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Conflict Between Disabling and Enabling Paradigms in Law: Sterilization the Developmentally Disabled and the Americans With Disabilities Act of 1990

James C. Dugan

NOTES

THE CONFLICT BETWEEN "DISABLING" AND "ENABLING" PARADIGMS IN LAW: STERILIZATION, THE DEVELOPMENTALLY DISABLED, AND THE AMERICANS WITH DISABILITIES ACT OF 1990

> Heart and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living . . . these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than in life.[1]

> Although America has recorded great progress in the area of disability during the past few decades, our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human . . . the result is massive, society-wide discrimination.[2]

INTRODUCTION

Traditionally, the law's policy regarding individuals with developmental disabilities has been one of pessimism.[3] It has sought to lessen the social impact of their disabilities through remedial meas-

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1 Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

2 *The Americans With Disabilities Act: Hearings on H.R. 2273 Before the Subcomm. on Select Education and the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 101st Cong., 1st Sess. 62 (1989) (statement of Justin Dart, Chairperson of the Task Force on the Rights and Empowerment of Americans with Disabilities).

3 Many legislatures, courts, and health professionals now use the term "developmentally disabled" when referring to the mentally retarded. William A. Krais, Note, *The Incompetent Developmentally Disabled Person's Right of Self-Determination: Right-to-Die, Sterilization and Institutionalization*, 15 AM. J.L. & MED. 333, 333 n.1 (1990). This Note uses the terms "developmentally disabled" and "mentally disabled" interchangeably, with the caveat that definitional problems may arise from this usage. For example, "[t]he American Association of Mental Deficiency defines mental retardation as 'subaverage general intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior.' " *Id.* (citation ommitted). However, the precise legal meaning of "developmental disability" may be considerably narrower. 42 U.S.C.A. § 6001(5) (West Supp. 1992) provides this definition:

> The term "developmental disability" means a severe, chronic disability of a person 5 years of age or older which—
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> (A) is attributable to a mental or physical impairment or combination of mental and physical impairments;
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> (B) is manifested before the person attains age twenty-two;
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> (C) is likely to continue indefinitely;

ures but has not generally assisted them in leading fuller, more meaningful lives.[4] Within the last few decades, however, there has been a perceptible change in the law's approach to developmental disability; the underlying policy has shifted from negative expectation to "normalization."[5] This new approach is based on clinical psychology's changing conception of developmental disability,[6] from a treatment paradigm focused on the "different" needs of the disabled[7] to one that, in theory at least, assumes that their disabilities are more dynamic and flexible than was previously thought.[8]

The social ramifications of this shift are unclear, but its legal consequences are already visible. Congress and state legislatures have taken increasingly active roles in encouraging the normalization of the disabled, as witnessed by a proliferation of statutory

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> (D) results in substantial functional limitations in three or more of the following areas of major life activity: (i) self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self-direction, (vi) capacity for independent living, and (vii) economic self-sufficiency; and
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> (E) reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated . . . .

Id.; *see* Philip Roos, *The Law and Mentally Retarded People: An Uncertain Future* 31 STAN. L. REV. 613 (1979); Deborah H. Ross, *Sterilization of the Developmentally Disabled: Shedding Some Myth-Conceptions*, 9 FLA. ST. U. L. REV. 599 (1981).

4 *See* Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent* 103 HARV. L. REV. 1201 (1990).

5 Recoguizing that treating retarded people as "deviant" only reinforces "deviant" behavior, many leaders in the field of mental retardation have urged that retarded people be treated as much as possible like normal people, that they be afforded "patterns and conditions of everyday life which are as close as possible to the norms and patterns of the mainstream of society."

Roos, *supra* note 4, at 613-14 (citation omitted). Normalization was first seen as an end in itself, but more recently has been invoked as a means of fostering normative behavior. *See generally* Susan Rose-Ackerman, *Mental Retardation and Society: The Ethics and Politics of Normalization*, 93 ETHICS 81 (1982) (discussing the political and clinical foundations of "normalization" policy and the difficulty of putting it into practical effect).

6 Recognition of the receptivity of many mentally disabled persons to education and training has formed the basis for the most recent response model, the developmental approach. First articulated in the 1960s, this approach has made tremendous inroads into the traditional methods of dealing with mental disability. The emphasis of this approach is on teaching and training the disabled, thus allowing them to acheive their full developmental potential. Samuel J. Brakel, *Historical Trends*, *in* THE MENTALLY DISABLED AND THE LAW 9, 17 (Samuel J. Brakel et al. eds., 3d ed. 1985).

7 *See* Philip Roos, *Psychological Impact of Sterilization on the Individual*, 1 LAW & PSYCHOL. REV. 45 (1975).

8 *See, e.g.*, JANE R. MERCER, LABELING THE MENTALLY RETARDED (1973); William G. Bronston, *Concepts and Theory of Normalization*, *in* THE MENTALLY RETARDED CHILD AND HIS FAMILY 490 (Richard Koch & James C. Dobson eds., rev. ed. 1976); Roos, *supra* note 3; Rose-Ackerman, *supra* note 5.

schemes prohibiting discrimination against them.[9] With the passage of the Americans with Disabilities Act of 1990 (ADA),[10] the stage is set for society-wide implementation of the normalization program—yet the question remains whether the legal implementation of this program will have any significant social impact.[11] An important aspect of this question is how the new body of law implementing normalization policies will affect traditional legal conceptions of disability.[12]

This Note suggests that alternative policies concerning the developmentally disabled conflict in an area of law that has traditionally been rife with prejudice: involuntary sterilization.[13] Part I of this Note discusses the changing therapeutic and legal approaches to disability.[14] Crudely speaking, the clinical paradigm has gone from a "natural" to a "nurtural" interpretation of disability[15]—labelled herein, respectively, "disabling" and "enabling" paradigms[16] of disability.[17] Along with a shift in the clinical approach to disabil-

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9 *See e.g.*, Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1988); Education of the Handicapped Act, 20 U.S.C. §§ 1400-1485 (1988); Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213 (West Supp. 1992). In addition, 34 states have enacted their own anti-discrimination statutes. *See* John Parry, *Rights and Entitlements in the Community, in* THE MENTALLY DISABLED AND THE LAW, *supra* note 6, at 687-88.

10 42 U.S.C.A. §§ 12101-12213 (West Supp. 1992).

11 *See, e.g.*, Wendy E. Parmet, *Discrimination and Disability: The Challenges of the ADA*, 18 LAW, MED. & HEALTH CARE 331, 340 (1990) ("[The ADA] is a monumental bill that goes far in new directions. But it does not complete the voyage.").

12 *See generally* Hayman, *supra* note 4, at 1210 ("[Laws seeking to minimize the damage mentally retarded persons cause to society] are nearly always inconsistent with measures designed to eliminate the impacts of socio-political prejudice.").

13 This Note will focus on involuntary sterilization as authorized by statute. Very broadly, involuntary sterilization statutes authorize the sterilization of mentally retarded or generally incompetent persons without their consent. *Cf.* Barbara A. Burnett, *Voluntary Sterilization for Persons with Mental Disabilities: The Need for Legislation*, 32 SYRACUSE L. REV. 913, 914 (1981) ("Where informed consent of the patient cannot be obtained or may be compromised, some provision for substituted consent must be made if the procedure is to he performed.").

For historical accounts of involuntary sterilizations, see Robert L. Burgdorf, Jr. & Marcia P. Burgdorf, *The Wicked Witch is Almost Dead:* Buck v. Bell *and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995 (1977); Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30 (1985).

14 *Cf.* MICHAEL WERTHEIMER, A BRIEF HISTORY OF PSYCHOLOGY (1970) (discussing the emergence and growth of experimentalism in psychology); Philip Roos & Brian M. McCann, *Major Trends in Mental Retardation*, 6 INT'L J. MENTAL HEALTH 3 (1977) (discussing changing paradigms of mental disability).

15 The use of these rather well-worn terms represents the shift in prevailing therapeutic approaches, a shift that emphasizes deinstitutionalization and community-based systems of support and treatment. For discussion, see WOLF WOLFENSBERGER ET AL., THE PRINCIPLE OF NORMALIZATION IN HUMAN SERVICES (1972).

16 This term is used with all due respect to Thomas Kuhn, who formulated the concept of "paradigm shifts" in THOMAS KUHN, THE STRUCTURE GF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

17 Although these terms have unavoidable political connotations, the use of "enabling" and "disabling" is normative and is meant to characterize the poles of scientific

ity has come a shift in the legal approach—from a containment regime designed to administer services[18] to a normalization regime constructed from statutory rights.[19]

Part II of this Note provides the legal and social history of involuntary sterilization in the United States as a means to regulate the developmentally disabled's ability to reproduce. Currently, the legal regulation of sterilization is undergoing a crisis of faith,[20] with competing paradigms of disability creating tension in the law. This tension results from widely varying levels of protection available for the reproductive autonomy of developmentally disabled persons.[21]

This Note then argues that the law's approach to sterilization of the developmentally disabled should be enabling. Lawmakers intent on regulating the procreative ability of the disabled should be wary of over-generalizations about what such persons can or cannot do.[22] Policies of normalization[23] and constitutional due process protections on the fundamental right to "bear and beget a child"[24] mandate maximally protective sterilization statutes. These policies

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and legal debate. The term "disabling paradigm" is not intended to suggest that holders of this view are responsible for the persistence of developmental disability and its societal effects; likewise, holders of the enabling view do not banish disability by ineffable optimism. Adherents to the enabling view, however, are much more willing to believe that behaviorial modifications reinforced by law may alter the social effects of disability in a positive way.

18 Actually, this approach is still the norm in many contexts. *See, e.g.*, Hayman, *supra* note 4, at 1210-11 (discussing "redemptive" measures in retardation law, which are "designed to limit, rather than maximize, [the retarded's] niche in the social order").

19 *See generally* Bonnie P. Tucker, *The Americans with Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923 (discussing the recently enacted statute prohibiting discrimination in employment, public services, and public accomodations); Judith W. Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401 (1984) (discussing the growing body of law interpreting a federal statute prohibiting discrimination among recipients of federal funds).

20 *See* Burnett, *supra* note 13, at 916.

21 *Id.* at 924-25.

22 *See* Richard K. Sherlock & Robert D. Sherlock, *Sterilizing the Retarded: Constitutional, Statutory and Policy Alternatives*, 60 N.C. L. REV. 943, 978 (1982) ("Especially at the higher I.Q. end of the retardation spectrum, one might find individuals labeled retarded who are capable of understanding the significance of sterilization . . . . [When individuals can understand] the meaning of sterilization for themselves, we see no reason to deem them incompetent to make the decision for themselves.").

23 *See* Roos, *supra* note 7, at 53

> (One of the major concerns of many retarded persons is their desire to 'pass for normal,' but sterilization tends to interfere with this attempt, particularly when the individual plans to marry. Hence it may well increase the retarded person's reluctance to join the 'mainstream of society' and to foster withdrawal and isolation.)

Id. (citation omitted). *But see* Burnett, *supra* note 13, at 923.

24 *See* Ross, *supra* note 3, at 609-30. *See generally* Rex Dunn, *Eugenic Sterilization Statutes: A Constitutional Re-evaluation* 14 J. FAM. L. 280 (1975) (subjecting involuntary sterilization statutes to procedural and substantive due process and equal protection analysis).

suggest that laws infringing on the developmentally disabled's procreative ability should do so only when necessary for their well-being.[25]

Unfortunately, minimally protective sterilization statutes were upheld as constitutional decades ago in *Buck v. Bell*,[26] an infamous decision that seems unlikely to be overruled in the near future. Thus, Part III of this Note suggests that the ADA[27] should be used to encourage the adoption of uniformly rigorous protections for developmentally disabled persons against state-mandated sterilization.[28]

I
A SHIFTING PARADIGM OF DISABILITY AND ITS LEGAL CONSEQUENCES

A. The "Disabling" Paradigm

Historically, the developmentally disabled have borne the brunt of much fear and prejudice and have been singled out for special treatment.[29] This treatment has varied from their enshrinement as "holy innocents"[30] to systematic attempts to eradicate their propagation through forced sterilizations.[31] However different the treatment, the underlying perception has remained consistent: the developmentally disabled are fundamentally different from the rest of society—so different that they cannot exist in the community

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25 *See* Ross, *supra* note 3, at 635-37; Richard A. Estacio, Comment, *Sterilization of the Mentally Disabled in Pennsylvania: Three Generations Without Legislative Guidance are Enough*, 92 DICK. L. REV. 409 (1988).

26 274 U.S. 200 (1927). For discussion, see *infra* notes 87-100 and accompanying text.

27 42 U.S.C.A. §§ 12101-12213 (West Supp. 1992).

28 *See infra* part III.B.

29 *See* MICHEL FOUCAULT, MADNESS AND CIVILIZATION (1965) (discussing the phenomenology of mental disability); *see also* Marie Appleby, Note, *The Mentally Retarded: The Need for Intermediate Scrutiny*, 7 B.C. THIRD WORLD L.J. 109, 112-13 (1987) (discussing the historical trend of misunderstanding mental retardation).

30 *See* Patricia Werner, Comment, *Terminating the Rights of Mentally Retarded Parents: Severing the Ties that Bind*, 22 J. MARSHALL L. REV. 133, 137 (1988).

Depictions of the "holy innocent" stereotype are common in world literature, ranging from Prince Myshkin in FYODOR DOSTOYEVSKY, THE IDIOT (Constance Garnett trans., 1913) to Ben Compton in WILLIAM FAULKNER, THE SOUND AND THE FURY (1929).

31 Forced sterilization of the developmentally disabled reached its height during the 1930s in two modern industrial societies—Nazi Germany and the United States. Similarities between their methods have been noted in James B. O'Hara & T. Howland Sanks, *Eugenic Sterilization*, 45 GEO. L.J. 20, 31, 36-37 (1956).

without assistance.[32] Indeed, such persons are often deemed unable to exist in the community at all.[33]

Requirements of different treatment and the prevalence of negative expectations have led to a paradigm of disability that one may label "disabling."[34] This paradigm reflects the presumption that one who has been diagnosed as disabled in some important functional way is unable to live in the community as a normal person and therefore must receive special treatment. This presumption may, in many cases, be correct. Too often, however, it may serve as a self-fulfilling prophecy, especially since those who employ it assume, often without justification, that the retarded are irremediably different from others.[35]

This presumption, combined with imperfectly understood principles of genetics[36] and advances in medical sterilization procedures,[37] led to a brief period of popularity for eugenic sterilizations in the early decades of this century.[38] The premise behind eugenic sterilization was a progressive, social Darwinistic desire to better the human race through the sterilization of those with congenital and behavioral abnormalities that were thought to be genetically transmitted.[39] The study of eugenics never rose above the level of a pseudo-science because of wide gaps in knowledge about how ge-

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32 *See* Thomas K. Gilhool, *The Right to Community Services*, *in* THE MENTALLY RETARDED CITIZEN AND THE LAW 172 (Michael Kindred et al. eds., 1976). *See generally* Norman R. Ellis, *Issues in Mental Retardation*, 1 LAW & PSYCHOL. REV. 9 (1975) (discussing various therapeutic approaches to mental retardation).

33 *See* Jo Ann Chandler & Sterling Ross, Jr., *Zoning Restrictions and the Right to Live in the Community*, *in* THE MENTALLY RETARDED CITIZEN AND THE LAW, *supra* note 32, at 305.

34 *See supra* notes 16-17.

35 A dated version of this view is provided by psychologist Henry H. Goddard's empirical study of the geneology of the Kallikak family, in which he offers the following assessment:

> Feeblemindedness is hereditary and transmitted as surely as any other character. We cannot successfully cope with [social deviancy] until we recognize feeble-mindedness and its hereditary nature. . . .
>
> In considering the question of care, segregation through colonization seems in the present state of our knowledge to be the ideal and perfectly satisfactory method.

HENRY H. GODDARD, THE KALLIKAK FAMILY 117 (1912).

36 Specifically, the dominant model was one of Mendelian genetic inheritance. The ability of such a model to explain the appearance of retardation has since been widely questioned. *See* Robert J. Cynkar, Buck v. Bell: *"Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418 (1981); Dunn, *supra* note 24, at 284-87.

37 *See* Cynkar, *supra* note 36, at 1429-30.

38 *See* Burgdorf & Burgdorf, *supra* note 13; Cynkar, *supra* note 36; Dunn, *supra* note 25; and Lombardo, *supra* note 13.

39 *See* HARRY H. LAUGHLIN, EUGENICAL STERILIZATION IN THE UNITED STATES (1922) (written from the point of view of a contemporary advocate of eugenic sterilization); George T. Skinner, Note, *A Sterilization Statute for Kentucky?*, 23 KY. L.J. 168 (1934).

netics actually worked.[40] The legal ramifications of the eugenics movement, however, have proved much more durable.[41]

Similarly, other areas of the law that intersect with mental disability, such as adoption[42] and marriage,[43] are highly receptive to the disabling paradigm.[44] For example, despite the Supreme Court's enunciation of a protected right to keep a child that one has "sired and raised,"[45] over forty states do not require parental consent to adoption if a parent is "incompetent."[46] Only a few states require notice to an incompetent parent or a hearing before a decision is made.[47] Likewise, despite the Court's declaration that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival,"[48] over forty states restrict the marital rights of "imbeciles," individuals "under guardianship," "mental retardates," the "feebleminded," and so on.[49] Such laws are disabling in nature because they adopt the view that disability equals incapability. Furthermore, by forgoing individualized determinations in favor of blanket presumptions, they legitimize prejudice against the developmentally disabled.

B. The "Enabling" Paradigm

Like the disabling paradigm, the enabling paradigm originated in a medical and legal conception of disability.[50] In contrast to the precautionary nature of the disabling paradigm, the enabling paradigm represents the more optimistic and dynamic view of a disabled person's capabilities. In fact, holders of the enabling view typically believe that negative expectations are partially responsible for the debilitating effects of many disabilities.[51]

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40 The impulse behind eugenics has also been criticized as fundamentally isolationist, xenophobic, and totalitarian. *See* Cynkar, *supra* note 36, at 1432.

41 *See infra* part II.A.

42 *See* Patricia M. Wald, *The Legal Rights of People with Mental Disabilities in the Community: A Plea for Laissez Faire*, *in* 3 LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 1033, 1061 (Bruce J. Ennis et al. eds., 1973).

43 *Id.* at 1044.

44 *See generally* Randy A. Hertz, Note, *Retarded Parents in Neglect Proceedings: The Erroneous Assumption of Parental Inadequacy*, 31 STAN. L. REV. 785 (1979) (discussing sterotypical presumptions underlying restrictive adoption laws).

45 Stanley v. Illinois, 405 U.S. 645, 651 (1972).

46 Wald, *supra* note 42, at 1061.

47 *Id.* at 1061-62.

48 Loving v. Virginia, 388 U.S. 112 (1967) (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

49 Wald, *supra* note 42, at 1044.

50 Some of the general characteristics that this Note refers to as the "enabling" paradigm in the therapeutic/psychology setting are set forth in Roos, *supra* note 3, at 613-15.

51 *See* Hertz, *supra* note 44; *cf.* Hayman, *supra* note 4, at 1244-45 (discussing the "helplessness-condoning" effect of negative expectations).

The source of the enabling paradigm is difficult to pinpoint, but it appears to have originated both in widespread dissatisfaction over the predictive validity of diagnostic tests used to determine the severity of mental disability[52] and in an increased awareness of the great influence that environmental factors may exert on the developmentally disabled's quality of life.[53] However this paradigm shift originated, the perception that the developmentally disabled are beyond the hope of a "normal" life has undergone drastic revision in the course of this century. At present, the dominant view is that one's surroundings can greatly alter the impact of developmental disability on one's potential for a normal life.[54]

The enabling view is the impetus behind therapeutic devices such as community care centers for the disabled.[55] The expectation behind such centers is that care programs exposing residents to the daily life of the community can alleviate the damaging effects of mental disability.[56] While these programs have encountered varying degrees of success and much community opposition,[57] they do provide a more beneficial and stimulating atmosphere than the highly restrictive and artificial environment at a typical state mental institution.[58]

The enabling paradigm has likewise found forceful expression in the legal sphere, largely because of the therapeutic revolution discussed above[59] and the civil rights movement of the 1960s.[60] The atmosphere of politicalization among traditionally powerless minority groups, including the disabled,[61] led to the creation of disability

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52 *See* Hayman, *supra* note 4, at 1213-16; Michael S. Sorgen, *Labeling and Classification, in* THE MENTALLY RETARDED CITIZEN AND THE LAW, *supra* note 32, at 214.

53 Roos, *supra* note 3; Hayman, *supra* note 4, at 1213-16.

54 *See* Thomas K. Gilhool, *supra* note 32, at 179-80.

55 *See generally id.* at 173-82 (changing assumptions about the retarded's ability to benefit from community services justifies legal protection of those services).

56 Chandler & Ross, *supra* note 33, at 310.

57 *Id.*; *see also* Laura L. Robinson, Note, *The Controversy over Community Residences for the Mentally Retarded*, 13 LAW & PSYCHOL. REV. 119 (1989) (examining social and legal issues with a view towards possible solutions). The debate surrounding community care for the retarded has engendered numerous suits, one of which resulted in a controversial Supreme Court decision, City of Cleburne v. Cleburne Living Ctr., Inc. 473 U.S. 432 (1985); *see* discussion *infra* notes 197-213 and accompanying text.

58 *Cf.* Barbara A. Weiner, *Rights of Institutionalized Persons, in* THE MENTALLY DISABLED AND THE LAW, *supra* note 6, at 251 (examining legal protections afforded the institutionalized); Barbara A. Weiner, *Treatment Rights, in* THE MENTALLY DISABLED AND THE LAW, *supra* note 6, at 327 (discussing treatment of the mentally disabled in state institutions).

59 *See supra* notes 52-54 and accompanying text.

60 MICHAEL L. PERLIN, MENTAL DISABILITY LAW § 1.02 (1989).

61 The disabled have been recognized as a minority. U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES OF HANDICAPPED AMS: PUB. POLICY IMPLICATIONS 29 (1980).

law advocacy projects. These projects have served as sources of funding for litigation as well as clearinghouses for information on the growing legal rights of the disabled.[62]

Likewise, legal manifestations of the civil rights movement, such as the Civil Rights Act of 1964,[63] helped lay the groundwork at a national level for codifying the rights of the disabled.[64] In the wake of federal action many states amended their antidiscrimination statutes to cover discriminatory acts against the disabled.[65] This legislative activity resulted in the creation of statutorily imposed mandates to adopt an enabling view of the disabled in certain contexts, such as education,[66] employment,[67] and the provision of public services.[68]

One must recognize however, that the legally enabling view of the disabled fundamentally differs from the disabling view that has traditionally dominated the law.[69] The recent passage of the ADA[70] only exacerbates this tension. The remainder of this Note demonstrates the potential difficulties that may result from the co-existence of these polar conceptions of disability by focusing on the legal issues involved in state mandated sterilization of the developmentally disabled.[71]

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62 *See What is the Mental Health Law Project?*, *in* 3 LEGAL RIGHTS OF THE MENTALLY HANDICAPPED, *supra* note 42, at 1517.

63 42 U.S.C. §§ 2000a-2000h-6 (1988).

64 *Cf.* PERLIN, *supra* note 60 (discussing the genesis of disability discrimination laws).

65 *See* John Parry, *Decision-making Rights Over Persons and Property*, *in* THE MENTALLY DISABLED AND THE LAW, *supra* note 6, at 687-88. Note, however, the state legislation in some cases actually produced federal legislation, at least in the area of education. *Id.* at 634.

66 Education of the Handicapped Act, 20 U.S.C. §§ 1400-1485 (1988).

67 Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1988).

68 Developmental Disabilities Assistance and Bill of Rights Act, Pub. L. No. 100-146, 101 Stat. 840 (1987) (codified as amended in scattered sections of 29 and 42 U.S.C.).

69 *See* Hayman, *supra* note 4, at 1210 (arguing that laws placing society's interests before the retarded's are nearly always inconsistent with laws emphasizing normalization).

70 42 U.S.C.A. §§ 12101-12213 (West Supp. 1992).

71 The current poles of debate involve, on the one hand, the view that the developmentally disabled should preferably never be subject to involuntary sterilization, Ross, *supra* note 3, at 643, and on the other hand, the view that sterilization is a family decision akin to a protected privacy right, and that family members should be allowed to make the sterilization decision with minimal degrees of interference from the state. *See generally* Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806.

II

STERILIZATION OF THE DEVELOPMENTALLY DISABLED: AN ARENA OF CONFLICTING PRINCIPLES

A. The Eugenic Enterprise: Sterilization in the United States

Reproductive control of the disabled is not a new idea.[72] Involuntary sterilization as a widespread phenomenon in the United States dates from the early decades of this century, when sterilization statutes were passed *en masse* by state legislatures[73] under the influence of progressive politics and the pseudo-science of eugenics.[74] The discipline of eugenics, strongly influenced by social Darwinism, claimed as its goal the betterment of the human race through the study and classification of genetic traits, establishing in the process a ranking of desirable and undesirable traits for human propagation.[75]

According to the eugenicists, retardation was a remediable social evil that could be genetically isolated and effectively neutralized through the sterilization of those who were obviously afflicted.[76] Despite the questionable scientific basis for this assertion,[77] sterilization of the developmentally disabled captured the legislative imagination. This was partly due to the well-organized and politically effective lobbying groups that espoused the cause to various state legislatures.[78] Such legislation also became popular as a cost-saving device: these statutes typically provided for the discharge of the sterilized person from state custodial care, thus saving the state the expense of full-time care for that person, as well as for any possible offspring.[79]

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72 Eugenic breeding was advocated at least as early as Plato. *See* Cynkar, *supra* note 36, at 1432 n.63.

73 The first sterilization statute was enacted in Indiana in 1907. By 1925, twenty-three states had passed such laws. *Id.* at 1433.

74 The following defines eugenics:

> Derived from the Greek word meaning "well-born," the term eugenics was coined by Sir Francis Galton in 1883 who defined it as "the study of agencies under social control that may improve or impair . . . future generations either physically or mentally."

Estacio, *supra* note 25, at 91-92.

75 *See* Cynkar, *supra* note 36, at 1428.

76 *See id.* at 1429.

77 *See* Burgdorf & Burgdorf, *supra* note 13, at 1008; Elyce Z. Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591, 604 (1966) ("In short, the present state of our scientific knowledge does not justify the widespread use of the sterilization procedures in mentally ill or mentally deficient persons . . . ." (testimony of Dr. Bernard L. Diamond, special consultant to the American Psychiatric Association)).

78 For a fascinating account of political and scientific figures working behind the scenes to get Virginia's eugenic sterilization law passed, see Cynkar, *supra* note 36, at 1435-40.

79 *Cf.* Burgdorf & Burgdorf, *supra* note 13, at 1014-15 (discussing fiscal considerations behind state-sanctioned sterilization).

These factors spurred legislatures into passing statutes that allowed either the superintendent of a custodial care institution or a guardian to consent to sterilization of the disabled person.[80] Because it was often the guardian who decided to sterilize in the first place, consent was rarely denied.[81] Courts initially reacted with hostility to this legislation.[82] Frequently the statutes, many of which lacked effective limits on the decisionmaker's discretion, were struck down as unconstitutional.[83] Many courts held that the statutes violated either due process, by failing to provide a hearing prior to sterilization,[84] or equal protection, by affecting only disabled persons in institutions.[85]

In reaction to these adverse rulings, some state legislatures amended their statutes to require a formal hearing before authorizing the operation.[86] However, in the case of *Buck v. Bell*,[87] the Supreme Court settled the questions of substantive due process and

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80 A representative example of this type of statute is Virginia's sterilization statute, now repealed:

> Whereas, both the health of the individual patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives under careful safeguard and by competent and contientious authority, and
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> Whereas, such sterilization may be effected in males by the operation of vasectomy and in females by the operation of salpingectomy, both of which said operations may be performed without serious pain or substantial danger to the life of the patient, and
>
> Whereas, the Commonwealth has in custodial care and is supporting in various State institutions many defective persons who if now discharged or paroled would likely become by the propagation of their kind a menace to society but who if incapable of procreating might properly and safely be discharged or paroled and become self-supporting with benefit both to themselves and to society, and
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> Whereas, human experience has demonstrated that heredity plays an important part in the transmission of insanity, idiocy, imbecility, epilepsy and crime, now, therefore
>
> 1. Be it enacted by the general assembly of Virginia, That whenever the superintendent of [a state mental institution] shall be of the opinion that it is for the best interests of the patients and of society that any inmate of the institution under his care should be sexually sterilized, such superintendent is hereby authorized to perform, or cause to be performed by some capable physician or surgeon, the operation of sterilization on any such patient confined in such institution . . . .

Act of Mar. 20, 1924, ch. 394, 1924 Va. Acts 569 (repealed 1968).

81 By 1973, over 50,000 sterilization operations had been performed. *See* Wald, *supra* note 42, at 1055.

82 Burgdorf & Burgdorf, *supra* note 13, at 1000-01.

83 *See, e.g.*, Brewer v. Valk, 167 S.E. 638 (N.C. 1933).

84 *See, e.g.*, Williams v. Smith, 131 N.E. 2 (Ind. 1921).

85 *See* Haynes v. Lapeer, 166 N.W. 938 (Mich. 1918); Smith v. Board of Examiners of Feeble-Minded 88 A. 963 (N.J. 1913).

86 *See generally* Richard K. Sherlock & Robert D. Sherlock, *Sterilizing the Retarded: Constitutional, Statutory and Policy Alternatives*, 60 N.C. L. REV. 943, 945 (1982).

87 274 U.S. 200 (1927).

equal protection scrutiny for the developmentally disabled and revitalized the eugenic sterilization movement with one stroke.[88]

The statute at issue in *Buck*[89] allowed the superintendent of a mental health institution to petition for the sterilization of residents suffering from hereditary mental defects.[90] At the superintendent's discretion, the petition could be brought before the institution's board of directors. The only limitations upon the board's decision were the statutory directions that sterilization be in the best interests of society and that the operation be performed "without detriment to [the] general health" of the developmentally disabled person.[91] Procedurally, the statute allowed for the appointment of a guardian to represent the resident's interests at a pre-decision hearing and provided for a review of the Board's decision by the state appellate courts.[92]

While these procedural protections effectively nullified the threat of procedural due process challenges,[93] the question remained whether involuntary sterilization statutes could be struck down for substantive reasons.[94] In rejecting the claim that the statute was an impermissible exercise of authority unjustified by the vague "best interests of society" standard, the Supreme Court delivered an especially abrasive opinion,[95] indicating the dominance of the disabling paradigm at that time.[96]

Noting that the state's interest in preserving the public welfare occasionally justified sacrificing the lives of our "best citizens," the Court opined: "[i]t would be strange if [the state] could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence."[97] In other words, the privacy interests of the disabled are

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88 *See* Burgdorf & Burgdorf, *supra* note 13, at 1001.

89 Act of Mar. 20, 1924, ch. 394, 1924 Va. Acts 569 (repealed 1968).

90 274 U.S. at 206.

91 *See supra* note 80 (quoting portions of the Virginia sterilization statute).

92 274 U.S. at 206.

93 *Id.* at 207. In writing for the Court, Justice Holmes stated that:

> There can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered, and as every step in this case was taken in scrupulous compliance with the statute and after months of observation, there is no doubt that in that respect the plaintiff in error has had due process of law.

Id.

94 *Id.*

95 Burgdorf & Burgdorf, *supra* note 13, at 1006-07.

96 Justice Holmes, author of the majority opinion in *Buck v. Bell*, was a noted supporter of the eugenics movement. At that time, several members of the Court ascribed to the Social Darwinist views that so strongly influenced the eugenics movement. Cynkar, *supra* note 36, at 1451.

97 274 U.S. at 207.

accorded little weight in comparison to the state's interest in regulating their procreation.

One's acceptance of this result depends upon how highly one values reproductive privacy rights for the developmentally disabled. For example, one may generally favor reproductive privacy protections but feel that the state's interest in interfering with privacy is considerably stronger when the person claiming the protection is disabled. Arguably, however, a showing of disability alone should not increase the state's interest without a showing that sterilization is justified in the individual case.[98] The *Buck* decision, however, allows states to sterilize developmentally disabled individuals on little more than a showing that they are in fact disabled.[99] In *Buck*, the disabling paradigm became a matter of constitutional law, as a protected element of the states' inherent power to act in the public interest.[100]

In the post-opinion rush to adopt involuntary sterilization statutes, thirty states passed such laws.[101] Although most states have either altered the tone of sterilization statutes to minimize their eugenic origin or have repealed them entirely, the statutes that currently exist are inconsistent; legislatures follow either the disabling paradigm, the enabling paradigm, or a combination of the two.[102]

Legal issues surrounding sterilization of the developmentally disabled maguify the conflict between disabling and enabling paradigms of disability. For example, a lawmaker framing the sterilization decision within the disabling paradigm may authorize involuntary sterilizations more often and with a minimal degree of procedural protections on the assumption that a person who is significantly mentally disabled is both unlikely to contribute to the quality of the communal gene pool and unable to cope with the results of parenthood.[103] Under this approach, any protected interest

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98 *See* Wald, *supra* note 42, at 1059 (citation omitted).

99 According to the tenets of eugenic science, a mentally retarded person is automatically "the probable potential parent of socially inadequate offspring likewise afflicted," and is therefore subject to sterilization under the Virginia law upheld in *Buck*. 274 U.S. at 207.

100 *Id.* ("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.") (Holmes, J.).

101 Julie Marcus, Note, In Re Romero*: Sterilization and Competency*, 68 DENV. U. L. REV. 105, 106 (1991).

102 *Cf.* Dunn, *supra* note 24. In an appendix, the author provides an informative breakdown of the sterilization statutes on the books as of 1975. Of the 24 statutes analyzed, only 5 required a court proceeding; 16 gave authority to institute the proceeding to the superintendant of a care facility; 19 required the subject to be present at the proceeding; only 16 required the subject to receive notice of the decision and 12 gave the subject the right to obtain counsel.

103 *See, e.g.*, Skinner, *supra* note 39, at 168.

the disabled person may have in her reproductive autonomy would pale in comparison to the state's interest in preventing the proliferation of retarded or neglected children.

Conversely, a lawmaker acting within the enabling paradigm may deny involuntary sterilization absent a showing by clear and convincing evidence that parenthood would be beyond the capacity of the disabled person or would seriously harm that person.[104] Such a lawmaker will not readily assume that a person who meets a clinical standard of mental disability is more likely to have afflicted or neglected offspring, and will therefore believe that maximum deference should be given to her reproductive autonomy.[105]

B. Disabling and Enabling Paradigms in the Sterilization Context: Legislation

The intervening shift in the medical and legal perceptions of persons with disabilities,[106] coupled with the development of "reproductive privacy" jurisprudence,[107] has led to a radical shift in the policy justification behind sterilization statutes.[108] Such statutes are currently justified as guaranteeing an important privacy right for the developmentally disabled, who would otherwise be unable to choose sterilization[109] because doctors will refuse to perform the operation absent legal authority.[110] This rationale works well *only* if

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104 *Cf.* Brakel, *supra* note 6, at 218 (condemning eugenic sterilization rationales and advocating stringent protections on reproductive autonomy).

105 *See In re* Grady, 426 A.2d 467, 475 (N.J. 1981)

> (The right to choose among procreation, sterilization and other methods of contraception is an important privacy right of all individuals. Our courts must preserve that right. When an incompetent person lacks mental capacity to make that choice, a court should ensure exercise of that right on behalf of the incompetent in a manner that reflects his or her best interests.);

Ross, *supra* note 3, at 642-43.

106 *See supra* notes 29-78 and accompanying text; *see also* Brakel, *supra* note 6, at 17-18.

107 *See infra* notes 131-54 and accompanying text (suggesting that sterilization of the developmentally disabled may be increasingly used as a tool for "normalization").

108 *Cf.* Burnett, *supra* note 13, at 923-24.

109 *See* Scott, *supra* note 71, at 807:

> Sterilization law has undergone a radical transformation in recent years. Influenced by a distaste for eugenic sterilization and a desire to redress past injustices, the emerging law seeks to protect the interests of mentally disabled persons by erecting formidable barriers to sterilization. The policy goals of this reform movement are commendable. However, in its singleminded effort to prevent erroneous sterilizations, the law departs from its underlying objectives: to protect where possible the individual's right to make her own reproductive decisions and to ensure that any decision made by others will best protect her interests (citation omitted).

110 *See* Alan B. Munro, Note, *The Sterilization Rights of Mental Retardates*, 39 WASH. & LEE L. REV. 207, 212-13 (1982).

the statute authorizing sterilization maximizes the disabled person's ability to choose. This, however, is often not the case.

States that confer authority to order sterilizations by statute vary widely in their protection of the disabled person's reproductive autonomy. They range from Mississippi, which has essentially the same statute as that upheld in *Buck v. Bell*,[111] to Maine, which maximizes reproductive autonomy through a series of strict procedural and substantive protections.[112] The difference between the Mississippi and Maine statutes rests not merely upon a different degree of awareness concerning the need to protect reproductive choice, but also upon whether the operating assumption of the legislation is disabling or enabling.[113]

These considerations are inextricably linked; normalization policies naturally seek to preserve reproductive autonomy as an important facet of the retarded person's general autonomy,[114] whereas eugenic policies see reproductive autonomy for the retarded as a threat to the welfare of the state.[115] As this Note will show, sterilization laws failing to reflect an enabling view of the developmentally

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111 Compare the following provisions of the Mississippi statutes with those of the Virginia statute, discussed *supra* note 80 and accompanying text:

> Whenever the director . . . shall be of the opinion that it is for the best interests of the patients and of society that any inmate . . . should be sexually sterilized, such director is hereby authorized to perform . . . the operation of sterilization on any such patient confined in such institution afflicted with hereditary forms of insanity that are recurrent, idiocy, imbecility, feeble-mindedness, or epilepsy . . .
>
> If the board shall find that the inmate is insane, idiotic, imbecile, feeble-minded or epileptic, and by the laws of heredity is the probable potential parent of socially inadequate offspring likewise afflicted, that the said inmate may be sexually sterilized without detriment to his or her general health, and that the welfare of the inmate and of society will be promoted by such sterilization, the said board may order the director to perform . . . the operation . . . .

See MISS. CODE ANN. §§ 41-45-1, 41-45-9 (1972 & Supp. 1992).

112 *See* The Due Process in Sterilization Act of 1982, ME. REV. STAT. ANN. tit. 34-B & §§ 7001-17 (West 1988). The Act requires a court order in all sterilizations. The Acts also requires informed consent or statutorily authorized excuse from such consent. *See infra* notes 167-82 and accompanying text.

113 For example, the Mississippi statute exhorts the board ruling on a sterilization petition to consult the "laws of heredity" to determine if the subject is the "probable potential parent of socially inadequate offspring." MISS. CODE ANN. § 41-45-9 (1972). As stated earlier, such laws are highly questionable and likely serve to mask the unfounded fears and prejudices of the decision-maker. *See supra* part II.B.2.a.

In contrast, the Maine statute explicitly states its goal of normalization. *See* discussion of the Maine statute, *infra* notes 167-82 and accompanying text.

114 *Cf.* Wald, *supra* note 42, at 1035-36. ("With an increasing acceptance of the principle of 'normalization,' however, I predict the future course of litigation in this field will involve more rights to community services . . . I believe it will also deal with the legal, personal, and civil rights of [mentally retarded] people.").

115 *See* discussion *supra* notes 36-41 and accompanying text.

disabled represent substantively poor policy choices as well as possible violations of the Due Process Clause of the Constitution.[116]

1. *The Normalization Argument in the Legislative Context*

The normalization argument in favor of maximally protective sterilization laws seeks to conform sterilization law to other areas of the law that reflect normalization policies.[117] Since these policies encourage self-reliance and independence for the retarded,[118] they are essentially enabling.

Sterilization decisions made within the enabling paradigm look not to the tenuous ground of hereditary affliction, but rather to the best interests of the retarded person and her ability to perform competently as a parent.[119] Thus, a legislature acting on the assumptions of the enabling paradigm will individualize the sterilization proceeding, believing that a fair determination must involve an individual assessment.[120] For example, the Maine Due Process in Sterilization Act[121] requires a judicial determination that the disabled person is "not able to give informed consent" before the guardian's sterilization petition will be considered.[122] Even then, the court may only grant the petition if it finds that sterilization is in that person's "best interests."[123]

Conversely, a legislative body acting within the disabling paradigm will be frugal with procedural protections, believing that, once

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116 U.S. CONST. amend. V: "No person . . . shall be deprived of life, liberty, or property, without due process of law. . . ."

117 *See generally* Scott, *supra* note 72, at 808.

118 *See* Roos, *supra* note 3, at 613-15.

119 *Cf.* Wald *supra* note 42, at 1059 (quoting John B. Fotheringham *The Concept of Social Competence as applied to Marriage and Child Care in Those Classified as Mentally Retarded*, 104 CMA J. 813 (1971)).

120 For example, Oregon's sterilization statute requires the following findings:

> a) the individual is physically capable of procreating;
> b) the individual is likely to engage in sexual activity at the present or in the near future under circumstances likely to result in pregnancy;
> c) all less drastic alternative contraceptive measures, including supervision, education and training, have proved unworkable or inapplicable, or are medically contra-indicated;
> d) the proposed method of sterilization conforms with standard medical practice, is the least intrusive method available and appropriate, and can be carried out without reasonable risk to the life and health of the individual; and
> e) the nature and extent of the individual's disability, as determined by empirical evidence and not solely on the basis of standardized tests, renders the individual permanently incapable of caring for and raising a child, even with reasonable assistance.

OR. REV. STAT. § 436.205 (1992).

121 ME. REV. STAT. ANN. tit. 34-B, § 7001-17 (West 1988).

122 *Id.* § 7004.

123 *Id.* § 7010.

the crucial element of developmental disability is established, more process would only inhibit the legislative agenda.[124] For example, under the Mississippi sterilization statute, the subject of a sterilization proceeding may obtain judicial review only after the hospital board of trustees makes an initial determination.[125] Even then, the court proceeding is limited to a determination of whether the board has any foundation for its belief that "the inmate is insane, idiotic, imbecile . . . and by the laws of heredity is the probable potential parent of socially inadequate offspring likewise afflicted."[126]

If one favors the implementation of normalization policies through law, one will likewise favor the assumptions and results implicit in enabling legislation. This is because legislation that individualizes the sterilization decision necessarily conforms with policies that seek to augment the autonomy and self-reliance of disabled persons.[127] Similarly, one favoring policies of normalization will condemn disabling sterilization legislation primarily on three grounds: 1) it devalues the mentally disabled person by appropriating an important aspect of her autonomy without a showing that such appropriation is necessary to further a compelling interest;[128]

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124 *Cf.* Buck v. Bell, 274 U.S. 200 (1927):

> The judgment [of the directors] finds that Carrie Buck "is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization" and thereupon makes the order. In view of the general declarations of the Legislature and the specific findings of the Court, obviously we cannot say as a matter of law that the grounds do not exist, and if they exist they justify the result.

Id. at 207.

Since no evidence was presented concerning Carrie Buck's ability to be a parent, and there was no suggestion that mental or physical harm would occur as a result of pregnancy, it is apparent that the sterilization decision was based primarily on Buck's "feeble-mindedness."

125 MISS. CODE ANN. § 41-45-11 (1972).

126 *Cf.* MISS. CODE ANN. § 41-45-13 (1972)

> (Upon such review, the said chancery court, or judge thereof, may affirm, revise, or reverse the orders of the board of trustees of mental institutions so reviewed and may enter such order as it deems just and right . . . .).

Implicitly, the court will review the Board's decision under the controlling langnage of the Mississippi statute. This limiting language is quoted in the text *supra*.

127 *But see* Burnett, *supra* note 13, at 923 ("Sterilization of the retarded may increase with the growing acceptance of the concept of 'normalization' as a primary goal in the treatment of the disabled. . . . Some parents, legislators, and judges may regard sterilization as a prerequisite to community living.").

This conclusion seems counter-intuitive, however, when one considers the adverse psychological impact of sterilization on the retarded individual, a consequence with devastating implications for any course of treatment emphasizing normalization. *See* Philip Roos, *Psychological Impact of Sterilization on the Individual*, 1 LAW & PSYCHIATRY REV. 47 (1975).

128 *See* Ross, *supra* note 3, at 611.

2) it frustrates normalization policies by discouraging, rather than encouraging, autonomy and self-reliance on the part of the disabled;[129] and 3) it places the disabled in an equivocal position before the law by subjecting their reproductive freedoms to a large degree of uncertainty.[130] This last point foreshadows the second substantive basis upon which one may attack disabling presumptions in legislation.

2. *The Constitutional Argument in the Legislative Context*

Although the Supreme Court has not considered due process and equal protection arguments against involuntary sterilization statutes since *Buck v. Bell*,[131] commentators have suggested that the intervening years and the rise of reproductive privacy rights would mandate a different result were the case adjudicated today.[132] At the very least, these developments mandate a reassessment of Justice Holmes' analysis in *Buck*.

The strongest argument against the constitutional validity of minimally protective statutes, such as Mississippi's, rests upon substantive due process protections against laws that infringe upon reproductive autonomy and family privacy.[133] Indeed, one of the foundational cases establishing present privacy protections, *Skinner v. Oklahoma*,[134] involved a sterilization statute that was struck down as unconstitutional.[135] In *Skinner*, the petitioner, a recidivist felon who had twice been convicted of robbery, was sentenced to sterilization under a statute that authorized the sterilization of persons previously convicted two or more times of crimes " 'amounting to felonies involving moral turpitude.' "[136]

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129 *See Id.* at 621; Dunn, *supra* note 24, at 293-94.

130 *See* Burnett, *supra* note 13, at 924.

131 Buck v. Bell, 274 U.S. 200 (1927).

132 *See, e.g., In re* Grady, 426 A.2d 467, 472 (N.J. 1981); Burnett, *supra* note 13, at 919; Dunn, *supra* note 24, at 297.

133 *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1339-40 (2d ed. 1988):

> Although the Court had earlier upheld the state's power to sterilize an individual against her objection in order to prevent the birth of what Justice Holmes callously characterized as "imbeciles," and although that earlier holding continues to be cited without obvious disapproval from time to time, it is hard to square the basic philosophy of *Skinner v. Oklahoma* with the proposition that the state may usurp the individual's procreative choices in an irreversible way—whether by sterilization or compulsory breeding . . . [t]he meaning of *Skinner* is that *whether one person's body shall be the source of another life must be left to that person and that person alone to decide.* (citations omitted).

Id.

134 316 U.S. 535 (1942).

135 OKLA. STAT. ANN. tit. 57, §§ 171-82 (West 1935) (declared unconstitutional in 1942).

136 *Skinner*, 316 U.S. at 536.

The Supreme Court ruled that the statute violated the Equal Protection Clause[137] because it exempted from the sterilization penalty those guilty of "embezzlement, political offenses and revenue act violations," crimes that were "intrinsically the same" as robbery.[138] Writing for a unanimous Court, Justice Douglas stated:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. . . . [In] evil or reckless hands [the power to sterilize] can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. . . . [He] is forever deprived of a basic liberty.[139]

Although the decision did not explicitly overrule *Buck v. Bell*, its rationale severely limited Justice Holmes' conclusion that the statute at issue in *Buck* did not violate the Equal Protection Clause.[140] Justice Douglas's opinion in *Skinner* indicates that a more rigorous scrutiny is applicable to sterilization statutes than the "rational basis" test implicitly used in *Buck*.[141] As a result, a state cannot mandate sterilization merely by indicating a policy and drawing a convenient line,[142] but, rather, should indicate an interest sufficiently compelling to overcome the "basic civil right" at stake.[143] Presumably, a vague and unsubstantiated fear of being "swamped with incompetence"[144] would not suffice as a compelling interest.

Subsequent Supreme Court decisions, such as *Griswold v. Connecticut*,[145] *Eisenstadt v. Baird*,[146] and *Carey v. Population Services Interna-*

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137 U.S. CONST., amend XIV (nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.").

138 *Skinner*, 316 U.S. at 541.

139 *Id.*

140 *See* TRIBE, *supra* note 133; Burgdorf & Burgdorf, *supra* note 13, at 1011.

141 *See* Burgdorf & Burgdorf, *supra* note 13, at 1009

> (One of the most basic problems with the *Buck v. Bell* decision is its superficial constitutional analysis . . . . [T]he rational basis [test used in *Buck*] has ceased to be the only test for equal protection arguments. Today, strict scrutiny and even a balancing approach may be used.).

142 *Skinner*, 316 U.S. at 541 ("Strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.").

143 *See* Burnett, *supra* note 13 at 919; Ross, *supra* note 3 at 611; Estacio, *supra* note 25, at 92-93; *see also* North Carolina Ass'n for Retarded Children v. State, 420 F. Supp. 451 (M.D.N.C. 1976) (applying strict scrutiny review to sterilization claim).

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

145 381 U.S. 479 (1965) (holding that a statute outlawing the use of contraceptives is unconstitutionally restrictive of married couple's right of privacy).

146 405 U.S. 438 (1972) (extending fundamental right of privacy over contraceptive decisions to single persons).

tional[147] have both reaffirmed the notion that reproductive autonomy is an important civil right and broadened the significance of that right to strike down statutes on both due process and equal protection grounds.[148]

The most recent of these cases is *Carey v. Population Services*.[149] In *Carey*, the Court invalidated a New York law[150] that allowed only pharmacists to sell nonmedical contraceptive devices to persons over sixteen.[151] Speaking for a majority of the Court, Justice Brennan found that the decision to use contraceptives fell squarely within the zone of protected privacy interests delineated in *Griswold*.[152] The Court applied strict scrutiny analysis to the statute's prohibition on the sale of contraceptives, stating that, "where a decision as fundamental as that of whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."[153] The Court found none of the interests advanced to be sufficiently compelling.[154]

Involuntary sterilization is a form of nonconsensual contraception.[155] Sterilization statutes should therefore be subject to strict scrutiny analysis under the *Carey* standard.[156] As this Note will

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147 431 U.S. 678 (1977) (ruling that legislation impacting decision to "bear and beget a child" is subject to strict scrutiny review).

148 WILLIAM B. LOCKHART, ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS 455 (6th ed. 1986).

149 431 U.S. 678 (1977).

150 N.Y. EDUC. LAW § 6811(8) (McKinney 1972).

151 The statute at issue made it a misdemeanor for any person to sell or distribute contraceptives to a minor under sixteen years old. The statute also restricted the distribution of contraceptives to licensed pharmacists for persons of any age. *Carey*, 431 U.S. at 681 n.1.

152 *Carey*, 431 U.S. at 685

> (The decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy, a right first explicitly recognized in an opinion holding unconstitutional a statute prohibiting the use of contraceptives, Griswold v. Conneticut . . . [I]n a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive (citations omitted)).

153 *Carey*, 431 U.S. at 686.

154 While noting that state interests such as "maintaining medical standards," "protecting health," and "protecting potential life" would qualify as "compelling," 431 U.S. at 689-90, the Court felt that none of these interests were furthered by the New York statute.

155 *See* Bernard M. Dickens, *Retardation and Sterilization*, 5 INT'L J. L. & PSYCHIATRY 295, 297 (1982).

156 The test used in *Carey* was originally announced in Roe v. Wade, 410 U.S. 113, 155-56 (1973) ("[W]here certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." (citations omitted)).

show, an application of the *Carey* test to both the Maine Due Process in Sterilization Act and the Mississippi Sexual Sterilization Act indicates that enabling and disabling presumptions in law affect the constitutional validity of legislation that touches the reproductive privacy rights of the developmentally disabled.

a. *Constitutional Case Study: The Mississippi Statute*

The primary interest underlying Mississippi's sterilization statute is the prevention of hereditary disability among the state's citizens.[157] This interest is linked to the presumptory conclusion that mental disability obeys some vaguely defined "law of heredity," and implies that the state may sterilize those whose genetic contributions to the public weal are likely to be deficient. The rationale for this statute is thus explicitly eugenic, and its operative paradigm is disabling.[158] Moreover, an application of the *Carey* test to the Mississippi law indicates that it infringes upon the liberty interests of developmentally disabled persons in violation of the Due Process Clause.

This infringement occurs because the state's interest fails to be compelling and the means used to fulfill that interest fail to be narrowly tailored. In comparison to interests deemed compelling, such as maintaining medical standards or protecting potential life,[159] a state's interest in the genetic quality of its citizens seems deficient. Moreover, there is a lack of hard evidence suggesting that mentally disabled parents are significantly more likely to produce mentally disabled offspring than are normal parents.[160] In fact, studies indicate that it is more likely that a normal parent will produce disabled offspring than a developmentally disabled parent per se.[161]

In addition, if the Mississippi statute implicitly supports the interest of the state in insuring the genetic quality of its citizens, it is difficult to characterize the statute as a "narrowly tailored" means to achieve that end. As written, the Mississippi statute is both underin-

157 The purpose of the statute is to allow the involuntary sterilization of persons "afflicted with hereditary forms of insanity that are recurrent, idiocy, imbecility, or feeble-mindedness." MISS. CODE ANN. § 41-45-1 (1972).

158 For the connection between disabling presumptions and eugenic sterilization statutes, see *supra* notes 36-41 and accompanying text.

159 Carey v. Population Servs. Int'l, 431 U.S. 678, 690 (1977).

160 *See* Dunn, *supra* note 24, at 286-87.

161 *See Eugenic Sterilization*, *in* THE MENTALLY DISABLED AND THE LAW 212 (Samuel J. Brakel et al. eds., rev. ed. 1971).

clusive[162] and overinclusive.[163] It is underinclusive, because if the state wishes to curtail hereditary afflictions,[164] it should sterilize all persons having identifiable hereditary afflictions, including alcoholism and myopia. It is overinclusive because the broad rubric of developmental disabilities, many of them environmental in origin,[165] forces the state either to determine whether the particular form of retardation at issue is genetically transmissible or to risk sterilizing a mentally disabled person whose affliction is non-hereditary.

b. *Constitutional Counterpoint: The Maine Statute*

The primary purpose underlying Maine's sterilization act is to ensure the well-being of its mentally disabled citizens through equal access to "desired medical procedures."[166] Statutes premised upon the "best interests" of the retarded person, while capable of abuse, are more likely to support enabling assumptions about the reproductive privacy rights of the developmentally disabled.[167] Furthermore, such statutes are more likely to withstand the constitutional analysis outlined in *Carey*. Whereas eugenic statutes place greater value on a disability-free society than on a mentally disabled person's right to "bear and beget" a child, "best interests" statutes generally stress reproductive choice.[168] Thus, Maine's Due Process in Sterilization Act of 1982[169] states in its preamble:

> [S]terilization procedures are generally irreversible and represent potentially permanent and bigbly significant consequences for the patient involved. The Legislature recognizes that certain legal safeguards are necessary to prevent indiscriminate and unnecessary sterilization and to assure equal access to desired medical procedures for all Maine citizens.[170]

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162 A statute is underinclusive when a classification drawn by the statute fails to include within its boundries all persons who may cause the harm that the statute seeks to address. *See* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

163 A statute is overinclusive if it draws a classification that contains persons who are not causing the harm it seeks to avoid. *Id.*

164 *See supra* note 157 and accompanying text.

165 *See* Ross, *supra* note 3, at 613.

166 ME. REV. STAT. ANN. tit. 34-B, § 7002 (West 1988).

167 In fact, best interests standards for authorizing involuntary sterilization are commonly justified as the state's constructive use of the retarded person's ability to consent, which they cannot exercize due to their disability. It has been argued that such statutes are necessary in order to guaranty the retarded person's ability to choose sterilization. Carla I. Struble, Note, *Protection of the Mentally Retarded Individual's Right to Choose Sterilization: the Effect of the Clear and Convincing Evidence Standard*, 12 CAP. U. L. REV. 413, 418 (1983).

168 *See* Denise Lachance, *In re* Grady: *The Mentally Retarded Individual's Right to Choose Sterilization*, 6 AM. J. L. & MED. 559, 572 (1981).

169 ME. REV. STAT. ANN. tit. 34-B, §§ 7001-17 (West 1988).

170 *Id.* § 7002.

The Maine statute is conceived, not as a way to protect society's interest in genetic purity, but as an opportunity to impose important safeguards on a dangerous medical procedure.[171] The orientation of Maine's statute significantly differs from that of the Mississippi Sexual Sterilization Act. Maine's statute provides "equal access to medical procedures" for the mentally disabled by enabling others to make the sterilization decision on their behalf in certain specified instances.[172] In short, the Maine statute is a clear reflection of the policies of normalization and is cast squarely within the enabling paradigm.[173]

Significantly, the very qualities that characterize the Due Process in Sterilization Act as an "enabling" statute also cause it to be amenable to a constitutional analysis under the *Carey* test. The "compelling state interest" standard is arguably met by the need for legislatures to provide guidance in the administration of a politically sensitive medical procedure that would otherwise be left to the discretion of state courts.[174] Doctors, fearful of potential tort liability, generally refuse to sterilize mentally disabled patients without the approval of a legal authority.[175] In the absence of legislation, courts generally refuse jurisdiction[176] or hear the case and apply their own version of a best interests test.[177] These common law tests often provide negligible protection for the disabled person's privacy, and may ignore the potential health risks of the operation altogether.[178]

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171 Sheila M. Donahue, Note, In re Debra B.: *The Best Interest Standard in Court-Authorized Sterilization of the Mentally Retarded*, 39 ME. L. REV. 209, 210-11 (1987).

172 ME. REV. STAT. ANN. tit. 34-B, §§ 7010-7013 (West 1988).

173 Recall that the normalization principle urges that retarded people be treated as much as possible like other people. Roos, *supra* note 3, at 614. The Maine statute furthers this goal by attempting to extend equal access to medical procedures to retarded persons.

174 *See* Burnett, *supra* note 13, at 928.

175 *See* Munro, *supra* note 110, at 211.

176 *See, e.g.*, Frazier v. Levi, 440 S.W.2d 393 (Tex. 1969) (sterilization decision does not fall within general jurisdiction of the court); *In re* D.D., 394 N.Y.S.2d 139, 140 (1977) (noting that restrictions on right to bear children must meet "compelling state interest" test and stating: "[t]he sounder view . . . is that in the absence of specific statutory authority, the courts lack jurisdiction to make this fundamental and irreversible decision").

177 *See, e.g., In re* Grady, 426 A.2d 467, 475 (N.J. 1981) (noting the potential for abuse but stating that "[s]ince the sterilization decision involves a variety of factors well suited to rational development in judicial proceedings, a court can take cognizance of these factors and reach a fair decision of what is the incompetent's best interest."); *In re* Sallmaier, 378 N.Y.S.2d 989, 991 (1976) (finding jurisdiction over the sterilization decision arising from "the common-law jurisdiction of the Supreme Court to act as *parens patriae* with respect to incompetents").

178 *See, e.g.*, Stump v. Sparkman, 435 U.S. 349 (1978) (holding state judge immune from § 1983 suit brought by woman he had ordered sterilized; the judge had ordered the sterilization at the request of the woman's mother without a hearing, notice to the woman, or appointment of a guardian ad litem).

Given these undesirable results, the state could certainly claim a compelling interest in safeguarding the lives and well-being of mentally disabled persons by imposing uniformly rigorous standards for sterilization.

Similarly, the Maine statute is narrowly tailored to enable the developmentally disabled to be sterilized without their consent only when health reasons necessitate such an operation. Procedural protections built into the statute make informed consent a prerequisite to any sterilization;[179] in its absence, two hearings are required. The first hearing determines whether the subject is capable of informed consent; if so, the operation will be authorized if consent is given.[180] If the subject is found incapable of informed consent, a second hearing is held to determine whether sterilization is in her best interests.[181] For sterilization to be authorized, it must be shown by clear and convincing evidence that: I) less drastic methods of contraception have proven to be unworkable,[182] and 2) sterilization is necessary to preserve the physical and mental health of the person.[183] The relationship between the means and ends of the statute is tight, as only those who need the sterilization procedure for health reasons are subject to the statute.

C. The Persistence of the Disabling Paradigm and the Failure of Fundamental Rights

Although legislative activity has increased the visibility of the enabling paradigm, it is doubtful that the now largely conservative Supreme Court[184] will overrule *Buck v. Bell*.[185] In fact, a string of cases since *Carey*, which deal with the rights of developmentally disabled persons, have indicated that the Court's primary policy in this area is one of non-intervention.[186]

In *Youngberg v. Romeo*,[187] the Court considered the constitutional due process rights of involuntarily committed mentally disabled persons for the first time.[188] The respondent was a

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179 ME. REV. STAT. ANN. tit. 34-B, § 7004.(1) (West 1988).

180 *Id.* § 7008.

181 *Id.* § 7013.

182 *Id.*

183 *Id.*

184 Linda Greenhouse, *Court Serves Notice of Its Transformation*, N.Y. TIMES, Feb. 2, 1992 at E3.

185 274 U.S. 200 (1927). For discussion, see *supra* notes 87-105 and accompanying text.

186 *See* discussion *infra* notes 187-226 and accompanying text.

187 457 U.S. 307 (1982).

188 *Id.* at 314.

profoundly retarded man[189] who suffered injuries as a result of poor safety conditions at a state institution.[190] The respondent claimed constitutional rights to 1) safe conditions of confinement, 2) freedom from bodily restraint, and 3) minimally adequate habilitation.[191]

In reasoning that an involuntarily committed person's liberty interests "require the State to provide minimally adequate or reasonable training to ensure safety,"[192] the Court indicated in *dicta* that a considerably less protective due process test may apply to mentally disabled persons confined to state institutions:

> In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance "the liberty of the individual" and "the demands of an organized society" . . . the Constitution only requires that the courts make certain that professional judgment was in fact exercized.[193]

Thus, *Youngberg* develops a balancing test for the protection of due process rights of the developmentally disabled in state institutions that bears an uncomfortable resemblance to Mississippi's exhortation that sterilizations be performed when in the "best interests of society."[194] Under *Youngberg*, it could very well be that the "demands of organized society," if pressing enough to justify the neglectful treatment of disabled persons in state institutions, would justify "therapeutic" involuntary sterilization.[195] Ironically, if interpreted in this way, *Youngberg* curtails the due process protections available to those that need them most: institutionalized per-

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189 *Id.* at 309 ("Respondent . . . has the mental capacity of an 18-month-old child, with an I.Q. between 8 and 10.").

190 *Id.* at 310 ("The complaint alleged that 'during the period July, 1974 to the present, plaintiff has suffered injuries on at least sixty-three occasions.' ").

191 *Id.* at 315 ("[respondent] argues that he has a constitutionally protected liberty interest in safety, freedom of movement, and training within the institution.").

192 *Id.* at 319.

193 *Id.* at 320-21.

194 *See supra* notes 157-65 and accompanying text.

195 Admittedly, *Youngberg* concerned the institutionalized person's right to treatment, which is derived from due process protections of the "liberty" of the individual. 457 U.S. at 316; *see also* Linda V. Gallo, Note, Youngberg v. Romeo: *The Right to Treatment Dilemma and the Mentally Retarded*, 47 ALB. L. REV. 179, 187 (1982). Sterilization, although it certainly touches upon one's "right to be free from physical restraint," is generally thought to infringe upon the "penumbral" privacy rights of the individual, which have typically been afforded a higher level of protection. Arguably, however, a very close analogy exists between state interests implicated in *Youngberg* (fiscal and administrative necessity) and those at issue in sterilization cases. Moreover, the sterilization of an institutionalized person may be characterized as within the zone of deference to the decisions of health care professionals calculated in *Romeo*. *Cf.* Phyllis P. Dietz, Note, *The Constitutional Right to Treatment in Light of* Youngberg v. Romeo, 72 GEO. L.J. 1785, 1796 (1984).

sons who, under the complete supervision of the state, are most likely to suffer abuse at the state's hands.[196]

The Court's abridgement of the rights of the institutionalized disabled in *Youngberg* was continued in *Cleburne v. Cleburne Living Center, Inc.*,[197] where the Court dispensed with the possibility that the mentally disabled could qualify as a suspect or even "quasi-suspect" class.[198] In *Cleburne*, a Texas City Council denied a permit for the operation of a group home for the developmentally disabled.[199] The home was expected to house thirteen mentally disabled men and women who would be under the constant supervision of staff members.[200] The City Council denied the permit for the following reasons: (1) the negative attitude of adjacent property owners;[201] (2) concerns that residents would be subject to abuse from local high school students;[202] (3) the location of the living center on a "500 year flood plain";[203] and (4) the size of the home and number of prospective residents.[204]

The Court found that the city's refusal to grant a permit violated the Equal Protection Clause because "the record [did] not reveal any rational basis for believing that the . . . home would pose any special threat to the city's legitimate interests."[205] The real significance of *Cleburne*, however, was revealed in *dicta*, where Justice White stated:

> [W]e conclude . . . that the Court of Appeals erred in holding mental retardation a quasi-suspect classification. . . . First, . . . those who are mentally retarded have a reduced ability to cope with and function in the everyday world. . . . They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one. . . . Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation.[206]

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196 *See* Barbara A. Weiner, *Rights of Institutionalized Persons*, *in* THE MENTALLY DISABLED AND THE LAW, *supra* note 6 at 251.

197 473 U.S. 432 (1985).

198 *See* Mark V. Wunder, Comment, *Equal Protection and the Mentally Retarded: A Denial of Quasi-Suspect Status in* City of Cleburne v. Cleburne Living Center, 72 IOWA L. REV. 241-42 (1986).

199 473 U.S. at 437.

200 *Id.* at 435.

201 *Id.* at 448.

202 *Id.* at 449.

203 *Id.*

204 *Id.*

205 *Id.* at 448.

206 *Id.* at 442-43.

The Court went on to distinguish the mentally disabled from other "discrete and insular" minorities, whose isolation from majoritarian legislatures has traditionally provided the justification for an interventionist response by the Court:[207]

> the distinctive legislative response, both national and state, to the plight of those who are mentally retarded demonstrates not only that they have unique problems, but also that the lawmakers have been addressing their difficulties in a manner that belies a continuing antipathy . . . and a corresponding need for more intrusive oversight by the judiciary.[208]

Thus the Court openly declared itself to be relatively hostile to an expansionist reading of fundamental rights for the developmentally disabled[209] and emphasized the disabled's "reduced ability to cope with the everyday world." This formed the basis for its finding that individuals with disabilities were "immutably different" and thus subject to being singled out by legislatures without heightened scrutiny.[210] In doing so, the Court closed its eyes to the history of alienation and abuse that defines much of the mentally disabled's experience.[211]

The majority's dismissive dicta has chilled the possibility of greater constitutional protections for the developmentally disabled.[212] *Cleburne* suggests that the Court will apply a "rational basis" test[213] to legislation that singles out the disabled for special treatment; *Youngberg* suggests that the rights of institutionalized mentally disabled persons will be subject to a substantive due process "balancing" test. Read together, the tests limit the circumstances under which a *Carey* strict scrutiny test will be applied to alleged violations of the disabled's privacy rights.

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207 "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938).

208 473 U.S. at 443.

209 *See* 473 U.S. at 446 ("[W]e will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate.").

210 *Id.* at 444.

211 *See* Brakel, *supra* note 6.

212 *See* 473 U.S. at 474 ("[T]he Court's as-applied remedy relegates future retarded applicants to the standardless discretion of low-level officials who have already shown an all too willing readiness to be captured by . . . 'vague, undifferentiated fears . . . .' "). (Marshall, J., dissenting).

213 *But see* TRIBE, *supra* note 133, at 1444 (suggesting that the Court in *Cleburne* applied a hybrid scrutiny test somewhat more protective than the traditional rational basis test).

In addition, the Court's decision in *Bowers v. Hardwick*,[214] which held that private consensual homosexual sodomy is unprotected under the *Skinner-Griswold-Eisenstadt-Carey* line of cases,[215] presents yet another limitation on reproductive privacy rights for the disabled. In *Bowers*, the Court narrowed its reading of fundamental rights either to those that "are 'implicit in the concept of ordered liberty,' " such that "neither liberty nor justice would exist if [they] were sacrificed,"[216] or to those that are " 'deeply rooted in this Nation's history and tradition.' "[217]

The history of involuntary sterilization[218] indicates that the notion of reproductive freedom for the developmentally disabled is anything but "deeply rooted" in the nation's history. As Justice Holmes' opinion in *Buck*[219] indicates, many have felt that justice demands the sterilization of the disabled so that the state may be stronger, just as the state may demand the sacrifice of its "best citizens" in times of war.[220] The increasingly conservative Court is reluctant to expand its former role as protector of the disenfranchised.[221] Consequently, the Court has implicitly denied the mentally disabled rigorous constitutional protections on the state's power to regulate their reproductive capabilities.

The implications of this development for a widespread adoption of the enabling paradigm in sterilization laws are disheartening. The Court's retrenchment has ensured the continuing viability of the disabling paradigm as the normative measure for laws affecting the mentally disabled's reproductive privacy. According to *Cleburne*, the disabled are "immutably different," and legislation singling them out is thus afforded a presumption of validity.[222] In *Youngberg*, the state's interest in administrative convenience outweighs the disabled's right to be free from unnecessary restraints.[223] Neither decision addresses the situation in which the state singles out developmentally disabled persons for sterilization.

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214 478 U.S. 186 (1986).

215 *Id.* at 190-91.

216 *Id.* at 191-92.

217 *Id.*

218 *See supra* notes 72-85 and accompanying text.

219 274 U.S. 200 (1927).

220 *Id.* at 207.

221 In fact, the Court currently exhibits an active desire to shrink this role. *See* Greenhouse, *supra* note 184, at E3 (discussing Presley v. Etowah County, 112 S. Ct. 820 (1992)).

222 Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985).

223 Youngberg v. Romeo, 457 U.S. 307, 322 (1982) ("By . . . limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized.").

Sterilization statutes should pass the *Carey* test because they are state actions affecting the decision to reproduce. Equally clear, however, is the Court's consensus that special laws addressed to the disabled are acceptable.[224] The implication is that a strict scrutiny test may not be applicable to sterilization statutes addressed solely to the disabled.

In previous sections of this Note, the advantage of enabling assumptions has been discussed.[225] The problem is that the notion of a constitutionally protected right of reproductive privacy for the developmentally disabled lacks solid grounding. The right of reproductive privacy is crucial to the widespread implementation of enabling assumptions in sterilization laws. The limitations of the Supreme Court decisions discussed above provide a shaky foundation for fostering reproductive privacy rights, especially for a group that historically has had none. However, Justice White was quite correct in *Cleburne* when he emphasized the growing role that remedial legislation has played in shaping the rights of the mentally disabled.[226] The remainder of this Note focuses on Title II of the Americans with Disabilities Act of 1990 and its impact upon state-sanctioned sterilizations of the disabled.

III

THE AMERICANS WITH DISABILITIES ACT OF 1990: A FEDERAL MANDATE FOR THE ENABLING PARADIGM?

> Although our dignity and confidence make us strive to be independent and invulnerable, compassion and reality require us to recognize the vulnerability that social structures often exacerbate. The task is thus truly a Herculean one. While it may be too much to ask of any law, the ADA by its ambition, invites the question: does it meet the challenge?[227]

The newly enacted Americans with Disabilities Act[228] (ADA) arguably addresses the decision to sterilize involuntarily a developmentally disabled person.

Policies of normalization, which seek to alleviate the impact of disabilities by bringing disabled persons into the social mainstream, provide the basis for enabling legislation. Statutes based upon enabling assumptions will seek to maximize autonomy in order to en-

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224 *Cleburne*, 473 U.S. at 444.

225 *See supra* notes 184-223 and accompanying text.

226 473 U.S. at 443.

227 Wendy E. Parmet, *Discrimination and Disability: The Challenges of the ADA*, 18 L. MED. & HEALTH CARE 331, 334 (1990).

228 42 U.S.C.A. §§ 12101-12213 (West Supp. 1992).

courage integration. These goals are at the core of the ADA, a statute primarily intended to foster independence by eradicating disabling stereotypes.[229]

The ADA prohibits discrimination in employment,[230] public services,[231] and public accommodations.[232] When sterilization proceedings originate with the state, they may be characterized as "public services," and thus may come within the purview of the statute.

A. The ADA as a Guide to Policy Implementation

The ADA is an equal opportunity statute; one of its goals is to set the disabled on equal footing in the eyes of the administrative state.[233] Thus all programs, activities, and services "provided or made available by State and local governments" may not discriminate on the basis of disability.[234] At least one commentator on the ADA has suggested that its anti-discrimination provisions will be given a narrow reading by the courts.[235] Evidence, however, suggests that key anti-discrimination provisions should be interpreted as they were written: broadly. One need only examine the Findings and Purposes section of the Act[236] and the relevant legislative history,[237] as well as the recently promulgated Department of Justice regulations,[238] support such a conclusion. For example, the Congressional Findings and Purposes indicate that:

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229 Parmet, *supra* note 227, at 340.

230 42 U.S.C.A. § 12111 (West Supp. 1992).

231 *Id.* § 12132.

232 *Id.* § 12181.

233 The Congressional Findings and Purposes section of the ADA states:

> Individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C.A. § 12101 (West Supp. 1992).

234 28 C.F.R. § 35.102 (1991).

235 *See* Parmet, *supra* note 227, at 338.

236 42 U.S.C.A. § 12101 (West Supp. 1992).

237 Concluding its report on the need for comprehensive legislation protecting the rights of the disabled, the House Committee on Education and Labor states:

> there is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of Americian life . . . there is a need to provide clear, strong, consistent, enforceable standards addressing discrimination . . . .

H.R. REP. No. 485, 101st Cong., 2d Sess., pt. 2, at 50 (1989).

238 *See* 28 C.F.R. pt. 35 (1992) (implementing Title II of the Act).

> the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independant living, and economic self-sufficiency for such individuals . . . . .[239]

Thus the opening provisions of the ADA adopt the enabling paradigm. The Findings echo the principles of normalization and integration upon which the Act is premised. Although they do not have the force of law, congressional findings nevertheless have the potential to direct policy in the courts.[240] These findings enable courts to make principled enabling decisions in sterilization cases.

B. Sterilization as Discrimination under Title II of the ADA

One of the most potentially far reaching provisions of the ADA is Title II, which prohibits discrimination in the administration of public services by state and local governments.[241] The Title II prohibition states that:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.[242]

This section covers "public entities"—defined as any state or local government or instrumentality thereof.[243] This section also protects "qualified individual[s] with disabilit[ies],"[244] who are defined as "individual[s] . . . with disabilit[ies] who, with or without reasonable modifications to rules, policies, or practices . . . meet[] the essential eligibility requirements for the receipt of services . . . provided by a public entity."[245]

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239 42 U.S.C.A. § 12101 (West Supp. 1992).

240 *See* Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 436-37 (1991).

241 42 U.S.C.A. § 12132 (West Supp. 1992). For an overview of this provision, see Burgdorf, *supra* note 241, at 464-70.

242 42 U.S.C.A. § 12132 (West Supp. 1992).

243 The relevant portion of the Act reads:

> DEFINITION
> as used in this subchapter:
> (1) PUBLIC ENTITY.—The term "public entity" means—
> (A) any State or local government;
> (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government.

42 U.S.C.A. § 1231 (West Supp. 1992).

244 42 U.S.C.A. § 12132 (West Supp. 1992).

245 The relevant portion of the Act reads:

> (2) QUALIFIED INDIVIDUAL WITH A DISABILITY.—The term "qualified individual with a disability" means an individual with a disabilty who, with or without reasonable modifications to rules, policies, or

An examination of the Act raises the question of whether state-mandated involuntary sterilization could qualify as an act of discrimination under Title II. The legislative history of the Act and its implementing regulations suggest that it does. The House Committee on Education and Labor's report on the ADA explicitly mentions involuntary sterilization as an area of continuing discrimination: "[discrimination] persists in such critical areas as education, employment, institutionalization, medical treatment, involuntary sterilization, architectural barriers and transportation."[246]

In addition, the House Committee's report sets forth a few clear examples of discrimination, which include the refusal of a New Jersey zoo keeper to admit children with Down's Syndrome because he "feared they would upset the chimpanzees,"[247] and the exclusion of an academically competitive cerebral palsied child from public school because "his teacher claimed his physical appearance 'produced a nauseating effect' on his classmates."[248] The crucial elements of discrimination in these examples involve differentiation made solely on the basis of disability without adequate justification. The disabled are thereby dehumanized, as their desires and needs are sacrificed either to satisfy society's intangible aesthetic needs or to placate its irrational fears.

Any action by a public entity that creates an unnecessary or unjustified distinction between disabled persons and others on the basis of disability which thereby denies the disabled the opportunity to receive equal treatment in the provision of services should constitute discrimination under Title II.[249] The inquiry should address

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practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Id. § 12131.

246 H.R. REP. No. 487, *supra* note 237, at 31 (quoting U.S. Commission on Civil Rights, *Accomodating the Spectrum of Individual Abilities*).

247 *Id.* at 30.

248 *Id.*

249 *See* H.R. REP. No. 487, *supra* note 237, at 29-30

(Discrimination against people with disabilities includes segregation, exclusion, or other denial of benefits, services or opportunities to people with disabilities that are as effective and meaningful as those provided to others . . . [it] also includes adverse actions taken against those regarded by others as having a disability . . . [s]uch discrimination often results from false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies.);

see also Martha T. McCluskey, Note, *Rethinking Equality and Difference: Disability Discrimination in Public Transportation*, 97 YALE L.J. 863, 878-79 (1988)

(Disability discrimination doctrine should confront the prejudice that makes the "differences" related to disability seem like abnormal, separate problems that are necessarily disadvantageous. Instead of approving special, segregated services, courts and policymakers should follow the dis-

the relation between the decision to differentiate and the actual capabilities of the disabled person.[250]

Under the above analysis, involuntary eugenic sterilization statutes, such as Mississippi's,[251] fall within this proposed statutory definition of discrimination. By allowing the decisionmaker to single out the mentally disabled on the premise that they are "by the laws of heredity . . . the probable potential parent of socially inadequate offspring,"[252] the Mississippi statute allows invidious stereotypes and overbroad generalizations to enter into the sterilization decision. When a legislature authorizes sterilization because it is in society's best interests to minimize the possibility of "socially inadequate" citizens, the situation is fundamentally the same as a school board's decision to deny a cerebral palsied child an education because it is in the "best interests" of the student body not to be distracted by the "nauseating" disabilities of others. In both cases, the decision to differentiate is made solely on the basis of society's reaction to the disability, without regard to the capabilities of the persons being differentiated.[253]

The Department of Justice regulations that implement the Act suggest that involuntary sterilization is within the regulatory ambit of Title II. The regulations provide:

> A public entity, in providing any aid, benefit, or service, may not directly or through contractual, licensing, or other arrangements, on the basis of disability . . . [p]rovide different or seperate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with . . . services that are as effective as those provided to others.[254]

State-mandated sterilization of the disabled is discriminatory to the extent that it represents a "different or seperate service" from that available to persons who are not disabled, unless it is needed to provide the disabled with a service that is as effective as that provided others. Eugenic sterilization statutes, which are explicitly aimed at eradicating genetically transmissible mental disabilities, always pro-

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parate impact model, which generally requires that unjustified policies with harmful effects be changed as a whole, rather than remedied through separate policies targeted at the adversely affected groups.).

250 *See* 28 C.F.R. pt. 35, app. A, Preamble to Regulation on the Basis of Disability in State and Local Government Service, 440 (1992) ("The starting point is to question whether the seperate program is in fact necessary or appropriate for the individual.").

251 MISS. CODE ANN. §§ 41-45-1-41, 45-19, discussed *supra* notes 157-65 and accompanying text.

252 *Id.* § 41-45-9.

253 *See* H.R. REP. NO. 485, *supra* note 237, at 30.

254 28 C.F.R. § 35.130(b)(1)(iv) (1992).

vide a "different" service without regard to the effectiveness of state-sponsored sterilizations provided to others. In this manner, eugenic sterilization statutes are always discriminatory under these regulations. The only limiting factor on this provision operates when sterilization is part of a state-run or state-funded program available to all citizens.

For example, if Maine sponsored a planned parenthood program enabling eligible participants to obtain state-funded sterilizations at a public hospital, the standards by which the sterilizations were administered would have to comply with the above provision. Under the Maine sterilization act, all citizens must first give informed consent before being sterilized.[255] Persons whose ability to consent is questionable, which in most cases will be persons who fall under the ADA's definition of mentally disabled, are required to undergo a special hearing to determine their ability to consent;[256] they are thereby provided with a "different service" under the above regulations. This service, however, is permissible because it is intended to identify those mentally disabled persons who are capable of informed consent so that they may obtain a sterilization if they so desire. Those mentally disabled persons capable of informed consent are "qualified" persons whose ability to consent enables them to benefit from sterilization procedures on equal footing with the general population.

The Preamble to the Department of Justice Regulations offers further insight into the scope of those duties imposed on public entities by the above provision:

> [T]hese provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others . . . . [P]ublic entities are required to ensure that their actions are based on facts applicable to individuals and not on presumptions as to what a class of individuals with disabilities can or cannot do.[257]

The Preamble goes on to indicate what kind of "facts applicable to individuals" are relevant. They specify:

> The determination [to deny equal participation] . . . must be based on an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, and severity of the [health or safety] risk [of allowing equal participa-

255 ME. REV. STAT. ANN. tit. 34-B, § 7004. For discussion, see *supra* notes 166-83 and accompanying text.

256 *Id.*

257 28 C.F.R. pt. 35, app. A, Preamble to Regulation on the Basis of Disability in State and Local Government Service, 439 (1992).

> tion]; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk.[258]

These regulations, transposed into the context of state-mandated involuntary sterilizations, suggest that such procedures may be acceptable if guided by an "individualized assessment, based on reasonable judgment that relies on the best available evidence" that the failure to sterilize would pose a health risk on a person otherwise incapable of giving consent. This standard is reminiscent of that underlying the Maine Due Process in Sterilization Act,[259] which requires a judicial proceeding to determine by clear and convincing evidence that sterilization is "necessary to preserve the physical and mental health" of the non-consenting disabled person.[260]

The determinations required under both statutes are similar because their underlying assumptions are those of the enabling paradigm. They both seek to maximize the autonomy and self-reliance of disabled persons by shifting the balance between their "right to be free from interference" and society's interest in limiting the impact of their disabilities. By adopting principles of normalization, these statutes alter the legal conception of disability in order to remove its social stigma. One hopes that, if the social experiment envisioned by such legislation succeeds, the co-existence of disabling and enabling paradigms will be a mere resting place in the evolution of a more holistic legal approach to disability.

CONCLUSION

Conflicting paradigms of what it means to be disabled—and the proper measures that society should take concerning those with disabilities—have created conflicting legal conceptions of disability. In many cases, the law assumes that the mentally disabled are incapable of self-direction, and in these circumstances the law enables others to act in their behalf. This side of the law is evident in statutes authorizing the non-consensual sterilization of mentally disabled persons. Alternatively, the law seeks to create a sense of independence and a certain amount of self-sufficiency on the part of the disabled through statutes that create rights—in the hope that, by increasing the legal strength of the disabled, such statutes will ultimately alter social expectations and alleviate the impact of disability on one's potential for a normal life.

Sterilization represents an area of the law that fluctuates between competing interests. Because the decision to sterilize is im-

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258 *Id.* at 436.
259 ME. REV. STAT. ANN. tit. 34-B, §§ 7001-7017.
260 *Id.* § 7013.

portant, not only in the personal life of the disabled person but also as a symbol of the law's fundamental stance towards disability, it well serves to underscore a basic point: the legal paradigm of disability is changing. Whether this change will have its desired effect of increasing independence and self-sufficiency among the disabled remains to be seen.

James C. Dugan†

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