Medical Center},\textsuperscript{88} clearly implies that a hospital's refusal to permit a woman to be sterilized, which was based upon an age-parity formula, invaded her right to privacy in her marital relationship. The Court of Appeals for the Second Circuit held that plaintiff's claim for damages under the Civil Rights statute (42 U.S.C. § 1983) was not rendered moot by the fact that the hospital granted the sterilization procedure subsequent to the commencement of plaintiff's action.\textsuperscript{89} The court further held that federal jurisdiction was properly invoked\textsuperscript{90} and that plaintiff's possible claim for malpractice in the state courts did not justify invoking the doctrine of abstention.\textsuperscript{91} In reversing the district court's dismissal of plaintiff's claim, the court specifically delineated the right to privacy in the marital relationship as one of the issues to be considered on remand.\textsuperscript{92} However, the Court of Appeals stated that the plaintiff's claim for damages "is clearly based upon invasion of a right of 'personal liberty'..."\textsuperscript{93}

\textsuperscript{86} The interest of the state in seeing that contraceptives sold to its citizens meet certain health standards and are fitted properly seems to bear reasonable relation to the exception of physicians from the prohibition. The antidisplay statute can only be justified on a "contraceptives are immoral per se" rationale. However, the new Supreme Court decision in \textit{Eisenstadt} implies that the state can only prohibit laymen from dispensing contraceptives that involve some health hazard. \textit{See} 405 U.S. at 452-55.

\textsuperscript{87} \textit{Jessin v. County of Shasta, 274 Cal. App. 2d 737, 79 Cal. Rptr. 359 (Dist. Ct. App. 1969)}. California does not have a statute allowing voluntary sterilization. It was stated in the decision of the court:

\begin{quote}
[T]here is no legislative policy or any other overriding public policy proscribing consensual vasectomy in this state... [I]t is an acceptable method of family planning, while \textit{Griswold} indicates that it may fall within constitutional protection.
\end{quote}

\textit{Id.} at 748, 79 Cal. Rptr. at 366.

\textsuperscript{88} 453 F.2d 698 (2d Cir. 1971).

\textsuperscript{89} \textit{Id.} at 701-02.

\textsuperscript{90} \textit{Id.} at 703-04.

\textsuperscript{91} \textit{Id.} at 704.

\textsuperscript{92} \textit{Id.} at 701.

\textsuperscript{93} \textit{Id.} at 702.
III. PREPARING A LEGAL ATTACK WHERE NO STATUTE PROHIBITING VOLUNTARY STERILIZATION EXISTS AND HOSPITAL REGULATIONS ARE RESTRICTIVE

For the woman with substantial financial means, a process of doctor-and-hospital shopping94 might not constitute a substantial burden. However, if the possibility of voluntary sterilization is not to be extinguished for the many women who would find the burden of this process prohibitive, access to public hospitals becomes crucial. Thus, a legal framework is necessary to protect the fundamental right to choose voluntary sterilization as an alternative means of contraception. A two-pronged attack is proposed: (1) finding a hospital of sufficiently public character to obtain jurisdiction under civil rights statutes; and (2) raising an equal protection argument when a hospital purports to offer medical services for those unable to afford them, yet refuses a reasonable request for a voluntary sterilization.

A. Obtaining Jurisdiction

The virtual abolition of sovereign immunity has resulted in state hospital administrative officials becoming liable to suit for an injunction and/or damages under federal civil rights statutes.95 Private/public hospital distinctions have been waning as “private” hospitals taking federal Hill-Burton monies96 have been deemed vulnerable to suit on federal question grounds.97 The necessary degree of state involvement present to raise a federal question as a result of participation in the Hill-Burton programs has been held to include “massive use of public funds and extensive state-federal sharing in the common plan” as

94. Due to the fact that a physician is usually allowed to operate only at those hospitals at which he holds staff privileges, finding a doctor who will perform a voluntary sterilization is only a minor step toward having the operation. If the hospital refuses the doctor permission to perform the operation, the woman must find a new doctor with different hospital affiliations. The number of women financially able to bear the costs of voluntary sterilization are substantially reduced by the Blue Cross-Blue Shield plans which do not pay for such an operation. See Ass'n for Voluntary Sterilization, Inc., note 111 infra and accompanying text.

95. See Jobson v. Henne, 355 F.2d 129 (2d Cir. 1966); see also notes 108 and 109 infra.


Since it has been estimated that some 35 percent of the general hospital beds in the United States were constructed with Hill-Burton monies, it is evident that this is a potentially far-reaching ground in the strategy of challenging hospital action.

The majority opinion in McCabe illustrates the kinds of conditions that tend to support a finding of "color of state action" in cases involving hospitals. The character of the defendant hospital as "a community hospital funded by certain public funds," along with the probability that some employees were paid from public funds, was sufficient to meet the requirements of section 1983, at least to the extent of withstanding a motion to dismiss. The defendant hospital's argument that there was no section 1983 jurisdiction because the hospital "merely rendered 'a discretionary decision' as physicians," was rejected by the court:

Of course, few decisions of doctors or administrators in a public hospital will provide a proper basis for a section 1983 action because such decisions do not usually affect rights secured by the Constitution and the laws of the United States. Where medical treatment of a patient in a public hospital is alleged to be the basis of an invasion of a recognized constitutional right, some other highly unusual factor would seem necessary.

The court went on to find such an "unusual factor" regarding the defendant hospital's refusal to sterilize plaintiff:

[That refusal] was based not on medical factors peculiar to her case but on an arbitrary age-parity formula. In effect, according to plaintiff, this rule is as constitutionally odious as a rule prohibiting voluntary sterilization of blacks. Plaintiff argues that through use of the age-parity rule defendants violated her constitutional rights by attempting to decide for her that she must subject herself to the possibility of pregnancy, despite the risk to her health, and by attempting to decide how many children she and her husband should have and by what means they may prevent conception.
Once the necessary state action is found, the applicable federal civil rights statutes may be invoked. The content of relevant federal statutes, 42 U.S.C. § 1983107 and 28 U.S.C. § 1343108 has been clarified by judicial declarations. A cause of action has been held to lie for conspiracy to violate 42 U.S.C. § 1983.109 Aside from the Hill-Burton "color of state action" route, it seems possible that the requisite authority might be found in state public health or hospital laws. For example, the New York Public Health Law contains a sweeping statement of policy and purpose,110 which might be read to confer "color of state action" on all hospital practices implementing state policies.

B. Equal Protection Issues

Statistics on payments for voluntary sterilization indicate that even persons not usually considered "poor" may have great difficulty financing the operation.111 The Blue Cross plans of seventeen states would not pay for sterilizations motivated by socioeconomic factors; of the state Blue Shield plans, nineteen would not pay. Medicaid would pay for voluntary sterilizations in thirty-three states, as well as in the District of Columbia. As a result of the refusal of many health insurance plans, as well as certain Medicaid programs, to pay for voluntary sterilizations, the number of women to be classified as "poor" increases. Thus, an equal protection argument becomes a concrete one, because "[v]oluntary sterilization is a method of birth control which should be

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

108. 28 U.S.C. § 1343 (1970). The civil rights and elective franchise statute confers original jurisdiction on federal district courts and provides for remedies of damages or equitable or other relief.


110. N.Y. Pub. Health Law § 2800 (McKinney 1971) provides:
   [T]he department of health shall have the central, comprehensive responsibility for the development and administration of the state's policy with respect to hospital and related services, and all public and private institutions, whether state, county, municipal, incorporated or not incorporated, serving principally as facilities for the prevention, diagnosis or treatment of human disease, pain, injury, deformity or physical condition or for the rendering of health-related service shall be subject to the provisions of this article.

available to all, rich or poor, who wish no more children."\(^{112}\) This argument is strengthened by the development of the “new” equal protection, in which economic inequalities have been a major area of controversy.\(^{113}\) *Griffin v. Illinois*\(^ {114}\) and *Douglas v. California*\(^ {115}\) expand the constitutional dimensions of economic inequalities beyond formerly well-established areas, such as voting.\(^ {116}\) Statutes imposing jail terms on persons unable to pay fines have also been held to be violative of equal protection.\(^ {117}\)

Courts have also been receptive to this argument in regard to abortion statutes. It has been said that a practice of not informing ward patients of their legal right to abortion while making such a service more available to the wealthier patients creates an unconstitutional inequality.\(^ {118}\) In *City of New York v. Wyman*\(^ {119}\) the lower court held that “the effect of the State’s refusal to provide Medicaid reimbursements is to deny the poor . . . the benefits of [the liberalized abortion law] solely because of their indigency.”\(^ {120}\) It was explicit that such a result would violate the equal protection clause.\(^ {121}\) The Appellate Division for the First Department affirmed.\(^ {122}\) In a four to three decision the Court of Appeals reversed, holding that the mere fact that the indigent cannot pay for elective abortions does not place a constitutional mandate upon the state to supply the service.\(^ {123}\) Judge Gibson’s dissent,\(^ {124}\) in which Chief Judge Fuld and Judge Bergan concurred, em-

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114. 351 U.S. 12 (1956) (refusal to afford appellate review solely because of inability to pay for transcript of trial is denial of equal protection).
120. 66 Misc. 2d at 415, 321 N.Y.S. 2d at 709.
121. *Id.* at 420-22, 321 N.Y.S.2d at 713-15.
124. *Id.* at 538, 281 N.E.2d at 181, 330 N.Y.S.2d at 286.
phsized the legislative intent of the liberalized abortion law was to “reduce discrimination against the poor.”

Notwithstanding the Wyman case, expansion of the dimensions for application of the equal protection clause has continued. In Eisenstadt v. Baird the Supreme Court recently held that a Massachusetts statute permitting married persons to obtain contraceptives to prevent pregnancy but prohibiting distribution of contraceptives to single persons violates equal protection. In reference to sterilization, a federal court has held that a plaintiff’s complaint should not be dismissed on jurisdictional grounds without providing her with the opportunity to offer proof that arbitrary age-parity rules of the defendant hospital violated her equal protection rights. As Professor Michelman has stated, “[i]t is no justification for deprivation of a fundamental right (i.e., involuntary nonfulfillment of a just want) that the deprivation results from a general practice of requiring persons to pay for what they get.” It has been suggested elsewhere that compared to due process, equal protection is a superior justification for the invalidation of actions or regulations infringing upon unenumerated fundamental rights.

**CONCLUSION**

The absence of statutes in the majority of states on the subject of voluntary sterilization has resulted in a general climate of restrictiveness through hospital regulations. This is perhaps not a fair appraisal of the situation in states with statutes which expressly allow voluntary sterilization. Yet, one of the purposes of this comment has been to show that nonexistent, or at best limited, admissions to hospitals for voluntary female sterilizations may be challenged before legislative enlightenment occurs. The woman choosing voluntary sterilization as a

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125. *Id.* at 540, 281 N.E.2d at 182, 330 N.Y.S.2d at 388.
127. “If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible.” *Id.* at 453.
128. McCabe v. Nassau County Medical Center, 453 F.2d 698, 704 (2d Cir. 1971); *see* especially *supra* note 94 and accompanying text.
129. Michelman, *supra* note 114, at 27.
131. *See* Tierney, *supra* note 43, at 365 n.62, who notes that the University of Virginia hospital recently discarded age-parity ratios, bringing their regulations in line with the Virginia statute.
COMMENTS

means of birth control has a fundamental right to such a choice and to the resources necessary for her physician to implement this decision.

A recent study of students and faculty at Cornell University indicated that the consequences of sterilization are not generally understood. Since community attitudes seem to have some influence as far as hospital committees are concerned, one might presume that greater dissemination of health education materials will have a liberalizing effect on hospital policies. The increasing public awareness of health and health care alternatives has led to demands for greater responsiveness of health systems. The mere fact that a particular legislature has not addressed itself to voluntary sterilization in no way negates such a choice as of right. Hospital regulations implementing a restrictive policy may be found to be within "color of state action" and subject to challenge when they infringe upon a woman's right to choose a contraceptive method without proving an overriding state interest. The disparity between the degree of access to hospitals enjoyed by the wealthy in contrast with that of the poor who wish to obtain a voluntary sterilization may be attacked by an equal protection argument. It is time for Griswold to stand for a woman's right to all contraceptive choices.

Susan L. Bloom
