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Equitable Jurisdiction to Order Sterilizations

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EQUITABLE JURISDICTION TO ORDER STERILIZATIONS

The nonconsensual sterilization of incompetent persons, like abortion and contraception, presents legal and ethical issues difficult enough to resolve in the abstract precincts of an individual conscience. These difficulties are only magnified when presented in the concrete reality of a courtroom. Nonetheless, courts have been dealing with statutorily authorized nonconsensual sterilizations for over a half century.[1] Recently, courts have begun to explore new judicial ground, asserting equitable jurisdiction to order nonconsensual sterilization of retarded persons where, after applying strict standards, the court is convinced that the welfare of the retarded person would be furthered.[2]

Part I of this comment examines the historical development of nonconsensual sterilization and contrasts the earlier statutory schemes with modern equitable principles. Part II examines both sides of the question whether authority to order nonconsensual sterilizations should be inferred from a general jurisdictional grant. Part III concludes that courts of general jurisdiction should have such authority, but that its assertion is proper only if it is based on as narrow a rationale as possible, if its exercise furthers the rights of the retarded person, and if its application is strictly circumscribed by standards consistent with its equitable nature.

I. STERILIZATION OF MENTALLY HANDICAPPED PERSONS

There are two recognized theoretical justifications for the sterilization of incompetent persons. The more notorious is based on eugenic theory, which supports a widespread sterilization policy aimed at improving the societal gene pool. Generally, eugenic theory has been implemented through statutes authorizing sterilization of mental incompetents.[3] In contrast is the more narrow equitable justification based upon the welfare of the person whose sterilization is sought rather than society's interest in having that person sterilized. This justification is usually exemplified by

1. *See, e.g.*, Buck v. Bell, 274 U.S. 200 (1927) (eugenic statute held constitutional); State v. Feilen, 70 Wash. 65, 126 P. 75 (1912) (sterilization as punishment for crime not cruel and unusual).

2. *See In re* C.D.M., 627 P.2d 607 (Alaska 1981); *In re* A.W., ___Colo.___, 637 P.2d 366 (1981); *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981); *In re* Hayes, 93 Wn. 2d 228, 608 P.2d 635 (1980); *In re* Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881 (1981). *But see* Hudson v. Hudson, 373 So. 2d 310 (Ala. 1981).

3. *See* note 6 *infra*.

cases in which courts order nonconsensual sterilization under their equitable powers.

A. *Eugenic Sterilization*

Theories of genetic selection historically have enjoyed some support among social theorists.[4] Within the last century, the emerging science of genetics lent an empirical focus to these theories.[5] The simultaneous development of modern surgical sterilization techniques resulted in legislative enactments implementing eugenic theory.[6] The new statutes codified the unexamined assumptions and prejudicial ignorance implicit in this "new" theory of eugenics, and broadly authorized the sterilization of amorphously defined classes of persons, including the "feeble minded" and "moral[ly] degenerate."[7]

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4. The idea of eugenics is as old as Western civilization. Plato said:

> [T]here is a need for the best men to have intercourse as often as possible with the best women, and the reverse for the most ordinary men with the most ordinary women; and the offspring of the former must be reared but not that of the others, if the flock is going to be of the most eminent quality.

PLATO, THE REPUBLIC 138 (Bloom trans. 1968).

5. The modern theory of eugenics was pioneered by Sir Francis Galton, whose seminal work, *Inquiries into Human Faculty*, was published in 1883. Galton's emphasis, however, was on "positive" eugenics, which seeks to promote what are considered to be desirable traits. *See* Vukowich, *The Dawning of the Brave New World—Legal, Ethical, and Social Issues of Eugenics*, 1971 U. ILL. L.F. 189 (1971). It remained for pragmatic theorists to place the emphasis on the negative aspects of eugenic theory. *See, e.g.*, Humphrey, *The Menace of the Half-Man*, 11 J. HEREDITY 228 (1920).

6. At one time, at least 25 states had statutes aimed at the eugenic sterilization of persons deemed mentally defective. Note, *Eugenic Sterilization—A Scientific Analysis*, 46 DEN. L.J. 631, 633 (1969). After a flurry of repeals in the last decade, only 11 states retain statutes that are eugenically based. *See* ARK. STAT. ANN. §§ 59-501, 502 (1971); DEL. CODE ANN. tit. 16, §§ 5701-5705 (1974); GA. CODE ANN. §§ 84-931 to 84-936 (1979); ME. REV. STAT. ANN tit. 34, §§ 2461-2468 (1964), MISS. CODE ANN. §§ 41-45-1 to 41-45-19 (1972); N.C. GEN. STAT. §§ 35-36 to 35-50 (1976 & supp. 1981); OKLA. STAT. ANN. tit. 43A, §§ 341-346 (West 1979); OR. REV. STAT. §§ 436.010-.150 (1981); UTAH CODE ANN. §§ 64-10-1 to 64-10-13 (1953); VT. STAT. ANN. tit. 18, §§ 8701-8704 (1968); W. VA. CODE §§ 27-16-1 to 27-16-5 (1980). Some of these, notably those of Oregon, North Carolina, and Utah, have been revised, seemingly to withstand constitutional attack. *See* notes 15-17 and accompanying text *infra*.

7. The statute enacted in Washington applied to "all feeble minded, insane, epileptic, habitual criminals, moral degenerates and sexual perverts." Act of March 8, 1921, ch. 53, § 1, 1921 Wash. Laws 162-63. None of these terms were further defined. This statute was held to violate procedural due process in *In re* Hendrickson, 12 Wn. 2d 600, 123 P.2d 322 (1942). The legislative embodiment of eugenic theory was carried to its logical extreme in Nazi Germany. The Nazis advanced the process by the establishment of the Hereditary Health Courts. Originally limited in a manner similar to the American statutes, the German versions were eventually expanded to include persons with cleft palates or severe hearing impairments. By 1937, 225,000 persons had been sterilized by the Nazi regime. In 1941, deeming sterilization a temporary solution, Hitler authorized concentration camps and extermination for persons deemed inferior. The law was compulsory for the mentally impaired. Brief of The National Center for Law and the Handicapped, Inc. Amicus Curiae at 7-14, Stump v. Sparkman, 435 U.S. 349 (1978).

The United States Supreme Court approved the substantive constitutionality of one such statute in 1927 in *Buck v. Bell*.[8] At issue in *Buck* was the validity of a Virginia statute authorizing the sterilization of persons in state institutions who were suffering from hereditary forms of retardation. The avowed purpose of the statute was to allow the release of persons, after sterilization, who would be a "menace" if released with their reproductive capabilities intact.[9] The Court cited the Virginia legislature's recital that "experience has shown that heredity plays an important part in the transmission of insanity, imbecility, etc.,"[10] and held that this expression of eugenic theory provided a rational basis for the statute.[11]

Since *Buck v. Bell,* eugenic theory has come under attack. First, modern genetic science simply does not support broad generalizations regarding the hereditary nature of mental deficiency. On the contrary, modern studies show that many forms of mental retardation are not inherited, and that many which are inheritable cannot be controlled with sterilization because they are not manifest in the parents.[12] Recent studies also deny the validity of assumptions, implicit in a eugenic theory, about the promiscuous nature of the mentally retarded and the lack of emotional damage from their sterilization.[13] Perhaps the most cogent criticism, however, points out that a widespread policy of sterilization will unavoidably include persons who later overcome their "congenital" incompetence.[14]

The extent to which *Buck v. Bell* allows states to sterilize individuals without any concern for the right of those individuals, whatever their mental condition, to be free from state-mandated bodily invasion and termination of their right to procreate shocks the modern conscience. The most disturbing aspect of *Buck v. Bell* and the history of statutory eugenic

8. 274 U.S. 200 (1927).

9. *Id.* at 205–06.

10. *Id.* at 206. Such a determination might invoke a different constitutional standard of review today than it did in 1927. *See* notes 15–17 and accompanying text *infra*.

11. 274 U.S. at 207. Justice Holmes left no doubt about his acceptance of eugenic theory:

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

Id. It appears, however, that the third generation imbecile was actually of normal intelligence. Coogan, *Eugenic Sterilization Holds Jubilee,* 177 CATH. WORLD 44, 46 (1953). One wonders if the statistical validity of Justice Holmes' conclusion is diminished by such a drastic reduction in the size of his sample population.

12. Cook, *Eugenics or Euthenics?,* 37 ILL. L. REV. 287 (1943); Murdock, *Sterilization of the Retarded: A Problem or a Solution?,* 62 CALIF. L. REV. 917, 924–26 (1974); Note, *Eugenic Sterilization—A Scientific Analysis,* 46 DEN. L.J. 631, 642–44 (1969).

13. *E.g.,* J. ROBITSCHER, EUGENIC STERILIZATION 19–22 (1973). Robitscher suggests that the mentally retarded are capable of adherence to stringent standards of social conduct.

14. *Id.*

sterilization is the implementation of a questionable social policy at the expense of individual rights. In the context of a eugenic sterilization statute, the issue is a clear and simple balance between the rights of an individual and the interest of the state in that individual's sterilization. Eugenic sterilization statutes represent a legislative decision resolving this balance in favor of the state. *Buck v. Bell* is rightly subject to criticism for its blind concurrence in that legislative determination.

The development of modern constitutional principles and the erosion of the precarious empirical basis for eugenic statutes has cast doubt upon the continuing constitutionality of eugenic-based sterilization statutes. Under modern constitutional standards, the right to freedom of choice in decisions about procreation has been held to be a fundamental individual right and within the constitutionally protected zone of privacy.[15] The infringement of a fundamental right by a state statute triggers strict scrutiny, thereby requiring any abridgement by a state of such a right to be in furtherance of a compelling state interest.[16] The abridgement must also be narrowly drawn to conform to that compelling state interest.[17] This "compelling state interest" standard, which would be applied to eugenic-based sterilization statutes today, is far more stringent than the "rational basis" standard applied in *Buck v. Bell* and would likely lead to an opposite result, especially in light of the diminishing empirical foundation for eugenic theory.

B. Equitably Justified Sterilization

In stark contrast to the social engineering rationale of eugenic theory are judicial assertions of inherent jurisdiction, absent specific statutory grant, to authorize nonconsensual sterilization under equitable principles. The key distinction between eugenic and equitable sterilization is the emphasis in the latter on the welfare of the individual before the court rather than on society's interest in having that individual sterilized.

Courts that recognize equitable jurisdiction to order nonconsensual sterilization base their authority upon the general grant of equitable pow-

15. Roe v. Wade, 410 U.S. 113 (1973) (abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Skinner v. Oklahoma, 316 U.S. 535 (1942) (sterilization of habitual criminal). *See generally* Comment, *Eugenic Sterilization Statutes: A Constitutional Re-evaluation*, 14 J. FAM. L. 280, 295–303 (1975).

16. Roe v. Wade, 410 U.S. 113, 155 (1973); Shapiro v.Thompson, 394 U.S 618, 634 (1969); *see* Comment, *supra* note 15, at 295–303.

17. Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975); Roe v. Wade, 410 U.S. 113, 155 (1973); Zwickler v. Koota, 389 U.S. 241, 250 (1967); *see* Comment, *supra* note 15, at 295–303.

ers given to them by their state constitution[18] or statutes.[19] Not all courts, however, agree that their equitable powers stretch so far.[20] Courts claiming that sterilization authority is within their equitable powers point to the doctrine of parens patriae developed from the historical jurisdiction of chancery courts over the persons and estates of the incompetent and insane.[21] The chancery courts essentially exercised for those individuals that discretion which, due to their condition, they could not exercise for themselves.[22]

The two leading examples of courts asserting equitable power over nonconsensual sterilizations are the Washington Supreme Court's decision in *In re Hayes*[23] and the New Jersey Supreme Court's decison in *In re Grady*.[24] Both the Washington and New Jersey Supreme Courts set forth stringent standards[25] that should be met before a court exercises its equitable jurisdiction to order a nonconsensual sterilization.[26]

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18. *E.g., In re* Hayes, 93 Wn. 2d 228, 234, 608 P.2d 635, 637 (1980).

19. *E.g., In re* C.D.M., 627 P.2d 607, 609 n.5 (Alaska 1981) (basing equitable jurisdiction on both constitutional and statutory grounds).

20. *E.g.*, Hudson v. Hudson, 373 So. 2d 310 (Ala. 1981); *In re* Tulley, 83 Cal. App. 3d 698, 146 Cal. Rptr. 266 (1978); *In re* M.K.R., 515 S.W.2d 467 (Mo. 1974).

21. *E.g., In re* Grady, 85 N.J. 235, 426 A.2d 467, 479 (1981); *In re* Hayes, 93 Wn. 2d 228, 233, 608 P.2d 635 (1980).

22. *See In re* C.D.M., 627 P.2d 607, 611 (Alaska 1981); *In re* Grady, 85 N.J. 235, 426 A.2d 467, 479 (1981); 67A C.J.S. *Parens Patriae* (1978).

23. 93 Wn. 2d 228, 608 P.2d 635 (1980).

24. 85 N.J. 235, 426 A.2d 467 (1981). *See generally* Note, *Court of Equity Has Inherent Power to Exercise Mentally Retarded Individual's Right to Sterilization*, 12 SETON HALL L. REV. 96 (1981) (*Grady* noted).

25. The standards enunciated by both can be summarized as follows:

1) The mentally retarded person must be represented by a guardian ad litem;

2) The court must consider independent advice based on a comprehensive medical, psychological, and social evaluation of the individual, especially considering the probable impact of pregnancy;

3) To the greatest extent possible, the court must elicit and take into account the view of the mentally retarded person.

See Grady, 85 N.J. 235, 426 A.2d at 481–83; *Hayes*, 93 Wn. 2d at 234–40, 608 P.2d at 639–42 (plurality opinion). Once these are accomplished, the petitioning party must show by clear and convincing evidence that:

1) The individual is incapable of making her own decision about sterilization, and is unlikely to develop that capacity in the future;

2) The individual is capable of reproduction and likely to engage in sexual activity in the near future;

3) The individual is permanently incapable of caring for a child;

4) All less drastic contraceptive methods are unworkable;

5) The proposed method of sterilization entails the least possible bodily invasion.

See Grady, 85 N.J. 235, 426 A.2d at 481–83; *Hayes*, 93 Wn. 2d at 234–40, 608 P.2d at 639–42 (plurality opinion). *See generally* Comment, *Nonconsensual Sterilization of the Mentally Retarded—Analysis of Standards for Judicial Determinations*, 3 W. NEW ENG. L. REV. 689 (1981) (detailed treatment of the standards).

26. Of these two, only the *Grady* court adopted these standards as effective law. 85 N.J. 235,

Constitutional requirements and the absence of statutory guidelines make these standards necessary.[27] Some courts, however, refuse to sanction the exercise of this equitable jurisdiction in the absence of legislatively determined standards.[28] This sort of controversy is, of course, absent in eugenic sterilization cases where standards, such as they are,[29] are provided by the legislature.

II. THE SCOPE OF THE COURTS' EQUITABLE JURISDICTION

Authority is divided on whether a general grant of equitable jurisdiction encompasses the power to order nonconsensual sterilizations in the absence of a sterilization statute. Prior to 1978, no court had held that a grant of general equitable jurisdiction enabled it to authorize nonconsensual sterilizations. Since then, however, five state courts have recognized such equitable authority.[30]

A. Judicial Immunity: Opening the Door to Equitable Jurisdiction

In 1975, Linda Sparkman brought an action in federal court against Judge Harold D. Stump of the Circuit Court of DeKalb County, Indiana, alleging violation of her civil rights. Her claim was based on a 1971 ex parte order by Judge Stump approving Linda's mother's request that Linda be sterilized. Linda was told at the time that the purpose of the hospitalization was to remove her appendix. She did not learn of her sterilization until 1975, two years after her marriage.[31]

The district court dismissed Linda's petition on grounds of judicial immunity. On appeal, the Seventh Circuit reversed on the ground that Judge Stump, in authorizing the sterilization, had acted without jurisdic-

426 A.2d at 481–83. *Accord, In re* C.D.M., 627 P.2d 607 (Alaska 1981) (adopting standards as effective law). The Washington court in *Hayes,* while recognizing jurisdiction, was unable to command a majority for adoption of standards. The Wisconsin Supreme Court has recognized jurisdiction, but refused to adopt the standards as positive law. *In re* Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881 (1981) (expressly deferring to the legislature for enunciation of standards).

27. *See generally* notes 15–17 and accompanying text *supra* (discussing constitutional requirements).

28. *E.g., In re* Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881 (1981); *see also In re* Hayes, 93 Wn. 2d 228, 240–42, 608 P.2d 635, 642–43 (1980) (Stafford, J., concurring).

29. *See* note 7 *supra.*

30. *In re* C.D.M., 627 P.2d 607 (Alaska 1981); *In re* A.W., ___Colo.___, 637 P.2d 366 (1981); *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981); *In re* Hayes, 93 Wn. 2d 228, 608 P.2d 635 (1980); *In re* Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881 (1981).

31. The facts of the case are recited in the opinion of the federal court of appeals, Sparkman v. McFarlin, 552 F.2d 172, 173–74 (7th Cir. 1977), *rev'd sub nom.* Stump v. Sparkman, 435 U.S. 349 (1978).

tion.[32] Noting the existence in Indiana of a statutory eugenic sterilization scheme, the court of appeals reasoned that "[t]his statutory scheme clearly negates jurisdiction to consider sterilization in cases not involving institutionalized persons and in which these procedures are not followed."[33] On the basis of what it found to be the majority rule, that courts lack equity jurisdiction to order a sterilization,[34] the court held that Judge Stump was not immune from civil liability for his action.[35]

The Supreme Court reversed in *Stump v. Sparkman,*[36] holding that the Seventh Circuit had given the standard of immunity too narrow a construction. It reasoned that the order, for purposes of judicial immunity, was not made in "clear absence of jurisdiction."[37] Hence the Judge's authorization of the sterilization could not give rise to liability.

Sparkman has little precedential value for purposes of ascertaining whether a court has equitable jurisdiction to authorize nonconsensual sterilizations. The Court did not decide whether the Indiana court's equitable powers actually included the right to authorize nonconsensual sterilizations. All the Court decided was that Judge Stump's actions were not so clearly without jurisdiction that they deprived him of immunity.[38] Despite this weakness, *Sparkman* provides a de facto point of departure for the emerging rule recognizing equitable jurisdiction to authorize the nonconsensual sterilization of mentally retarded persons.

*B. The Pre-*Sparkman *Rule Denying Equitable Jurisdiction*

The Seventh Circuit's opinion in *Sparkman* showed confidence that there was no inherent jurisdiction for Judge Stump's order.[39] Analysis of the authority cited for this rule demonstrates that this confidence was less than justified.

The issue of a court's inherent jurisdiction to authorize nonconsensual sterilization first arose before the Kentucky Court of Appeals in 1968 in

32. *Id.* at 176.
33. *Id.* at 175.
34. *Id.*
35. *Id.* at 176.
36. 435 U.S. 349 (1978).
37. *Id.* at 357.
38. This limitation on the *Sparkman* holding has been noted by several of the courts concerned with jurisdiction to order sterilizations. *E.g., In re* Grady, 85 N.J. 235, 426 A.2d 467, 480 (1981); *In re* Hayes, 93 Wn. 2d 228, 247–48, 608 P.2d 635, 646 (1980) (Rosellini, J., dissenting); *see also* Note, *supra* note 24, at 109 (stating same). *But see In re* C.D.M., 627 P.2d 607, 612 (Alaska 1981); *In re* Hayes, 93 Wn. 2d 228, 231–32, 608 P.2d 635, 637–38; *In re* Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881, 887–88 (1981).
39. Sparkman v. McFarlin, 552 F.2d 172, 175–76 (7th Cir. 1977), *rev'd sub nom.* Stump v. Sparkman, 435 U.S. 349 (1978).

Holmes v. Powers.[40] In *Holmes*, a county health officer and a local medical society sought a judicial declaration that they could, without fear of civil or criminal liability, sterilize a thirty-five year old retarded mother of two.[41] The court declined to make the requested declaration, without discussing either equitable jurisdiction or the best interests of the woman.[42] The following year, a similar summary denial of jurisdiction was made by the Texas Court of Civil Appeals in *Frazier v. Levi*.[43] Again, neither equitable jurisdiction nor the interests of the retarded person were mentioned.[44] Both cases, however, have been repeatedly cited as having established a lack of equitable jurisdiction.[45]

In 1974 the Missouri Supreme Court handed down its decision in *In re M.K.R.*[46] In *M.K.R.*, the court held that the jurisdiction of Missouri's juvenile courts is not coextensive with that of its courts of general jurisdiction, and thus that the former could not issue an order authorizing sterilization of a retarded person.[47] The court clearly based its holding on the limited jurisdiction of the juvenile courts rather than any inherent limitation in the jurisdiction of its equity courts.[48] Nonetheless, *M.K.R.* is often included among the "majority" denying the equitable jurisdiction of even courts of general equity jurisdiction.[49]

That same year, the California Court of Appeal employed similar reasoning in *In re Kemp*.[50] The issue in *Kemp* was whether the statutory jurisdiction of the probate court included the power to grant sterilization petitions.[51] Deciding that it did not include this power, the court reasoned that, since probate courts are not courts of general equitable jurisdiction, all their actions must necessarily be based on specific statutory grants.[52]

These four cases, cited by the Seventh Circuit in *Sparkman*,[53] form the backbone of the supposedly well-established rule denying equitable juris-

40. 439 S.W.2d 579 (Ky. 1968).
41. *Id.* at 580.
42. *See id.*
43. 440 S.W.2d 393 (Tex. Civ. App. 1969).
44. *See id.* at 394–95. The court relied extensively on legal encyclopedias in reaching its result
45. *See* cases cited in note 55 *infra*.
46. 515 S.W.2d 467 (Mo. 1974).
47. *Id.* at 470.
48. *Id.* There is language in *M.K.R.* denying the inherent power to authorize sterilizations in courts of general jurisdiction, and the court cites both the *Holmes* and *Frazier* cases. *Id.* Inasmuch as the issue before the court did not concern courts of general jurisdiction, these statements are clearly dicta.
49. *See* cases cited in note 55 *infra*.
50. 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974).
51. *Id.* at 760, 118 Cal. Rptr. at 64.
52. *Id.* at 765, 118 Cal Rptr. at 69.
53. Sparkman v. McFarlin, 552 F.2d 172, 175 (7th Cir. 1977), *rev'd sub nom.* Stump v. Sparkman, 435 U.S. 349 (1978).

diction. None are good authority. The earlier decisions in *Holmes* and *Frazier*—one an intermediate appellate opinion—deny jurisdiction after only cursory analysis without discussion of either equitable jurisdiction or the interests of the retarded person. *M.K.R.* and *Kemp* both based their holdings on a distinction between courts of limited statutory jurisdiction, which were held to lack authority, and courts of general jurisdiction. The issue of the effect of a grant of general jurisdiction was not before those two courts.

Despite the weakness of these precedents, no court prior to *Sparkman* had held that a grant of general equitable jurisdiction enabled courts to authorize nonconsensual sterilizations. Citing the above cases—and obviously concerned about apparent lack of judicial immunity[54]—courts summarily developed the "majority" rule denying jurisdiction.[55]

C. *Equitable Jurisdiction After* Sparkman

With the cloud of civil liability eliminated by *Sparkman,* courts were freed to consider the equitable-jurisdiction issue on its merits. The result has been a series of carefully reasoned opinions, the majority of which recognize the inherent authority of courts of general jurisdiction to authorize nonconsensual sterilization.[56] Although these courts agree that they

54. Though the concern of judges with the possibility of personal liability is rarely discussed in the opinions, it certainly is not far below the surface. *See, e.g., Kemp,* 43 Cal. App. 3d at 764–65, 118 Cal. Rptr. at 68–69. In 1977, before the Supreme Court's reversal of the Seventh Circuit in *Sparkman,* the Delaware Chancery Court said:

> I am convinced that the procedure prayed for would, under all the circumstances, be in the best interests of [the individual before the court]. I am, however, faced with the holding of the U.S. Court of Appeals for the 7th Circuit in *Sparkman v. McFarlin* . . . .
>
> I disagree with the reasoning of the Circuit Court [in *Sparkman*] . . . .
>
> In view of the *Sparkman* decision, however, and its holding that a judge who orders a sterilization without specific legislative authority is not clothed with judicial immunity, I decline to enter the proposed order authorizing the sterilization.

In re S.C.E., 378 A.2d 144, 145 (Del. Ch. 1977).

55. These four cases are the common thread for the "majority" rule denying equitable jurisdiction. *See* Hudson v. Hudson, 373 So. 2d 310, 312 (Ala. 1979); *In re* C.D.M., 627 P.2d 607, 609 (Alaska 1981); *In re* Tulley, 83 Cal. App. 3d 698, 146 Cal. Rptr. 266, 268 (1978), *cert. denied,* 440 U.S. 967 (1979); *In re* A.W., ___Colo.___, 637 P.2d 366, 376 n.1 (1981) (Lee, J., concurring specially); *In re* S.C.E., 378 A.2d 144, 145 (Del. Ch. 1977); A.L. v. G.R.H., 163 Ind. App. 636, 325 N.E.2d 501, 502 (1975); *In re* Grady, 85 N.J. 235, 426 A.2d 467, 480 (1981); *In re* A.D., 90 Misc. 2d 236, 394 N.Y.S.2d 139, 140 (Surr. Ct. 1977); *In re* Hayes, 93 Wn. 2d 228, 231, 608 P.2d 635, 637 (1980); *In re* Eberhardy, 97 Wis. 2d 654, 294 N.W.2d 540, 544 (Wis. App. 1980), *aff'd on other grounds,* 102 Wis. 2d 539, 307 N.W.2d 881 (1981).

56. Since *Stump v. Sparkman* was decided in 1978, six courts have decided the equitable jurisdiction issue. Of these, five have recognized jurisdiction based on a general grant. *See* note 30 and accompanying text *supra.* One court, apparently intimidated by the constitutional ramifications of the issue, refused to recognize equitable jurisdiction. Hudson v. Hudson, 373 So. 2d 310 (Ala. 1979). *See generally* notes 15–17 and accompanying text *supra* (discussing constitutional issues).

have jurisdiction, they differ on the reasoning used to find that jurisdiction.

1. The "Best Interests" Approach

Of those cases recognizing equitable jurisdiction, the majority base that jurisdiction simply on the inherent equitable power to act in the best interests of incompetents.[57] This is sometimes characterized as the parens patriae jurisdiction of equity.[58] However denominated, the analysis is a relatively straightforward balancing of this power of the courts against the right of the individual to procreate. Courts employing this analysis have enunciated standards intended to protect the right to procreate from the unwarranted exercise of equitable jurisdiction.

The Washington Supreme Court, in *In re Hayes,*[59] was the first court to use this reasoning to recognize equitable jurisdiction. After noting the "majority rule" denying jurisdiction,[60] the Court stated:

> These cases are not controlling. Their results are conclusory, as none of them demonstrates any controlling legal principle prohibiting a court of general jurisdiction from acting upon a petition for sterilization. They suggest instead a preference that the difficult decisions regarding sterilization be made by a legislative body. This is not simply a denial of jurisdiction, but an abdication of the judicial function. We are mindful that a court "cannot escape the demands of judging or of making . . . difficult appraisals."[61]

The *Hayes* court proceeded to infer jurisdiction from the grant of general equitable jurisdiction in the state constitution.[62] Nevertheless, the court was unable to reach a consensus on the circumstances under which that jurisdiction should be exercised.[63] The basis of the court's jurisdiction was simply the best interests of the retarded person.[64]

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57. *See In re* C.D.M., 627 P.2d 607 (Alaska 1981); *In re* Hayes, 93 Wn. 2d 228, 608 P.2d 635 (1980); *In re* Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881 (1981).

58. *In re* C.D.M., 627 P.2d 607, 610–12 (Alaska 1981); *In re* Hayes, 93 Wn. 2d 228, 233, 608 P.2d 635, 638 (1980).

59. 93 Wn. 2d 228, 608 P.2d 635 (1980).

60. *Id.* at 231, 608 P.2d at 637.

61. *Id.* (quoting Haynes v. Washington, 373 U.S. 503, 515 (1973)).

62. *Id.* at 234, 608 P.2d at 639. This grant of general jurisdiction is contained in WASH. CONST. art. IV, § 6.

63. As noted, a majority of the *Hayes* court recognized jurisdiction. A four-justice plurality proceeded to provide standards for the exercise of jurisdiction. *See* 93 Wn. 2d at 234–40, 608 P.2d at 639–42. *See generally* note 25 *supra* (summarizing the plurality's proposed standards). Two Justices, though recognizing jurisdiction (and thus providing a majority on at least that issue), would have deferred to the legislature for standards of exercise. *Id.* at 240–42, 608 P.2d at 642–43 (Stafford, J., concurring). Three justices, seemingly unable to distinguish between eugenic and equitable sterilization, dissented even from the recognition of jurisdiction. *Id.* at 242–49, 608 P.2d at 643–46

2. *The "Rights" Analysis*

In 1981 the New Jersey Supreme Court recognized its equitable jurisdiction to authorize sterilizations in *In re Grady*.[65] In affirming the lower court's grant of the petition of the parents to sterilize their twenty-year-old daughter, who was afflicted with Down's Syndrome, the court based its holding on analysis of the rights of the individual before the court. The court first recognized that any authorization is potentially a violation of the right to procreate, which is recognized as "fundamental to the very existence and survival of the race."[66] It then noted the abuses of sterilization as a tool of eugenic policy,[67] and expressly disavowed eugenic theory.[68]

The court distinguished the facts before it from both voluntary and compulsory sterilization on the ground that, rather than having expressed a desire not to be sterilized, the individual here was simply incapable of indicating her wish either way.[69] More significantly, however, the *Grady* court next examined the U.S. Supreme Court decisions dealing with privacy and contraception,[70] and concluded that those decisions support a broad personal right to control contraception, which includes an affirmative constitutional right to voluntary sterilization.[71] Coupled with the

(Rosellini, J., dissenting). *See generally* Note, *Sterilization of Mental Incompetents*, 16 GONZ. L. REV. 465 (1981) (noting *Hayes*).

64. 93 Wn. 2d at 232–34, 608 P.2d at 638–39. The same approach was taken by the courts in *In re* C.D.M., 627 P.2d 607 (Alaska 1981), and *In re* Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881 (1981).

65. 85 N.J. 235, 426 A.2d 467 (1981). The rights-based approach of the *Grady* court was recently followed by the Colorado Supreme Court in *In re* A.W., ___Colo.___, 637 P.2d 366 (1981).

66. 85 N.J. 235, 426 A.2d at 472 (quoting Skinner v. Oklahoma, 316 U.S. 535, 542 (1942)).

67. *Id.*, 426 A.2d at 472–73.

68. *Id.*, 426 A.2d at 473 n.3.

69. In the words of the court:

> The case before us presents a situation that is difficult to characterize as either "compulsory" or "voluntary." "Compulsory" would refer to a sterilization that the state imposes despite objections by the person to be sterilized or one who represents his interests. Here, however, Lee Ann's parents and her guardian *ad litem* all agree that sterilization is in her best interests, and while the state may be acting in the constitutional sense, it would not be compelling sterilization. Lee Ann herself can comprehend neither the problem nor the proposed solution; without any such understanding it is difficult to say that sterilization would be against her will. Yet for this same reason, the label "voluntary" is equally inappropriate. Since Lee Ann is without the capacity for giving informed consent, any explanation of the proposed sterilization could only mislead her. Thus, what is proposed for Lee Ann is best described as neither "compulsory" nor "voluntary," but as lacking personal consent because of a legal disability.

Id., 426 A.2d at 473.

70. *See generally* note 15 *supra* (citing these cases).

71. 85 N.J. 235, 426 A.2d at 473–74; *cf.* Ruby v. Massey, 452 F. Supp. 361 (D. Conn. 1978) (statute providing for sterilization of institutionalized persons denies equal protection to those not institutionalized).

right to be free from nonconsensual bodily invasions, the individual thus has a choice of which right to exercise.

The *Grady* court then reasoned that, in order for this choice to be meaningful, an individual's incompetence should not be allowed to prevent its exercise. Relying on *In re Quinlan*[72] and the equitable parens patriae jurisdiction of the courts, the *Grady* court recognized judicial power to make that choice in instances where limited mental capacity has rendered meaningless a person's own right to choose.[73]

III. ANALYSIS

Courts of general equitable jurisdiction should have inherent authority to order the sterilization of mentally handicapped persons where the welfare of the person before the court so dictates. If the exercise of such jurisdiction is expressly limited by stringent standards[74] to insure against violating fundamental rights,[75] there is no reason to deny this remedy with one hand while allowing other, equally drastic remedies with the other.[76] Disallowing this particular remedy under these circumstances would truly be to make equity equal to the length of the chancellor's foot.

72. 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976). The *Quinlan* case, which gained national publicity, involved Karen Ann Quinlan, who was comatose following the use of incompatible drugs. In authorizing the disconnection of life support machines, the court, after finding a constitutional right in the dependent person to disconnect them herself, allowed Karen's parents to exercise that right.

73. 85 N.J. 235, 426 A.2d at 475.

74. The standards proposed by the New Jersey court in *Grady* and the Washington court in *Hayes* are summarized in note 25 *supra*.

75. *See generally* notes 15–17 *supra* (citing cases setting forth the relevant constitutional standards).

76. As noted by the Supreme Court of Alaska:

> The question of a court's jurisdiction goes to its power to hear and adjudicate the subject matter in a given case. . . . Where a court is one of general jurisdiction, such as the superior court in the case at bar, it has traditionally been regarded as having the power to hear all controversies which may be brought before a court within the legal bounds of rights or remedies, except insofar as has been expressly and unequivocally *denied* by the state's constitution or statutes. . . .
>
> Subsequent cases have clearly established that the doctrine of *parens patriae* jurisdiction also extends to those difficult cases where the court must decide on behalf of an incompetent whether or not to consent to shock treatment, chemotherapy treatment, amputation, medication, and the removal of artificial life support mechanisms. We see no reason why the superior court's inherent *parens patriae* jurisdiction should not apply as well, to a petition for the sterilization of an incompetent. Indeed, to ignore this well-settled doctrine in favor of the so-called majority rule would amount to nothing less than an abdication of our judicial responsibilties, leaving C.D.M. and her parents without any means of recourse. Although we recognize that this petition, and others like it, present many troublesome questions, we are also "mindful that a court 'cannot escape the demands of judging or of making . . . difficult appraisals.' "

In re C.D.M., 627 P.2d 607, 610–11 (Alaska 1981) (footnotes & citations omitted) (quoting *In re* Hayes, 93 Wn. 2d 228, 231, 608 P.2d 635, 637 (1980)).

More importantly, however, if courts lack equitable jurisdiction in this area, they will be unable to provide a remedy where traditional notions of equity would dictate that they should.[77]

Eugenic sterilization is based on an archaic theory of questionable validity, and its statutory implementation is of doubtful constitutionality.[78] It is undeniable, though, that the embodiment of eugenic theory involves a social policy judgment. Such a judgment easily qualifies as a legislative concern that should be beyond any inherent judicial jurisdiction. Equitably justified sterilization, however, involves only the welfare of the person before the court. Within this limitation, sterilization is clearly within the scope of traditional equity jurisdiction. As noted by the Washington court in *Hayes,* the failure to recognize this jurisdiction is an abdication of judicial responsibility.[79]

The rationale employed in recognizing equitable jurisdiction should be, however, as narrow as possible. This is true for two reasons. First, too broad an assertion of jurisdiction, in light of the pre-*Sparkman* cases and the present disrepute of eugenic theory, sets the stage for charges of judicial legislation.[80] Second, since the contemplated remedy necessarily implicates fundamental rights,[81] jurisdiction should be based as narrowly as possible to prevent violation of those rights.[82] For these reasons, the rights-based analysis in *Grady* is preferable to the "best interest" reasoning of *Hayes.*

The *Hayes* approach and the constitutional analysis of eugenics in *Buck v. Bell* are strongly analogous. In both instances, the issue is assumed to be a simple balance between the right of an individual to be free from nonconsensual sterilization and the power of the courts either to compel[83] that sterilization or to authorize it in the person's best interest.[84] The failure to adequately distinguish between the rationales of eugenics and equi-

77. A good example of a case where equity should intervene is Ruby v. Massey, 452 F. Supp. 361 (D. Conn. 1978), which involved the parents' petition for the sterilization of three sisters, all of whom were severely retarded, blind, and deaf.

78. *See* notes 4–17 and accompanying text *supra.*

79. 93 Wn. 2d at 231–34, 608 P.2d at 637–39.

80. *See* Hudson v. Hudson, 373 So. 2d 310 (Ala. 1979); *Hayes,* 93 Wn. 2d at 240–48, 608 P.2d at 642–46 (Stafford, J., concurring & Rosellini, J., dissenting); *In re* Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881, 895–99 (1981).

81. *See* notes 15–17 and accompanying text *supra.*

82. *Id.; see In re* C.D.M., 627 P.2d 607, 611 (Alaska 1981); *In re* Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881, 905–11 (Day, J., dissenting).

83. It is only in the context of a statute that any question of compulsion is ever raised. A basic assumption of the equitable theory is that the individual is unable to consent, and thus no issue of compulsion is raised. *See In re* Grady, 85 N.J. 235, 426 A.2d 467, 473 (1981); *In re* Hayes, 93 Wn. 2d 228, 608 P.2d 635 (1980).

84. Note that this dichotomy of individual rights versus the power of the state acting through its courts is also assumed in those cases constituting the "majority" rule.

table jurisdiction hopelessly split the *Hayes* court[85] and has caused strong dissent in others.[86] Moreover, posturing the analysis in terms of this simple balancing does not provide an adequate basis to distinguish the pre-*Sparkman* "majority" rule.[87] The opinions forming that rule likewise relied on a simple analysis balancing individual rights against the power of the state, acting through its courts, to authorize nonconsensual sterilizations. In declining to follow those cases, courts adopting the "best interest" rationale simply come down the other way, without changing the reasoning.

The rights-based analysis of *Grady,* however, is not subject to these criticisms. Assertion of equitable jurisdiction to exercise an incompetent's right to control procreation is clearly distinguishable from the rationale underlying the eugenic analysis of the Supreme Court in *Buck v. Bell.* This distinction meets many of the objections to equitable jurisdiction based on charges of judicial legislation.[88] Moreover, the *Grady* reasoning provides a ready basis for rejecting the "majority" rule's denial of jurisdiction. The rationale in support of the jurisdiction asserted in *Grady* is clearly much narrower than that which was rejected by the pre-*Sparkman* cases but accepted by the post-*Sparkman* "best interest" cases. Under both the "majority" rule and the "best interests" approach, the power to sterilize is based squarely and solely on the equitable powers of courts of general jurisdiction, and either accepted or rejected on that basis. In *Grady,* however, the power to sterilize is based not just on the jurisdiction of the court, but on the right of the individual herself. Equitable jurisdiction is invoked only to give meaning to that right in a context where it would otherwise be meaningless.

The *Grady* reasoning also has practical advantages over the "best interests" approach. In the latter, standards are generally adopted in order to give content to the amorphous "best interest" characterization.[89] These have been strict and specific, and rightfully so. The reasoning of the "best interest" cases, however, provides less guidance to trial courts charged with equitable jurisdiction than that provided under the rights analysis. When a judgment call in interpreting the standards arises—as it necessarily will when courts must decide whether to authorize a sterilization—there is nothing more than the "best interest" characterization as a

85. *See* note 63 *supra.*

86. *E.g., In re* C.D.M., 627 P.2d 607, 614–16 (Alaska 1981) (Matthews, J., dissenting); *In re* Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881, 899–905 (1981) (Coffey, J., dissenting).

87. *See generally* notes 40–55 and accompanying text *supra* (discussing cases constituting the "majority" rule).

88. *See generally* note 80 *supra* (citing cases where this objection has been made).

89. *See, e.g., In re* Hayes, 93 Wn. 2d 228, 234, 608 P.2d 635, 639 (1980). The standards are discussed in note 25 *supra.*

guide to decision. Under *Grady,* however, the theoretical context is concrete: the court is to employ the standards to decide if intervention is necessary to give meaning to the individual's right to control her procreation.

IV. CONCLUSION

Though formerly accepted as sound policy, statutory eugenic sterilization schemes have fallen into general disrepute and are disappearing from the books.[90] Confronted with petitions for sterilization in a different context, courts, perhaps with a watchful eye on the possibility of civil liability, summarily refused to discuss the issue and developed a rule denying any independent jurisdiction to authorize sterilization. Since the veil of judicial immunity was restored, however, courts have rightfully refused to "throw the baby out with the bath water," and have recognized equitable jurisdiction to authorize sterilization of mentally handicapped persons in very limited circumstances. This is as it should be, provided the scope of the jurisdiction asserted is as narrow as possible, its exercise furthers the rights of the retarded person, and its applicability is strictly limited by standards consistent with the equitable nature of the remedy.

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90. *See* note 6 *supra; see also* R. Burgdorf & M. Burgdorf, *The Wicked Witch Is Almost Dead:* Buck v. Bell *and the Sterilization of Handicapped Persons,* 50 TEMP. L.Q. 995 (1977).