

# STERILIZATION ABUSE: CURRENT STATE OF THE LAW AND REMEDIES FOR ABUSE

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The sterilization<sup>1</sup> of both women and men has become a controversial subject involving a variety of legal issues. Sterilization is an emotional issue as it involves decisions regarding reproductive choice and particularly because the operation is irreversible.<sup>2</sup> The legal issues related to sterilization are of utmost importance to women as a disproportionate number of sterilizations are performed on women—particularly low-income, minority, and non-English speaking women.<sup>3</sup> Additionally, the instances of sterilization abuse or coerced sterilizations have usually involved only women. Sterilization for birth control purposes is a major issue in the volatile area of “reproductive freedom”—an area that also includes issues of federal funding of abortion and alternative birth control methods.<sup>4</sup>

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1. Sterilization is defined as a procedure by which a human or other animal is made incapable of reproduction. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2238 (1976). Surgical sterilization involves surgery to remove or block parts of the tubes which carry either the ovum or the sperm. For men this procedure is called a vasectomy; there are a variety of sterilization procedures for women, the most common is called tubal ligation. For a description of the four types of tubal ligation, see U.S. DEP'T OF HEW, INFORMATION FOR WOMEN, YOUR STERILIZATION OPERATION 3-5 (1978) [hereinafter cited as HEW PAMPHLET]. This paper does not address eugenic sterilization, performed on criminals and the mentally incompetent in the past.

2. “Sterilization must be considered permanent. For nearly all women, once this operation has been done, it can never be undone. Some doctors try to undo a sterilization by rejoining the tubes. This is a difficult and expensive operation and it doesn't work very often.” HEW PAMPHLET, *supra* note 1, at 2.

3. While vasectomies are an important form of contraception among white middle-class and upper-middle-class men, sterilizations in the United States, especially among low-income and minority groups are performed more frequently on women—especially if hysterectomies are included. Petchesky, *Reproduction, Ethics, and Public Policy: The Federal Sterilization Regulations*, HASTINGS CENTER REP. 29, at 29-31, Oct. 1979. According to 1971 figures from the Association for Voluntary Sterilization, Inc. (AVS), tubal ligations represented only 20% of all sterilizations, while 80% were vasectomies. The proportions in 1977 were 40% male and 60% female. *Id.* at 30. See also Westhoff & McCarthy, *Sterilization in the United States*, FAM. PLAN. PERSPECTIVES, May/June 1979, 147, at 147-49.

4. The basic issue involved in reproductive freedom is a principle that has very old roots in the tradition of radical individual-

While sterilization can be a relatively safe, reliable, and economical form of birth control,<sup>5</sup> involuntary sterilization—or sterilization abuse<sup>6</sup>—is a serious moral, political, and legal problem.<sup>7</sup> This paper summarizes past and present instances of sterilization abuse, federal and state regulation of sterilization (including what is legally allowed and under what circumstances sterilization is funded by the government), and the remedies available for sterilization abuse.<sup>8</sup> It is hoped that this information will be

ism, but that has been particularly espoused by the contemporary women's liberation movement: the need to control one's own body, or 'bodily self-determination.' It is primarily this value, and not any 'right to procreate' per se, that forms the aim of reproductive freedom—the freedom to determine when, whether, and under what conditions one will or will not bear children. Along with intellectual development, control over one's own body is an essential aspect of personality development and hence of the means by which individuals live out their connections to social groups and social purposes.

Petchesky, *supra* note 3, at 29. See also Bolner & Jacobson, *Right to Procreate: The Dilemma of Overpopulation and U.S. Judiciary*, 25 LOYOLA L. REV. 235 (1979).

5. "Experience is showing that mini laparotomy (a new method of sterilization) in appropriately selected candidates is simple to perform and appears to carry a very low risk of major complications—even lower than the already low risks of other female sterilization procedures." AVS News, Jan. 1978, at 2, col. 1. (*quoting* Louise B. Tyrer, M.D., Medical Director of Planned Parenthood Federation of America).

The [laparotomy and mini laparotomy] operation, including the anesthesia, takes about 30 minutes. With a mini-laparotomy, [the patient] will probably stay in the hospital less than 24 hours, and be back to normal in two or three days. With a [regular] laparotomy, [the patient] will be in the hospital four days or more, and it may be two weeks before [she] will feel back to normal.

HEW PAMPHLET, *supra* note 1, at 4.

"Sterilizations have some risks, including a small risk of death. Most of the . . . serious problems can be treated and cured by the Dr. without further surgery; however, an operation may be necessary to correct some of the problems." *Id.* For a list of some of the medical problems a patient could have during or after a sterilization operation, see *id.*

6. Sterilization abuse occurs when a person is sterilized without her or his consent or when a person has been coerced or pressured into being sterilized. See text accompanying notes 27-29 *infra*.

7. See Comment, *A Woman's Right to Voluntary Sterilization*, 22 BUFFALO L. REV. 291 (1972). See notes 30-33 *infra* for statistics demonstrating that sterilization has been a problem for certain groups. See notes 62-64 *infra* for summary of studies which revealed instances of sterilization abuse.

8. This paper will touch upon other issues such as sterilization of the mentally incompetent, institutionalized and retarded; the disproportionate number of certain minority and ethnic groups which have undergone sterilizations, e.g., Chicanos; the minimum age requirements for sterilization; and the issue of informed consent as it specifically relates to sterilization.

a useful guide for attorneys confronted with a potential sterilization abuse case.

## I. STERILIZATION ISSUES

### A. HISTORY OF STERILIZATION

In *Jessin v. County of Shasta*,<sup>9</sup> a California court of appeal ruled that voluntary sterilization is legal when informed consent has been given, that sterilization is an acceptable method of family planning, and that sterilization may be a fundamental right requiring constitutional protection.<sup>10</sup>

Before the early 1970's, many hospitals and government entities disapproved of sterilization as a contraceptive choice.<sup>11</sup>

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This paper will not cover other controversial sterilization issues. For a discussion of wrongful birth claims resulting from unsuccessful sterilization operations, see Robertson, *Civil Liability Arising From "Wrongful Birth" Following an Unsuccessful Sterilization Operation*, 4 AM. J. L. MED. 131 (1978); Comment, *Wrongful Conception: Who Pays for Bringing Up Baby?*, 47 FORDHAM L. REV. 418 (1978); Comment, *Wrongful Conception as a Cause of Action and Damages Recoverable*, 44 MO. L. REV. 589 (1979); and Note, *Cause of Action Recognized for Wrongful Pregnancy—Measure of Damages to be Applied*, 25 WAYNE L. REV. 961 (1979). For a discussion of sterilization as a criminal sanction, see Note, *In re Moore: The Sound and the Fury and the Scalpel*, 8 N.C. CENT. L.J. 307 (1977); Note, *North Carolina Compulsory Sterilization Statute Held Constitutional Against Challenge That It Constituted an Unlawful Invasion of Privacy*, 8 TEX. TECH L. REV. 436 (1976). For a discussion of sterilization of employees due to work place conditions, see Proposed Cal. A.B. 290 (1979), sponsored by Maxine Waters, statement promoting bill (July 18, 1979) (on file at Golden Gate University Law Review Office). This bill would make it an unlawful employment practice for an employer to refuse to hire, transfer, dismiss, suspend, or demote an individual on the ground that such individual is not sterilized. See also [1979] 440 EMPL. SAFETY & HEALTH GUIDE (CCH) 1 (the Occupational Safety and Health Administration proposed a \$10,000 penalty against the American Cyanamid Co. for its policy of requiring women employees to be sterilized or lose their job).

9. 274 Cal. App. 2d 737, 79 Cal. Rptr. 359, (1969). In *Jessin*, a husband and wife who were county welfare recipients, filed a complaint seeking declaratory relief to determine whether the county had the right and duty to perform a vasectomy on the husband, who voluntarily consented to the operation for purposes of limiting the size of the family. The county had refused to provide such service on the belief that sterilization was unlawful due in part to a 1950 California Attorney General opinion, 15 OP. CAL. ATT'Y GEN. 100, 103 (1950), that had concluded sterilization violated public policy because of the state's social interest in the maintenance of the birth rate. The court rejected the Attorney General's opinion, finding that there was no legislative policy proscribing consensual vasectomy in California. *Jessin v. County of Shasta*, 274 Cal. App. 2d 737, 747-48, 79 Cal. Rptr. 359, 365-66.

10. *Jessin v. County of Shasta*, 274 Cal. App. 2d 737, 748, 79 Cal. Rptr. 359, 366 (1969).

11. See Comment, *Hathaway v. Worcester City Hospital—The Right to Be Sterilized*, 47 TEMP. L.Q. 403 (1974).

This was due in part to conservative attitudes toward birth control generally and toward sterilization in particular. Physicians feared malpractice suits even in jurisdictions with no statutes prohibiting voluntary sterilization.<sup>12</sup> Following the *Jessin* decision in 1969, which concluded that no legislative policy existed prohibiting sterilization, attitudes toward sterilization began to change.<sup>13</sup>

Physicians and hospitals often maintained nonmedical criteria in order to avoid performing sterilizations. Some institutions required that women be of a certain age, or have a certain number of children before sterilization would be performed.<sup>14</sup> "Age/parity" formulas were devised to guide physicians in deciding when sterilization was appropriate.<sup>15</sup> The formulas provided that sterilization would be permitted only when the woman's age, multiplied by the number of her living children, equaled a predetermined number. Additionally, women were encouraged to obtain multiple physician approval and a psychiatric consultation.<sup>16</sup>

California eliminated these and other restrictions in 1974.<sup>17</sup> A year earlier, the First Circuit held unconstitutional state-imposed restrictions on an individual's decision concerning birth control, including restrictions on sterilization.<sup>18</sup> The additional

12. See S. BESERRA & S. FRANKLIN, *SEX CODE OF CALIFORNIA* 16 (1977). The only remaining state statute prohibiting sterilization was interpreted not to apply to voluntary sterilization. *Parker v. Rampton*, 28 Utah 2d 36, 40, 497 P.2d 848, 850-51 (1972).

13. S. BESERRA & S. FRANKLIN, *supra* note 12, at 17.

14. See Comment, *A Woman's Right to Voluntary Sterilization*, 22 *BUFFALO L. REV.* 291, 296-97 (1972).

15. For an example of an "age/parity" formula, see AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, *MANUAL OF STANDARDS IN OBSTETRIC—GYNECOLOGIC PRACTICE* 57 (1970).

16. *Id.*

17. CAL. HEALTH & SAFETY CODE § 1258 (West 1979). Section 1258, enacted in 1974, prohibited the imposition of nonmedical qualifications for sterilizations performed in health facilities. In 1972, California Health and Safety Code §§ 1232, 1459 and 32128.10 eliminated the same restrictions in clinics, county hospitals, and hospitals established under local hospital district laws.

18. *Hathaway v. Worcester City Hosp.*, 475 F.2d 701, 707 (1st Cir. 1973) (an action challenging a city hospital policy barring use of facilities in connection with consensual sterilization). The court held that the city hospital's prohibition violated the federal equal protection clause where no other surgical procedures were prohibited outright, and other procedures of equal risk were permitted. See also *McCabe v. Nassau County Medical Center*, 453 F.2d 698 (2d Cir. 1971) (an action under 42 U.S.C. § 1983 (1976) against

restriction of spousal consent had been struck down in California in 1950;<sup>19</sup> recent cases in other jurisdictions supported this position.<sup>20</sup>

In the past few years the number of sterilizations has increased dramatically, both nationwide and in California.<sup>21</sup> Sterilization has become the most frequent form of contraception used worldwide, and second only to birth control pills in the United States.<sup>22</sup> Several reasons for the increase seem indicated: 1) public attitudes toward birth control have become less restrictive; 2) the operation itself has become safer and less complicated;<sup>23</sup> 3) sterilization information is more accessible to the public through physicians and public interest groups; 4) federal funding policies have become more liberal to the point of encouraging sterilization;<sup>24</sup> 5) some physicians view sterilization more favorably than other birth control methods (and this preference tends to influence patients' medical decisions);<sup>25</sup> and 6)

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the county medical center—the only public hospital in the community—for refusing sterilization of women who had less than five children).

19. In *Kritzer v. Citron*, 101 Cal. App. 2d 33, 38, 224 P.2d 808, 811 (1950), the court stated that consent of the patient alone is sufficient.

20. *Doe v. Temple*, 409 F. Supp. 899, 902 (E.D. Va. 1976); *Ponter v. Ponter*, 135 N.J. Super. 50, 55, 342 A.2d 574, 577 (1975); *Murray v. Vandevander*, 522 P.2d 302, 304 (1974).

In *Beck v. Lovell*, 361 So. 2d 245 (1978), the court stated:

Although our own jurisprudence has never considered the issue, other jurisdictions hold that absent an emergency, the relationship of husband and wife does not confer authority for one spouse to grant permission for surgery on another. We consider the rule reasonable and well founded. We adopt it as our own and apply it herein.

*Id.* at 250 (citation omitted). The United States Supreme Court adopted this position for abortions. *Planned Parenthood v. Danforth*, 428 U.S. 52, 67-71 (1976).

21. In the six-year period between 1970 and 1975, there was a 250% increase in the number of American women, aged 15 to 44, who chose sterilization. *STERILIZATION EPIDEMIOLOGY SECTION, FAMILY PLANNING EVALUATION DIV., CENTER FOR DISEASE CONTROL, TUBAL STERILIZATION IN U.S. HOSPITALS: 1970-1975*, at 12 (1978). For a summary of this study, see *AVS News*, June 1979, at 3, cols. 1-2.

22. *Petchesky*, *supra* note 3, at 30.

23. See *AVS News*, *supra* note 5, at 2, col. 1.

24. Title XIX of the Social Security Act provides matching funds for sterilization reimbursement. 42 U.S.C. §§ 1396(a)(13)(B), (C) (1974), 1397(a)(4)(c) (Supp. 1980). These provisions require state Medicaid plans to provide family planning services and supplies to individuals of child-bearing age who are eligible under state plans and who desire such services and supplies. Title XX of the Social Security Act authorizes grants to the states for social services including family planning services. *Id.* § 1397(a)(1) (Supp. 1980).

25. Silver, *Birth Control and the Private Physician*, *FAM. PLAN. PERSPECTIVE*, Apr.

sterilization operations and hysterectomies have represented a training ground for new physicians in large hospitals.<sup>26</sup>

## B. STERILIZATION ABUSE AND ITS VICTIMS

### *Instances of Abuse*

Although sterilization abuse of women has occurred in many forms, the issue is ultimately whether the patient has truly given informed consent to the operation.<sup>27</sup> The most common situations of sterilization abuse of a woman occurs when she is:

- (a) Sterilized without knowledge that the operation is irreversible;

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1972, 42, at 45.

26. In the past, physicians had to perform a specified number of operations as part of their training program. Sterilizations were considered relatively safe and reliable operations for young physicians. See B. ROSENFELD, S. WOLFE, & R. MCGARRAH, JR., A HEALTH RESEARCH GROUP STUDY ON SURGICAL STERILIZATION: PRESENT ABUSES AND REGULATIONS 1, 1-31 (1973) [hereinafter cited as STERILIZATION STUDY]. This study reported that at the Los Angeles County Hospital, University of Southern California, a resident told the new interns in 1973: "I want you to ask every one of the girls if they want their tubes tied, regardless of how old they are. Remember everyone you get to get her tubes tied mean two tubes . . . for some resident or intern . . ." *Id.* at 7.

27. "In sum, the patient's right of self-decision is the measure of the physician's duty to reveal. That right can be effectively exercised only if the patient possesses adequate information to enable an intelligent choice." *Cobbs v. Grant*, 8 Cal. 3d 229, 245, 502 P.2d 1, 12, 104 Cal. Rptr. 505, 515 (1972) (citing *Canterbury v. Spence*, 464 F.2d 772, 786 (D.C. Cir. 1972)).

According to 22 CAL. ADMIN. CODE § 51163(1) (1977), elective sterilization can be either of the following:

(A) Nontherapeutic . . . : Nontherapeutic sterilization means any treatment, procedure, or operation, the primary purpose of which is to render an otherwise fertile person permanently incapable of producing offspring, and which is neither of the following:

1. Medically or surgically indicated as an accompaniment of a surgical procedure on the genitourinary organs;
2. A necessary part of the treatment for an actual illness or injury. For the purpose of Section 51163, 51305.1 through 51305.7, mental or emotional illness is not considered an illness or injury.

(B) Therapeutic . . . : An elective procedure performed for prevention of future pregnancy which would be life-threatening to the mother because of existing illness or injury. An example is medically indicated sterilization in cases of severe heart disease, chronic hypertension or chronic renal disease.

This definition is also set out at 22 CAL. ADMIN. CODE § 70037.1(a)(1) for sterilizations performed in health facilities.

- (b) Sterilized without knowledge of all risks, benefits, and alternatives to the operation;
- (c) Sterilized because she has been threatened with denial of medical services or termination of welfare payments;
- (d) Sterilized by means of a hysterectomy when other less risky or costly methods are available;
- (e) Sterilized without comprehending the significance of the operation because she does not speak English and no information is provided in her own language;
- (f) Sterilized due to coercive pressures exerted by a physician imposing her or his own moral values on a patient.<sup>28</sup>

### *Victims of Sterilization*

The overall increase in surgical sterilization has taken place disproportionately by sex, race, class, and age. While vasectomies are an important form of contraception among white middle-class and upper middle-class men, sterilization among low-income and minority groups are performed more frequently on women.<sup>29</sup> Several studies made during the seventies have shown that sterilizations occurred in greater proportion in several groups of women: Blacks,<sup>30</sup> Puerto Ricans,<sup>31</sup> Chicanos,<sup>32</sup> and Native Americans.<sup>33</sup> A large number of those sterilized within these

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28. See generally COMMITTEE TO END STERILIZATION ABUSE, *STERILIZATION ABUSE: THE FACTS 2* (1976) (on file in Golden Gate University Law Review Office) [hereinafter cited as *STERILIZATION ABUSE*].

29. Petchesky, *supra* note 3, at 30.

30. One study found that 43% of women sterilized in 1973 under a federally financed family planning program were Black, although only 33% of the patient population were Black. OFFICE OF POPULATION RESEARCH, PRINCETON UNIVERSITY, *NATIONAL FERTILITY STUDY 5* (1975).

31. Thirty-five percent of the women of childbearing age in Puerto Rico have been sterilized, which is the highest rate of sterilization in the world. *STERILIZATION ABUSE, supra* note 28, at 4.

32. In the United States, 22% of the Chicanos between ages 15 and 44 have been sterilized, almost entirely through federally funded programs. *STERILIZATION ABUSE, supra* note 28, at 4. See also Hernandez, *Chicanas and The Issue of Involuntary Sterilization: Reforms Needed to Protect Informed Consent*, 3 *CHICANO L. REV.* 3 (1976).

33. One study found that 3,000 female sterilizations had been performed over a four-year period in federally funded Indian Health Service facilities using consent forms not in compliance with the federal regulations. Activities of the Indian Health Service,

groups are poor, uneducated, and non-English speaking.<sup>34</sup>

Inadequate alternative methods of birth control, lack of federal funding for abortions, and full insurance coverage for sterilization<sup>35</sup> (while excluding abortion or other methods of contraception) encourage sterilization. Thus, the social climate has created the impetus for sterilization of poor and minority women. This view was supported in *Relf v. Weinberger*,<sup>36</sup> in which Judge Gesell stated, "an indefinite number of poor people have been improperly coerced into accepting a sterilization operation under the threat that various federally supported welfare benefits would be withdrawn unless they submitted to irreversible sterilization. Patients receiving Medicaid assistance at childbirth are evidently the most frequent targets of this pressure . . ."<sup>37</sup> Many instances have come to light in which the woman's decision to be sterilized was not voluntary.<sup>38</sup> In *Stump v. Spark-*

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General Accounting Office, HRD-77-3 (1976). There were 13 sterilizations on women under the age of 21 after the HEW regulations moratorium was imposed, and far more prior to the date of the regulations. See note 46 *infra*. The 72-hour waiting period had not been observed in 13 cases. As of November 1975, none of the Indian Health Service facilities were in compliance with the regulations for informed consent. Furthermore, the monitoring of services and the informed consent process provided by contract physicians was inadequate. *Id.*

34. Petchesky, *supra* note 3, at 30.

35. For a summary of insurance coverage see Muller, *Insurance Coverage of Abortion, Contraception and Sterilization*, FAM. PLAN. PERSPECTIVE, Mar./Apr. 1978, 71, at 71-77.

36. *Relf v. Weinberger*, 372 F. Supp. 1196 (D.D.C. 1974), *on remand sub nom. Relf v. Mathews*, 403 F. Supp. 1235 (D.D.C. 1975), *vacated sub nom. Relf v. Weinberger* 565 F.2d 722 (D.C. Cir. 1977).

37. *Id.* at 1199.

38. See, e.g., *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978), *cert. denied*, 439 U.S. 910 (1978) (civil rights action was instituted by a deaf mute for an alleged conspiracy to sterilize her against her will. See text accompanying notes 94-96 and 107-12 *infra* for discussion of this case); *Beck v. Lovell*, 361 So. 2d 245, 253 (1978) (malpractice action brought by women against a physician who performed sterilization without her express or implied consent. Physician contended that he was led to believe that she wanted the operation following birth of her child, although no consent form was signed. The lower court finding of no physician liability was reversed due to lack of consent. Plaintiff was awarded \$25,000 in damages); *Cliett v. Hospital of Univ. of Pa.*, No. 3869 (Ct. Common Pleas, Phila. 1975) (where an indigent Black mother of three brought a state tort action against a physician and the hospital for performing a sterilization immediately after childbirth without her knowledge or consent. She underwent an operation to reverse the sterilization and became pregnant nearly two years later, while discovery procedures were taking place in this case. Settlement negotiations were then initiated). See also REPRODUCTIVE FREEDOM PROJECT, AMERICAN CIVIL LIBERTIES FOUNDATION, LEGAL DOCKET (1979) for a list of cases involving sterilization abuse.

*man*,<sup>39</sup> an Indiana state court judge, without a hearing or appointment of a guardian ad litem for the minor, authorized sterilization of a fifteen-year old woman upon petition by the woman's mother. The petition alleged that her daughter was minimally retarded, although she attended public schools and had been passed along with other children in her age level.<sup>40</sup> The young woman was not informed of the nature of the operation and married in 1973; two years later she learned that she had been sterilized. The plaintiff brought an action pursuant to 42 U.S.C. § 1983 alleging that the defendants—her mother, the attorney who drafted the petition to sterilize, the state court judge who approved the petition, the three doctors who performed or assisted in the sterilization, and the hospital where the surgery was performed—acted in “concert” to deprive her of her constitutional rights by sterilizing her without her knowledge or consent.<sup>41</sup> The United States Supreme Court held that, given jurisdiction over the matter, the judge was absolutely immune from liability.<sup>42</sup>

In *Harris v. Karam*,<sup>43</sup> two women initiated a class action suit against the county and county officials alleging that the county denied them maternity care and would pay only for sterilizations or abortions. Plaintiffs brought suit under 42 U.S.C. § 1983 alleging violation of a woman's right to due process of law, equal protection under the laws, the right to privacy, and her fundamental human right to procreate.<sup>44</sup> A consent judgment

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39. 435 U.S. 349 (1978).

40. *Id.* at 351-53.

41. *Id.* at 353. The statute provides:

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

42 U.S.C. § 1983 (1976).

42. 435 U.S. at 364. The Court did not decide “whether the district court correctly concluded that the federal claims against the other defendants were required to be dismissed if Judge Stump, the only state agent, was found to be absolutely immune.” *Id.* n.13. The Court remanded the case for consideration of the federal claims of the other defendants. *Id.* at 364.

43. No. CIV. 78-601 PHX VAC (D. Ariz. 1979).

44. *Id.*, Complaint at 2 (July 25, 1978).

was entered which declared unlawful the conditioning of other medical services on the birth control, sterilization, or abortion of applicants for indigent medical care.<sup>45</sup>

## II. STERILIZATION REGULATIONS

As a result of publicized instances of sterilization abuse and the lack of federal and state regulations covering sterilization operations, a number of political organizations and women's groups emerged whose main purpose was to publicize instances of sterilization abuse and lobby for new legislation.<sup>46</sup> The first

45. *Id.*, Consent Judgment at 1-2 (filed Aug. 24, 1979).

46. Prior to the 1970s, sterilizations were funded under a variety of HEW programs. However, the guidelines were not comprehensive and no regulations had been established specifically for sterilization. P. HOROWITZ, PROPOSED RESTRICTIONS APPLICABLE TO STERILIZATIONS FUNDED BY THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE 3 (1978) (position paper for ACLU).

In 1973, instances of sterilization abuse received nationwide publicity. In that year, two Black girls, age 12 and 14, were sterilized at a federally funded clinic in Alabama without the knowledge of the girls or their parents. *Relf v. Weinberger* 403 F. Supp. 1235 (D.D.C. 1975) *vacated sub nom. Relf v. Weinberger*, 565 F.2d 722 (D.C. Cir. 1977). The revelations about the Relf sisters marked the first public confirmation that federally funded sterilizations were being performed in coercive and abusive circumstances. A subsequent investigation revealed that the clinic involved had sterilized 11 young girls, 10 of whom were Black. HEW responded to these and other complaints about sterilization abuse in July 1973, by imposing a moratorium on federal funding of sterilizations of persons under 21, and those mentally incompetent or incapable of consent. 38 Fed. Reg. 20,930 (July 27, 1973, effective August 3, 1973). In September 1973, HEW began rulemaking proceedings which ultimately resulted in guidelines issued on February 6, 1974 and the moratorium was rescinded. 42 C.F.R. §§ 50.201-204 (1974); 45 C.F.R. § 205.35 (1974).

In March 1974, Judge Gesell held that the February 6, 1974 rules were inconsistent with statutory requirements of voluntariness insofar as they permitted sterilization of persons who could not give legally effective consent under state law; therefore, he permanently enjoined HEW from providing federal funds for the sterilization of such persons. *Relf v. Weinberger*, 372 F. Supp. 1196, 1201 (D.D.C. 1974).

In April 1974, HEW complied with the Relf order by adopting some interim measures guarding against sterilization abuse; the moratorium on sterilization of individuals under 21 or legally incapable of consent was reinstated. The policies also required that a consent form be signed by the patient and that the consent be obtained at least 72 hours prior to the sterilization. 42 C.F.R. § 50.203(c) (1974); 45 C.F.R. § 205.35(a)(1)(iii) (1974). This marked the first instance in which informed consent required a fixed waiting period.

The Relf holding was appealed in 1974 and the circuit court vacated the injunction entered against HEW, stating that HEW had the legal authority to define a federal standard of "voluntariness" and took note of HEW's intention to engage in rulemaking to devise that standard. The court found that the controversy had been mooted by HEW's withdrawal of the February 1974 regulations and by its promise to promulgate regulations. *Relf v. Weinberger*, 565 F.2d 722, 727 (D.C. Cir. 1977). The proposed regulations were finally published on December 13, 1977. 42 Fed. Reg. 62,718 (1977) (sterilizations in

sterilization guidelines established in 1974 in New York City<sup>47</sup> became the framework for regulations later enacted by HEW and California.

#### A. FEDERAL PROVISIONS

Federal regulations are intended to prevent the involuntary or indiscriminate sterilization of all people, primarily those groups especially vulnerable to sterilization abuse—women, minorities, minors, the poor, and the mentally disabled. This goal was to be balanced with HEW's policy of maintaining and supporting access to sterilization services.<sup>48</sup> The major provisions of the regulations<sup>49</sup> are:

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federally assisted family planning programs administered by the Public Health Service would be covered by 42 C.F.R. §§ 50.201-.210 (1979); sterilizations and hysterectomies reimbursable under Medicaid Programs (Title XIV of the Social Security Act) which are administered by the Health Care Financing Administration (HCFA) would be covered by 42 C.F.R. §§ 441.250-259 (1979)).

During 1978, extensive hearings were held in all of HEW's ten regions and numerous comments were received concerning the proposed regulations. The final regulations were published on November 8, 1978, to become effective February 6, 1979. 43 Fed. Reg. 52,165 (1978). The effective date was later changed to March 8, 1979. 44 Fed. Reg. 5,665 (1979).

For a discussion of sterilization of the mentally retarded, see Paul, *Sterilization of Mentally Retarded Persons: The Issues and Conflicts*, 3 FAM. PLAN. POPULATION REP. 96 (1974); Note, *Addressing the Consent Issue Involved in Sterilization of Mentally Incompetent Females*, 43 ALB. L. REV. 322 (1979); Comment, *Substantive Due Process—Compulsory Sterilization of the Mentally Deficient*, 23 N.Y.L.SCH.L. REV. 151 (1977); Comment, *Courts—Scope of Authority—Sterilization of Mental Incompetents*, 44 TENN. L. REV. 879 (1977).

47. 22 N.Y. City Admin. Code title C (1977) (often cited as N.Y. Municipal Health and Hospitals Corporation Regulations, Pub. L. No. 37 (1977)).

48. 43 Fed. Reg. 52, 147 (1977).

49. HEW adopted uniform requirements for Medicaid programs, for six social service programs administered by the Administration of Public Services of the Offices of Human Development Services, and for programs administered by the Public Health Service. Sections 441.250-259 (Chapter IV) of 42 C.F.R. (1978) are applicable for sterilizations paid under the Medicaid Program. (Title XIX of the Social Security Act, 42 U.S.C. § 1302 (1976)). Sections 50.201-.210 of 42 C.F.R. are applicable for sterilizations administered by the Public Health Service.

The sterilization regulations also cover sterilization programs administered by the Administration for Public Services (APS). The programs administered by APS are those under Titles I, IV-A, X, XIV, XVI(AABD) and XX of the Social Security Act. These six programs are subject to the same rules for sterilizations as in the Medicaid program, set forth in 42 C.F.R. §§ 441.250-.259 (1978). Rather than setting out a new rule for APS programs, the new Medicaid rule was incorporated by reference in the regulations for APS. The previous rule set forth in 45 C.F.R. § 205.35 was vacated. 43 Fed. Reg. 42,174 (1978).

1. Minors, mentally incompetents and institutionalized: Federal funding is prohibited for sterilizations to persons under twenty-one, mental incompetents and institutionalized.<sup>50</sup>

2. Consent form: Patient is required to sign a consent form indicating that the decision is voluntary and that the patient fully understands the nature of the procedure.<sup>51</sup>

3. Waiting period: Patient must wait thirty days after signing the consent form to have the operation except in instances of premature delivery or emergency abdominal surgery. In these emergency situations the patient is required to wait only seventy-two hours.<sup>52</sup>

4. Childbirth: Consent cannot be obtained while the patient is in labor or childbirth or seeking to obtain an abortion.<sup>53</sup>

5. Alcohol and other substances: Consent cannot be obtained while the patient is under the influence of alcohol or other substances that affect state of awareness.<sup>54</sup>

6. Hysterectomies: HEW will not subsidize hysterectomies as a form of birth control.<sup>55</sup>

7. Witness: Patient may bring a witness along to sign the consent form.<sup>56</sup>

8. Characteristics of informed consent:<sup>57</sup> a) Notice that a decision not to be sterilized will not have any effect on the patient receiving welfare or other benefits; b) Description of available methods of birth control; c) Advice that sterilization is irreversible; d) Thorough explanation of specific sterilization procedure to be performed; e) Interpreter to be provided if patient does not understand language of the consent form; f) Effective communication to the blind, deaf, or otherwise hand-

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50. 42 C.F.R. §§ 50.203(a),(b), .206, 441.253(a),(b), .254 (1978).

51. 42 C.F.R. §§ 50.205(a)-(c), 441.253(a)-(c) (1978).

52. 42 C.F.R. §§ 50.203(d), 441.253(d) (1978).

53. 42 C.F.R. §§ 50.204(e)(3), 441.253(3) (1978).

54. 42 C.F.R. §§ 50.207, 441.255 (1978).

55. 42 C.F.R. §§ 50.204(d), 441.257(a)(4) (1978).

56. 42 C.F.R. §§ 50.204(a)(1)-(4), (7)(b),(c), 441.257(a)(1)(i)-(iv), (2), (3) (1978).

57. 42 C.F.R. §§ 50.204, 441.257 (1978).

icapped.

### *Shortcomings of the Federal Regulations*

The federal regulations set forth guidelines for federally funded sterilization operations. There are no civil or criminal sanctions for failure to follow the regulations; they determine only whether the procedure is reimbursable. HEW reimburses states for ninety percent of state money spent for family planning services, including sterilization and most other birth control methods.<sup>58</sup> Although federally funded sterilizations probably constitute a relatively small proportion of all sterilizations performed in the United States,<sup>59</sup> it is likely that instances of sterilization abuse occur with greater frequency within this group.<sup>60</sup>

One of the primary concerns of women's groups and other public interest groups has been the limited enforcement action by HEW to insure compliance with the regulations. HEW's enforcement record has been criticized repeatedly both at public hearings and in many written comments received in response to the regulations.<sup>61</sup> The validity of this concern was confirmed by the results of several studies that revealed consistent violation of the regulations by the major metropolitan hospitals throughout the United States.<sup>62</sup> Over seventy percent of the hospitals in one

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58. 42 U.S.C. § 1397(a)(1) (1979).

59. As private physicians are not required to record non-federally funded sterilizations, no available statistics exist to support this contention.

60. Various reasons are often given for this statement; the reason most often state is that the people using federal funds for sterilization are more vulnerable because of their financial situation; they are often uneducated and non-English speaking; therefore, it is understandable that abuses might occur for these individuals who do not have a high level of understanding and can be more easily coerced by persons of apparent authority to do acts they normally might not do.

61. 43 Fed. Reg. 52,147 (1978).

62. On October 29, 1978, a Public Citizen Health Research Group (HRG) report submitted to HEW documented significant abuses at three major teaching hospitals in the United States—Baltimore City Hospital, Boston City Hospital and Los Angeles County Hospital. *STERILIZATION STUDY*, *supra* note 26, at 3-8. In 1975, the heads of obstetrics/gynecology departments at the 50 largest United States teaching hospitals were contacted in a sterilization study, 42 of which performed non-therapeutic sterilizations. R. McGARRAH, JR., *STERILIZATION WITHOUT CONSENT: TEACHING HOSPITAL VIOLATIONS OF HEW REGULATIONS* (1975). About nine months after the court-ordered HEW regulations became effective, these major teaching hospitals were not in compliance: 33% were completely unaware of the legal requirements; 76% in 13 states were in violation; two hospitals did not comply with the 72 hour waiting period; four used consent forms that failed to provide information basic to informed consent. *Id.* at 2.

In another 1975 survey of teaching hospitals, 70% were found to be out of compli-

study were violating the regulations as of January 1975, thirty-three percent of which were not even aware of their existence.<sup>63</sup> The poor compliance record was reconfirmed in 1979 when another study verified many continuing violations.<sup>64</sup>

## B. CALIFORNIA REGULATIONS

California has two sets of sterilization regulations, one for Medi-Cal patients and a second covering health facilities.<sup>65</sup> While the California regulations are similar to federal regulations, there are important variances.

ance with HEW regulations for failing to observe the 72-hour waiting period, failing to provide proper consent forms and failing to inform recipients of public assistance that their benefits would not be terminated if they refused to be sterilized. REPRODUCTIVE FREEDOM PROJECT, AMERICAN CIVIL LIBERTIES UNION (ACLU), HOSPITAL SURVEY ON STERILIZATION POLICIES 1 (1975).

63. R. MCGARRAH, JR., *supra* note 62, at 5.

64. A survey revealed that 70% of the 83 hospitals which responded to the study were out of compliance with one or more major aspects of the 1974 regulations; 1. 63% did not adhere to HEW's complete prohibition on federally funded sterilizations of persons under 21; 2. 12% did not require a waiting period of at least 72 hours between initial consent and performance of the sterilization procedure; 3. 18% will obtain consent for non-therapeutic sterilization operations during labor (which also means that the 72-hour waiting period requirement is not being observed); 4. 14% did not orally inform patients (in addition to including a written statement on the consent form) prior to obtaining consent that refusal to consent to a proposed sterilization would not result in withholding of Medicaid or other welfare benefits or services. The study was very critical of HEW's enforcement procedures. T. BOGUE & D. SIGELMAN, *supra* note 62, at 4-5. All ten California hospitals in the study were in violation of the federal regulations because they sterilized women under 21, but this was the only violation found in these hospitals. *Id.* at 13.

65. In April 1975, the California Coalition for the Medical Rights of Women filed an administrative petition with the court requesting the promulgation of regulations governing informed consent for sterilization. After two years of discussions, hearings, research and consultation with health professionals, the California Department of Health finally promulgated regulations on May 16, 1977, to become effective August 1, 1977. 22 CAL. ADMIN. CODE §§ 51163(a),(b) (1979), 51305.1-3 (1978), .4-6 (1977), .7 (1978), 70037.1(a),(b), 70707.1-8 (1977).

In response to the regulations, the California Medical Association (CMA) and four individually licensed California physicians filed suit against the Director of the California Department of Health, the Department of Health and the state of California alleging that the regulations were contrary to California law governing informed consent and the practice of medicine, that they were arbitrary and unreasonable, and that they adversely affected patients' rights and the public health. *Cal. Medical Ass'n v. Lackner*, No. 268099 (Cal. Super. Ct., Sacramento County, Apr. 24, 1978). The court granted defendants' motion for summary judgment. *Id.* slip. op. at 45.

For discussions of the sterilization regulations, see Comment, *Contraceptive Sterilization: The Need for State Regulation*, 6 GOLDEN GATE U. L. REV. 79 (1975); Comment, *Sterilization Regulation: Government Efforts to Guarantee Informed Consent*, 18 SANTA CLARA L. REV. 971 (1978).

*Present Regulations — Major Variances from Federal Regulations*

1. **Waiting period:** California provides for a fourteen-day waiting period instead of the thirty-day period set by federal regulation. Under California law, the patient may request a shorter waiting period but the elective sterilization cannot be performed less than seventy-two hours following the signing of the sterilization consent document.<sup>66</sup>

2. **Informed consent process:** California provides that the patient cannot be in a condition or medical state in which her or his judgment is impaired or significantly altered, "whether due to medication, emotional state, or impaired sensorium."<sup>67</sup> These provisions appear broader than the federal regulations, which prohibit obtaining consent only while the patient is under the influence of alcohol or other substances that affect state of awareness.<sup>68</sup>

3. **Explanation of proposed procedure and anticipated results:** The California regulations are more comprehensive than federal regulations in that they set forth guidelines as to what the physician is required to disclose to the patient: a) the surgical procedure to be used and how sterilization occurs; b) types of anesthesia to be used; c) approximate length of hospital stay; d) approximate length of time for recovery; e) whether procedure is new or experimental; f) possible short and long-term consequences including common side effects, discomforts, health risks, complications and benefits; g) financial cost to the patient; and h) right to consultation by a second physician.<sup>69</sup>

4. **Age minimum:** Individuals eighteen and over may be sterilized in California while HEW's minimum age standard for sterilization is twenty-one.<sup>70</sup> This has been a major area of controversy in California and in other states where the age of majority is eighteen.<sup>71</sup>

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66. 22 CAL. ADMIN. CODE §§ 51305.2(A),(B), 70707.2(a)(2)(A),(B) (1978).

67. 22 CAL. ADMIN. CODE §§ 51305.3(a)(1), 70707.3(a)(1) (1978).

68. 42 C.F.R. §§ 50.204(e)(3) (1979); 42 C.F.R. § 441.257(b)(3) (1979).

69. 22 CAL. ADMIN. CODE §§ 51305.3(f)(1)-(4),(6)-(8), 51305.4(a)(2), 70707.3(f)(1)-(4), (6)-(8), 70707.4(a)(2) (1978).

70. *Id.* at 51305.5(a)(1), 70707.5(a)(1); 42 C.F.R. §§ 441.253(a), 50.203(a) (1978).

71. CAL. CIV. CODE § 25 (West Supp. 1980). Proposed regulations will change the age

5. **Retardation:** The California regulations provide that no person shall by reason of retardation alone be prevented from consenting to sterilization.<sup>72</sup> The federal regulations do not mention retardation.

6. **Auditor-Witness:** California provides that a physician or hospital employee cannot be the patient's auditor-witness. Also, in California, if a witness is selected s/he must be present during the entire informed consent process, and if waived, the waiver of selection should be verified in the patient's own handwriting on the sterilization consent document.<sup>73</sup> The federal regulations are general, providing that a patient may have an auditor-witness if s/he desires.<sup>74</sup> The California regulations do not provide civil or criminal sanctions for noncompliance. As with federal regulations, failure to follow California regulations will result in non-payment for the medical services and the physician will be referred to the California Board of Medical Quality Assurance.<sup>75</sup>

### *Proposed California Regulations*

On February 13, 1979, the California Department of Health announced that it would be amending the state sterilization regulations to bring them into total compliance with federal regulations.<sup>76</sup> HEW had denied California's request for a waiver of compliance with the federal regulations, even though California Department of Health officials argued that the California regulations were superior to federal regulations, especially "in terms of assuring enlightened choice to patients seeking sterilization services."<sup>77</sup> The decision to change the California law so as to conform to federal regulations has been controversial, primarily because of the minimum age provision and the waiting period difference. It has been argued that because eighteen is the mini-

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requirement to conform to federal requirements. See discussion at notes 58-62 *supra*.

72. 22 CAL. ADMIN. CODE §§ 51305.5(b), 70707.5(b) (1977).

73. *Id.* at 51305.3(b)(1)(2), 70707.3(b)(1)(2) (1978).

74. 42 C.F.R. §§ 50.204(d), 441.257(a)(4) (1979).

75. 22 CAL. ADMIN. CODE §§ 51305.7(a),(b), 70707.8(a),(b) (1977).

76. Department of Health Service News Release, No. 23-79, (Feb. 13, 1979) [hereinafter cited as DOH News Release].

77. Letter from Beverlee Myers, Director of California Department of Health Services, to Joseph Califano, Secretary of HEW 1-2 (Feb. 9, 1978). See also DOH News Release, *supra* note 76, in which California officials noted they were forced to amend the regulations in order not to lose approximately \$4 million in annual federal sterilization funding for California. *Id.* at 1-2.

mum age in California for other legal decisions, it should be so for sterilization as well.<sup>78</sup>

In January 1980, the Department of Health announced that the state regulations on privately funded sterilization will be repealed.<sup>79</sup> Therefore the regulations governing sterilization will apply only to Medi-Cal patients, and not to those who pay for their own sterilization. The amended regulations, expected to take effect in 1980, will conform to the federal regulations so that the state may keep its federal funding for Medi-Cal sterilizations. The minimum age for Medi-Cal patients who may be sterilized will be raised from eighteen to twenty-one, and the waiting period before sterilization increased from fourteen to thirty days.<sup>80</sup>

### III. THEORIES OF RECOVERY

#### A. FEDERAL ACTION UNDER 42 U.S.C. SECTION 1983<sup>81</sup>

A federal remedy may be available to a woman sterilized without informed consent under the Civil Rights Act of 1871.<sup>82</sup> The Supreme Court has held that, with certain limitations, the United States Constitution reserves to the individual rights and decisions concerning reproductive choice,<sup>83</sup> and that procreation is a fundamental right.<sup>84</sup>

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78. See Comment, *Sterilization Regulation: Government Efforts to Guarantee Informed Consent*, 18 SANTA CLARA L. REV. 971 (1978).

79. Department of Health News Release, No. 4-80 (Jan. 15, 1980). See also, Pogash, *The Controversy Over Statewide Sterilization Rules*, S. F. Examiner, June 11, 1980, at 43, col. 1, for a summary on the proposed regulation changes.

80. *Id.*

81. For text of 42 U.S.C. § 1983, see note 41, *supra*.

82. *Id.* The Civil Rights Act of 1871 (Act of April 20, 1871, Ch. 22, 17 Stat. 13 (1883)) was amended in 1964 and consequently the Act is often described as the Civil Rights Act of 1964; however, this section of the Act was not affected by the 1964 amendments.

83. *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

84. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). The Court held unconstitutional a state statute which provided for the sterilization of habitual criminals, defined as persons convicted two or more times for crimes amounting to felonies involving moral turpitude. The statute applied to persons convicted of larceny, including larceny by fraud, but expressly exempted persons convicted of embezzlement, although, as the court noted, the nature of the two crimes was intrinsically the same and the crimes were punishable in the same manner under state law. The court held that this exemption constituted a violation of the equal protection clause of the 14th Amendment. Justice Douglas noted:

We are dealing here with legislation which involves one of the

Section 1983 is intended to provide private parties with a federal cause of action for abuses of official authority which result in the deprivation of constitutional rights, privileges, and immunities.<sup>85</sup> In determining whether to bring suit the initial question is whether each defendant is considered a "state actor"—a determination with which courts are continually struggling.<sup>86</sup>

### *Potential Defendants—State Actor*

In sterilization cases, the most likely defendants are private and state hospitals, physicians, surgeons, hospital administrators, and possibly government entities and officials.

1. *Private hospitals and physicians.* Some circuits have held that a hospital is a state actor when it has received federal funds under the Hill-Burton Act<sup>87</sup> and federal and state tax ex-

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basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear . . . We advert to them merely in emphasis of our view that 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.

316 U.S. at 541.

85. *Monroe v. Pape*, 365 U.S. 167, 171 (1961).

86. The legal significance of state involvement in private conduct can be determined only by sifting facts and weighing circumstances of each case. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (where a private corporation, as lessee, while operating a restaurant in an automobile parking building owned and operated by a state agency, refused to serve the plaintiff on grounds that he was a Negro). The court held that when a state leases public property in the manner and purpose as it did there, the proscriptions of the 14th Amendment must be complied with by the lessee as though they were binding covenants written into the lease. The court concluded that the restaurant constituted an integral part of the state's plan to operate the building as a self-sustaining unit which was sufficient state action. *Id.* at 724-25.

87. 42 U.S.C. § 291-291o-1 (1976). The purpose of this title is:

(a) to assist the several States in the carrying out of their programs for the construction and modernization of such public or other nonprofit community hospitals and other medical facilities as may be necessary, in conjunction with existing facilities, to furnish adequate hospital, clinic, or similar services to all their people; (b) to stimulate the development of new or improved types of physical facilities for medical, diagnostic,

emptions.<sup>88</sup> The Ninth Circuit, however, has held these factors do not constitute a strong enough connection with the government to find the conduct of a private hospital state action.<sup>89</sup>

Generally, courts require several significant contacts between a hospital and the state before imposing liability on the hospital under section 1983.<sup>90</sup> Several circuits, including the Ninth, have held that state appointment of a majority of a hospital's board,<sup>91</sup> or city or state ownership of a reversionary interest in a hospital's property<sup>92</sup> are important factors in establishing state action. Some courts have held that when a hospital is the only one in the community it may have acquired a quasi-public character, and hence become a "state actor."<sup>93</sup>

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preventive, treatment, or rehabilitative services; and (c) to promote research, experiments, and demonstrations relating to the effective development and utilization of hospitals, clinics or similar services.

*Id.* § 291.

88. *Briscoe v. Bock*, 540 F.2d 392 (8th Cir. 1976) (hospital is state actor where it was non-profit and tax exempt, was subject to extensive state regulation, received Hill-Burton funds, and was a member of a county health planning agency); *Jackson v. Norton-Children's Hosp., Inc.*, 487 F.2d 502 (6th Cir. 1973) (hospital is state actor where it received Hill-Burton funds and was regulated by the state).

89. *Taylor v. St. Vincent's Hosp.*, 523 F.2d 75, 78 (9th Cir. 1975) (hospital was not state actor where it was non-profit, received tax benefits and Hill-Burton funds, and was alleged to be the only hospital in the area); *Ascherman v. Presbyterian Hosp. of Pac. Med. Center, Inc.*, 507 F.2d 1103, 1105-06 (9th Cir. 1974) (hospital was not considered a state actor even though it received Hill-Burton funds and federal and state tax exemptions, but no state agency selected or was represented on its governing board); *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 314 (9th Cir. 1974) (where a hospital received 13% of its construction budget from Hill-Burton and HEW funds, received state tax exemptions, and was generally regulated by the state, it was still not a state actor).

90. See notes 91-93 *infra*.

91. In *Aasum v. Good Samaritan Hosp.*, 395 F. Supp. 363, 367-68 (D. Or.), *aff'd*, 542 F.2d 792 (9th Cir. 1976), the court concluded that the appointment of three of seven directors of the hospital's board by the city, county and state did not make the hospital a state actor; the court specifically distinguished *Jackson v. Statler Foundation*, 496 F.2d 623, 634-35 (2d Cir. 1974), as involving appointment of a majority of the board while the Oregon hospital only had a minority of its board appointed by the state. *Aasum v. Good Samaritan Hosp.*, 395 F. Supp. at 368. See also *O'Neill v. Grayson County War Memorial Hosp.*, 472 F.2d 1140, 1143 (6th Cir. 1973); *Chiaffitelli v. Dettmer Hosp., Inc.*, 437 F.2d 429, 430 (6th Cir. 1971); *Meredith v. Allen County War Memorial Hosp. Comm'n*, 397 F.2d 33, 35 (6th Cir. 1968); *Isaacs v. Board of Trustees*, 392 F. Supp. 118, 124-25 (W.D. Pa. 1975).

92. *Eaton v. Gibbs*, 329 F.2d 710, 714-15 (4th Cir. 1964); *Hampton v. City of Jacksonville*, 304 F.2d 320, 323 (5th Cir. 1962).

93. *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 314 (9th Cir. 1974) (stating the applicable rule, but finding no state action). State action was found in

A private physician will not be considered a "state actor" unless there is a sufficient connection between the physician and a party who is a state actor, e.g., a state hospital. In *Downs v. Sawtelle*,<sup>94</sup> the court determined that a physician chief of staff was a state actor, distinguishing him from a physician simply making use of the hospital's facilities at the time of the sterilization operation.<sup>95</sup> The *Downs* court held that since agents and employees of state hospitals could be sued under section 1983, so could agents or employees of private hospitals with significant government connections.<sup>96</sup>

2. *Public entities, state hospitals and government officials.* In the past, cities, counties, state, and political subdivisions had not been considered "persons" under section 1983.<sup>97</sup> Nevertheless, in *Monell v. Department of Social Services*,<sup>98</sup> the court held local governments were not immune from suits under section 1983.<sup>99</sup> Moreover, the Ninth Circuit has specifically held that a city official is a "person" within the meaning of section 1983;<sup>100</sup> the same reasoning should apply to members of a hospital district. If a hospital is fully funded or owned by the local or state government there is little doubt that the hospital and its employees would be considered state actors for purposes of section 1983 liability.<sup>101</sup>

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O'Neill v. Grayson County War Memorial Hosp., 472 F.2d 1140, 1143 (6th Cir. 1973), in which the hospital was acting under color of state law, was the only hospital in the city, had Hill-Burton funding, and had facilities which were leased from the county in return for their maintenance and operation.

94. 574 F.2d 1 (1st Cir.), *cert. denied*, 439 U.S. 910 (1978).

95. *Id.* at 9-10.

96. *Id.* at 10.

97. In *Monroe v. Pape*, 365 U.S. 167, 187-92 (1961), the Court held that municipalities are immune from liability under § 1983 because they were not "persons" within the meaning of that statute. The Court had earlier found that counties were not "persons." *Moore v. County of Alameda*, 411 U.S. 693, 706-710 (1972). The Ninth Circuit has held that a state is not a person. *Whitner v. Davis*, 410 F.2d 24, 29 (9th Cir. 1969), citing *Williford v. California*, 352 F.2d 474, 476 (9th Cir. 1965). *Whitner* also held that a state agency was not a person within the meaning of 42 U.S.C. § 1983. *Id.* at 29. See notes 98-99 *infra* and accompanying text, for the present effect of these rulings.

98. 436 U.S. 658 (1978).

99. *Id.* at 663.

100. *Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897, 903 (9th Cir.), *cert. denied*, 424 U.S. 934 (1975) (citing *Ybarra v. City of Los Altos Hills*, 503 F.2d 250, 253 (9th Cir. 1974)).

101. See *id.*; *Wheeler v. Glass*, 473 F.2d 983, 985 (7th Cir. 1973). In *Spence v. Staras*, 507 F.2d 554, 557 (7th Cir. 1974), the court held that defendants as agents and employees of state hospitals, were clearly acting under color of state law.

*Immunities*

The United States Supreme Court has rejected a strict reading of 42 U.S.C. § 1983 as to immunities, holding that certain parties have absolute immunity.<sup>102</sup> The Court limits absolute immunity to narrow circumstances,<sup>103</sup> but *Woods v. Strickland*<sup>104</sup> sanctioned a qualified immunity to shield certain state officials from liability for official action done in good faith. An official entitled to assert a qualified immunity will be subject to liability for damages under section 1983

if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff]. . . . A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.<sup>105</sup>

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102. It has been argued that the statute created a species of tort liability that on its face admits of no immunities. *Imbler v. Pachtman*, 424 U.S. 409, 417-18 (1976). However, the section has consistently been construed as not intending wholesale revocation of the common-law immunities afforded certain government officials. The court first considered the legislative immunities in *Tenney v. Brandhove*, 341 U.S. 367 (1951), concluding that "immunities well grounded in history and reason" had not been abrogated by covert inclusion in the general language of § 1983. *Id.* at 376. Legislators, judges, and prosecutors have been held absolutely immune from liability for damages under § 1983. *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967) (judges); *Imbler v. Pachtman*, 424 U.S. at 417-18 (prosecutors).

For a discussion of the ruling in *Stump v. Sparkman*, 435 U.S. 349 (1978) (where a judge who approved the sterilization of a 15-year old woman without her consent and knowledge was granted absolute immunity for liability), see Comment, *Judicial Immunity—Tort Liability of a State Court Judge in Granting the Sterilization of a Minor Without Due Process*, 22 HOWARD L.J. 129 (1979); Comment, *Torts—Judicial Immunity—Absolute Immunity: Reaffirmed in Stump v. Sparkman*, 27 KAN. L. REV. 518 (1979); *Torts—Judicial Immunity—State Court Judge Has Absolute Immunity in Section 1983 Action*, WASH. U. L. Q., Win. 1979, 288.

103. Various government officials have been accorded a qualified immunity. *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (superintendent of a state hospital); *Wood v. Strickland*, 420 U.S. 308 (1975) (local school board members); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (governor, president of a state university, and officers and members of a state national guard).

104. 420 U.S. 308, 322 (1975).

105. *Id.*

The inquiry is both objective and subjective.<sup>106</sup> In *Downs*, where the physician had already been determined a state actor, the court concluded that a chief of staff would be permitted to assert a qualified immunity defense; as a result, the *Woods* test would apply. There, the court stated that "a member of the medical profession reasonably should be aware that irrevocably terminating a patient's ability to bear children without her consent is a deprivation of a fundamental constitutional right."<sup>107</sup> Therefore, the issue in *Downs* was the existence of free and informed consent and, if not present, whether the lack of such consent was intelligibly communicated to the physician. If a physician "negligently interprets a patient's communications to indicate she consented to the operation, he is not liable under the standards enunciated in *Wood*, even if [the patient] did not intend to consent."<sup>108</sup> However, if a jury could reasonably conclude that the physician determined that sterilizing the patient was for her own good or for the good of society and as a consequence of that belief ignored indications from the patient that she was not consenting to the operation, or if a jury could conclude that the physician attempted to take advantage of her mental and communications limitations to unduly influence her decision, s/he would be liable under both components of the *Woods* test.<sup>109</sup> The court stated that, in such circumstances, the physician "should reasonably have known that such conduct amounted to an unconstitutional deprivation and he would be acting with a malicious motive."<sup>110</sup>

In evaluating the physician's conduct the court may take cognizance of the patient's degree of helplessness. "Malice for constitutional purposes includes callous or wanton neglect<sup>111</sup> and "reckless indifference to the rights of the individual citizen.' Whether conduct is wanton or reckless depends in part on the context in which it occurs and this includes the inability of the victim to protect [her]self."<sup>112</sup> Thus the fact that the patient is uneducated or does not speak English is relevant in determining

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106. *Id.* at 321.

107. *Downs v. Sawtelle*, 574 F.2d 1, 11 (1st Cir.) cert. denied, 439 U.S. 910 (1978).

108. *Id.* at 12.

109. *Id.*

110. *Id.*

111. *Id.* at 12-13 (citing *Harper v. Cserr*, 544 F.2d 1121, 1124 (1st Cir. 1976)).

112. *Id.* (citations omitted).

whether the physician's conduct is malicious, in which case, liability would survive even qualified immunity.

### *Vicarious Liability*

Another strategy in a sterilization abuse case is to seek relief from persons not directly involved in the sterilization operation, such as supervisors or hospital administrators. Section 1983 does not itself establish a basis for liability, vicarious or otherwise, against persons not participating in a civil rights violation. Nevertheless section 1988 of the Civil Rights Act<sup>113</sup> provides that where federal laws are insufficient to furnish suitable remedies, the common law of the state of origin governs the trial. In California, section 820.8 of the Government Code provides, "[e]xcept as otherwise provided by statute, a public employee is not liable for an injury caused by the act or omission of another person."<sup>114</sup> Thus, parties not directly involved in the sterilization operation are not liable under section 1988.

There appear to be other means by which parties not directly involved in the sterilization procedure may be liable. In *Rizzo v. Goode*,<sup>115</sup> the court held that supervisory personnel were not liable under section 1983 since it had not been shown that there was any "affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any

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113. 42 U.S.C. § 1988 (1976) reads in part:

[W]here [federal laws] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

114. CAL. GOV'T CODE § 820.8 (West 1966). Nothing in the section is meant to exonerate "a public employee from liability for injury proximately caused by his own negligent or wrongful act or omission." *Id.* The doctrine of respondeat superior is unavailable as a basis for imposing liability under § 1983; there must be some showing of personal responsibility. *Arroyo v. Schaefer*, 548 F.2d 47, 51 (2d Cir. 1977); *Williams v. Vincent*, 508 F.2d 541, 546 (2d Cir. 1974).

115. 423 U.S. 362 (1976) (in which two class actions were instituted against Philadelphia's Mayor, Managing Director and Supervisory Police Officer, the plaintiffs sought equitable relief because of an allegedly pervasive pattern of unconstitutional police mistreatment of minority citizens in particular and of all city residents in general).

plan or policy by petitioners—express or otherwise—showing their authorization or approval of such misconduct.”<sup>116</sup> Conversely, to establish an affirmative link one must prove that the superior participated or acquiesced in the constitutional deprivations alleged in the complaint.<sup>117</sup> The affirmative behavior necessary to hold a superior liable for the actions of a subordinate under section 1983 was discussed in *Duchesne v. Sugarman*.<sup>118</sup> “It is not necessary for section 1983 liability that the appellees directed any particular action with respect to these

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116. *Id.* at 371. “Instead, the sole causal connection found by the District Court between petitioners and the individual respondents was that in the absence of a change in police disciplinary procedures, the incidents were likely to occur, *not* with respect to them, but as to the members of the class they represented.” *Id.* It was the absence of this ‘causal connection’ which proved fatal to plaintiffs action in *Rizzo*; the mere failure to adequately supervise was not enough. *Id.*

117. *Kite v. Kelley*, 546 F.2d 334, 337 (10th Cir. 1976). In *Coffy v. Multi-County Narcotics Bureau*, 600 F.2d 570 (6th Cir. 1979), the court stated that absent a showing that a supervisor (Director of Narcotics Bureau) is “somehow personally at fault by actively participating in, encouraging or directing the commission of illegal acts by his subordinates, there can be no recovery against him.” *Id.* at 580.

In *Cotton v. Hutto*, 577 F.2d 453, 455 (8th Cir. 1978), a prisoner sought damages from the prison warden based on the prisoner being subjected to a disciplinary proceeding because of his unorthodox hair style. The court noted that the prison warden was not alleged to have had any knowledge of, or connection with, the disciplinary proceeding and therefore any attempt to obtain damages from him would be predicated on a respondeat superior theory which does not apply in section 1983 suits. *Id.*

118. 566 F.2d 817 (2d Cir. 1977). The court held, “[i]n short this is not a case of indifference, that is, a failure to act in the face of misconduct by subordinates, but is rather a case of affirmative policy-making which may have caused the misconduct.” *Id.* at 831. *But see* *Allee v. Medrano*, 416 U.S. 802 (1974) in which the Court noted:

The complaint charged that the enjoined conduct was but one part of a single plan by the defendants, and the District Court found a pervasive pattern of intimidation in which the law enforcement authorities sought to suppress appellees constitutional rights. In this blunderbuss effort the police not only relied on statutes . . . found constitutionally deficient, but concurrently exercised their authority under valid laws in an unconstitutional manner.

*Id.* at 812.

*See also* *Hague v. CIO*, 307 U.S. 496 (1939) (where the pattern of police misconduct upon which liability and injunctive relief were grounded was the adoption and enforcement of deliberate policies by the defendants, which included the Mayor and Chief of Police, of excluding and removing the plaintiffs’ labor organizers and forbidding peaceful communication of their views to citizens of Jersey City). Plaintiffs claimed that they were denied the right to hold lawful meetings on the ground that they were Communists or members of a Communist organization. *Id.* at 501. Furthermore, they claimed these policies were implemented by force and violence on the part of individual policemen and that defendants proposed to continue their unrestrained policies against the members of this discrete group. *Id.* at 505.

specific individuals, only that they *affirmatively* promoted a policy which sanctioned the type of action which caused the violations."<sup>119</sup> The court stated that once it is established that conduct of the superior is directly related to the denial of a constitutional right, "it is not to be distinguished, as a matter of causation, upon whether it was through action or inaction."<sup>120</sup> Therefore, the jury must determine whether the action or inaction of the defendant played a significant role in causing the deprivation.<sup>121</sup>

In *Madrigal v. Quilligan*,<sup>122</sup> a recent California case involving sterilization, ten Chicana women with little knowledge of English brought a civil rights class action against doctors employed at the University of Southern California Los Angeles County General Medical Center and several hospital supervisors, for performing sterilizations upon the women without their informed consent in violation of 42 U.S.C. section 1983.<sup>123</sup> The women alleged that they were not provided sufficient information to give an informed consent,<sup>124</sup> and in some instances were co-

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119. *Duchesne v. Sugarman*, 566 F.2d 817, 831 (2d Cir. 1977).

120. *Id.* at 832. The court cited *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961):

[N]o State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.

*Duchesne v. Sugarman*, 566 F.2d 817, 832 (2d Cir. 1977).

121. *Kletschka v. Driver*, 411 F.2d 436, 447 (2d Cir. 1969).

122. No. CV 75-2057-JWC (C.D. Cal. June 30, 1978) (on appeal).

123. *Id.* at 2.

124. One of these women alleged that the doctors did not mention other forms of birth control and, upon her inquiry, they responded by indicating that sterilization was the best method of birth control. Brief for Appellants at 12, *Madrigal v. Quilligan* No. CV 75-2057-JWC (C.D. Cal. June 30, 1978). Two plaintiffs claimed they were never asked whether they wished to be sterilized before tubal ligations were performed on them. *Id.* at 13. All of the plaintiffs were alone when approached regarding sterilization. *Id.* at 14. None had the support or advice of a husband or other family member available. Three of the plaintiffs claim that they were told that California did not permit more than three caesarean sections to be performed on an indigent woman, in an effort to persuade plaintiffs to consent to tubal ligation. *Id.* at 14-15. Furthermore, most of the plaintiffs were approached many times, by multiple parties, regarding consent to sterilization. *Id.* at 15. Plaintiffs were not told the irreversible nature of the sterilization operation. *Id.* at 22-24.

erced and pressured into consenting to the sterilization.<sup>125</sup> The district court found that the defendants performed the sterilizations in the bona fide belief that the women had given their informed and voluntary consent and that such belief on the part of defendants was reasonable.<sup>126</sup> In *Madrigal*, the appellant argued that the lower court erred in dismissing the complaint against two supervisors because the court relied solely on a respondeat superior theory.<sup>127</sup> The defendants had been dismissed because the evidence failed to show that they had personally participated in the sterilization operations.<sup>128</sup> It appears that the trial court applied the law incorrectly by relying solely on respondeat superior theory without considering whether the defendants themselves played a role in *causing* the deprivation of a constitutional right. The appellant argued this very point:

In light of Dr. Quilligan's responsibility for medical policy in his department and his awareness and possibly establishment, of a de facto policy

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125. Five of the plaintiffs alleged that they were approached by County General hospital employees for the first time about becoming sterilized by a tubal ligation while they were in labor and waiting for a cesarian to be performed. *Id.* at 10. Two of the plaintiffs claimed they were approached by hospital employees requesting that they be sterilized while they were in labor after having first refused sterilization during the prenatal care. *Id.* at 12.

126. *Id.*, slip op. at 8-18. The district court found that defendants' action had been state action for purpose of maintaining the suit under 42 U.S.C. § 1983. *Id.* slip op., at 1. The court also found that procreation is a fundamental right and thus there was deprivation of a federally protected constitutional right for purpose of relief under section 1983. *Id.* at 2. The court failed to find concerted action on the part of the defendants, and thus viewed the case as ten separate claims against the individual doctors who actually performed the sterilization. *Id.* at 3. The court stated that "this case is essentially the result of a breakdown in communications between the patients and the doctors." *Id.* at 6. The court later concluded, "One can sympathize with them for their inability to communicate clearly, but one can hardly blame the doctors for relying on these indicia of consent which appeared to be unequivocal on their face and which are in constant use in the Medical Center." *Id.* at 19. None of the defendants could remember any of the plaintiffs and, as a result, the court relied heavily on defendant's custom and practice. *Id.* at 8. The court stated, "It is not surprising that none of the doctors have any individual recollection of the events leading up to the operation. . . ." *Id.* The court raised the immunity/good faith defense to the 42 U.S.C. § 1983 action and applied it to defendants' conduct. *Id.* at 4-6. This defense permitted the court to utilize malicious or reckless and wanton disregard of constitutional rights, rather than negligence, as the standard by which it measured defendants' conduct. *Id.* In addition, the court rejected the notion that a woman in labor would not be competent to give voluntary and informed consent to sterilization. *Id.* at 18-19.

127. *Id.*, Brief for Appellants at 56-63.

128. *Id.*, slip op. at 2. The two defendants were dismissed on the theory that they could not be liable under the respondeat superior doctrine in § 1983 actions. *Id.*

regarding sterilizations and consent in his department, his subsequent failure to correct that policy was an acquiescence in, and affirmation of that policy. This acquiescence of Dr. Quilligan is a statement of hospital policy, and his failure to change this policy in the peer review process in which he participated, may easily be seen as the cause of the violations against each of the plaintiffs.<sup>129</sup>

*Johnson v. Duffy*<sup>130</sup> supports this position. There, the court stated that section 1983 liability was appropriate for "[a]nyone who 'causes' any citizen to be subjected to a constitutional deprivation."<sup>131</sup> The requisite causal connection may be established not only by direct personal participation but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.<sup>132</sup> The difficulty will be in proving the supervisor had knowledge of the "practice" which violated the constitutional right. In *Madrigal*, evidence was presented showing that the supervisor was aware of physician attitudes toward overpopulation and that some physicians had been zealous in advocating sterilizations.<sup>133</sup> This appears to be a situation in which

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129. *Id.*, Brief for Appellants at 61-62.

130. 588 F.2d 740 (9th Cir. 1978).

131. *Id.* at 743. The court stated, "A person 'subjects' another to the deprivation of a constitutional right, within the meaning of section 1983, if [s/he] does an affirmative act, participates in another's affirmative acts, or omits to perform an act which [s/he] is legally required to do that causes the deprivation of which complaint is made." *Id.* at 743 (citing *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976)). Moreover, personal participation is not the only predicate for section 1983 liability. *Id.* at 743-44.

132. In *Beverly v. Morris*, 470 F.2d 1356 (5th Cir. 1972) in which plaintiff was arrested and placed in custody, and was injured when he was blackjacked by an auxiliary police officer, the police chief was held liable on a negligence theory for failing to train the auxiliary officer properly, to supervise the patrol duties, and to provide a regular police officer on duty the night of the incident. The Fifth Circuit held that this case was not one of vicarious liability founded on the theory of respondeat superior, but a claim founded upon the defendant's own negligence. *Id.* at 1357.

In *Hampton v. Hanrahan*, 600 F.2d 600, 626-27 (7th Cir. 1979) (a § 1983 action for monetary damages brought by members of the Black Panther Party and mothers of two deceased party members against federal and state law enforcement officers, arising from a gun battle which occurred during a raid on a party apartment), the court quoted *Schnell v. City of Chicago*, 407 F.2d 1084 (7th Cir. 1949), holding that supervisory personnel are proper defendants to a § 1983 action, "whether the plaintiffs' constitutional rights are violated as a result of police behavior which is the product of the active encouragement and direction of their superiors or as a result of the superiors' mere acquiescence in such behavior." *Id.* at 1086.

133. Brief for Appellants at 59-62, *Madrigal v. Quilligan*, No. CV 75-2057-JWC

the supervisor did "acquiesce" in a hospital policy which violated the constitutional rights of the sterilization patients. It thus appears that parties not directly involved in a sterilization operation may be held liable on a theory similar to respondeat superior. The issue will be whether the defendant played a significant role in causing the constitutional deprivation.<sup>134</sup>

### *Conspiracy Theory*

A woman claiming she was sterilized without her informed consent may allege a conspiracy to deny her constitutional rights and the rights of those similarly situated, under section 1983.<sup>135</sup> The conspiracy charge is advantageous because potential defendants who were engaged in purely private conduct (and who would not normally be held liable under section 1983) may be found liable if it is established that they acted in concert with another party against whom a valid claim under section 1983 could be made.<sup>136</sup>

In addition, a concerted action theory may be brought under 42 U.S.C. section 1985(c)<sup>137</sup> if it is asserted that the de-

(C.D. Cal. June 30, 1978).

134. *Kletschka v. Driver*, 411 F.2d 436, 447 (2d Cir. 1969).

135. The concerted action theory would generally be used against various hospital personnel, surgeons and supervisors.

136. *Briley v. California*, 564 F.2d 849, 858 (9th Cir. 1977). See *Gillibeau v. City of Richmond*, 417 F.2d 426, 430 (9th Cir. 1969); *Kletschka v. Driver*, 411 F.2d 436, 449 (2d Cir. 1969). In *Briley*, a § 1983 action brought against a California trial judge, prosecuting attorneys, privately retained criminal counsel and others to recover for the alleged violation of plaintiff's rights when plea bargaining negotiations resulted in plaintiff pleading to a lesser offense than child molestation provided he consent to castration, the court stated that defendants who were engaged in purely private conduct might be found liable under § 1983 if it was established that they acted in concert with another party against whom a valid claim could be stated. 564 F.2d at 858. Thus, the *Briley* court did not decide whether a private party who conspires with an immune state official is liable under § 1983. Dictum in the Ninth Circuit implies that no liability attaches. See *Haldane v. Chagnon*, 345 F.2d 601 (9th Cir. 1965) a § 1983 action against two judges, a bailiff and two attorneys for initiating and authorizing detention proceedings for examination of the plaintiff's mental health) in which the court reasoned that because no valid claim could be stated against the immune state official, the "color of state law" basis upon which a § 1983 action would lie is eliminated. *Id.* at 604-05. Nevertheless, the First Circuit has held that private parties who conspire with immune officials may be held liable under § 1983. *Slotnick v. Staviskey*, 560 F.2d 31, 32 (1st Cir. 1977) (citing *Kermit Constr. Corp. v. Banco Credito y Ahorro Ponceno*, 547 F.2d 1 (1st Cir. 1976)). The court acknowledged that a number of courts take the contrary view. *Id.* at 32.

137. If two or more persons in any State or Territory conspire . . .  
for the purpose of depriving, either directly or indirectly, any

defendants conspired to deprive a plaintiff of the equal protection of the law thereby causing injury to her or his person.<sup>138</sup> The Supreme Court made it clear in *Griffin v. Breckinridge* that section 1985(c) is not intended to apply to all tortious conspiratorial interferences with the rights of others but only to those which were founded upon some racial or perhaps otherwise class biased invidiously discriminatory intent.<sup>139</sup> There have been relatively few published cases dealing with this issue.<sup>140</sup> The situation does not arise often and it is difficult to prove in steriliza-

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person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation against any one or more of the conspirators.

42 U.S.C. 1985(c) (1976).

In *Griffin v. Breckenridge*, 403 U.S. 88 (1971), the Supreme Court enumerated the elements of a cause of action under § 1985(c):

[A] complaint must allege that the defendants did (1) "conspire or go in disguise on the highway or on the premises of another" (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." It must then assert that one or more of the conspirators (3) did, or caused to be done, "any act in furtherance of the object of (the) conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States."

*Id.* at 102-03.

138. *Griffin v. Breckenridge*, 403 U.S. 88, 99 (1971).

139. *Id.* at 103. See *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1241 n.19 (3d Cir. 1978) for a list of cases holding no class-based discrimination.

140. Courts construing § 1985(c) have not limited its protection to racial or other suspect classifications. See *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979) (citing *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975) (political opponents are a sufficient class)); *Azar v. Conley*, 456 F.2d 1382 (6th Cir. 1972) (a single family is a single class). In *Reichardt*, the Ninth Circuit concluded that women purchasers of disability insurance are a sufficient class. 591 F.2d at 505. Furthermore, in *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1243-44 (3d Cir. 1978), the court concluded that sex discrimination was one of the categories covered by § 1985(3), indicating that it was joining two other circuits on this position. *Id.* at 1244 n.36.

tion cases. In *Downs*, the court stated that the plaintiff had failed to present authority for the assertion that the deaf constituted a class for the purposes of 42 U.S.C. section 1985(c).<sup>141</sup> Furthermore, the court noted that even if such a class were cognizable, the plaintiff would have to establish that her membership in such a class was the cause of the alleged discrimination against her.<sup>142</sup>

### *Statute of Limitations*

Since sterilization abuse cases may arise many years after the operation, an important consideration is whether a statute of limitations exists for bringing an action under section 1983. Section 1983 does not in itself contain a limitations period. Therefore, federal courts look to the state statute of limitations applicable to a similar state cause of action.<sup>143</sup>

The applicable statute of limitations for actions brought in California under the Civil Rights Act is California Code of Civil Procedure section 338(1), which provides for a three-year limitation period "upon a liability created by statute."<sup>144</sup> In *Briley v. California*,<sup>145</sup> the plaintiff asserted that because of fraudulent misrepresentations, the statute of limitations should not be tolled until such time that the fraud was discovered or should reasonably have been discovered.<sup>146</sup> The California Code of Civil Procedure does not contain any specific tolling provision. Nevertheless, while state law determines the applicable limitation period, courts have held that federal law determines when the limitations period begins to run.<sup>147</sup>

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141. 574 F.2d 1, 16 (1st Cir.) *cert. denied*, 439 U.S. 910 (1978).

142. *Id.*

143. *Jackson v. Hayakawa*, 605 F.2d 1121, 1127 (9th Cir. 1979) (citing *Bradshaw v. Zoological Soc'y*, 569 F.2d 1066, 1068 (9th Cir. 1978)); *Briley v. California*, 564 F.2d 849, 854 (9th Cir. 1977).

144. CAL. CIV. PROC. CODE § 338(1) (West Supp. 1980).

145. 564 F.2d 849 (9th Cir. 1977).

146. *Id.* at 854. *Briley* also argued that his injury was of a "continuing nature" such that the cause of action arose on the date the injury became manifest. *Id.* at 854 n.5. In the alternative, *Briley* asserted that the side effects resulting from the castration represented an injury that was "separate and distinct" from the original mutilation and, accordingly, the cause of action did not accrue until discovery. Since the court held that *Briley's* cause of action against those who participated in the plea bargain did not accrue until he discovered the fraud or could have done so in the exercise of reasonable diligence, the court did not have to decide this issue. *Id.* n.5.

147. *Briley v. California*, 564 F.2d at 855; *Martin v. Merola*, 532 F.2d 191, 195 n.7

The *Briley* court reiterated an established rule which provides that where a plaintiff has been injured by fraud or concealment and remains in ignorance of the injury without any fault or negligence on her or his part, the statutory period does not begin to run until discovery of the injury.<sup>148</sup> The court stated that "[i]n light of the prevailing federal doctrine as to fraud and concealment," the broad remedial powers of the Civil Rights Act would be best served by holding that the California limitations period would not commence until discovery of the deprivation within the bounds of reasonable diligence.<sup>149</sup>

Therefore, in a sterilization case brought under section 1983, if a patient did not know she had been sterilized, or if she knew of the sterilization but the physician had misrepresented the necessity of the operation, the statute of limitations would not begin to run until discovery of the sterilization or until such time that the patient could have discovered the misrepresentation with reasonable diligence.

## B. STATE CAUSE OF ACTION

### *Negligence*

1. Negligence Per Se: A sterilization patient may prove negligence on the part of the physician for failing to conform to the codified state sterilization standards.<sup>150</sup> Where the conduct of a reasonable person under particular situations has been prescribed by statute, regulation or ordinance, conduct falling below that standard is negligent per se.<sup>151</sup> A physician who fails to fol-

(2d Cir. 1976). Nevertheless, both *Jackson v. Hayakawa*, 605 F.2d 1121, 1127 (9th Cir. 1979) and *Bradshaw v. Zoological Soc'y*, 569 F.2d 1066, 1068 (9th Cir. 1978) acknowledged that there is some confusion as to whether state or federal law determines when a claim accrues and whether the statute is tolled. Neither case decided the issue.

148. 564 F.2d at 855 (citing *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946)). See *Hilton v. Mumaw*, 522 F.2d 588, 602 (9th Cir. 1975); *Kaiser v. Cahn*, 510 F.2d 282, 287 (2d Cir. 1974); *United Cal. Bank v. Salik*, 481 F.2d 1012, 1014 n.7 (9th Cir.), *cert. denied*, 414 U.S. 1004 (1973).

149. 564 F.2d at 855. Indeed, it was a concern for the remedial nature of § 1983 and the important constitutional rights it sought to protect that led the court to originally adopt the three-year limitations period of § 338(1)—one which is longer than the most specific tort limitations periods. *Id.* n.7.

150. See 22 CAL. ADMIN. CODE §§ 51163(a)(1)(A), 51305.1-.8, 70037.1, 70707.1-9 (1977).

151. CAL. EVID. CODE § 669 (West Supp. 1980) provides:

- (a) The failure of a person to exercise due care is presumed if: (1) He violated a statute, ordinance, or regulation of a pub-

low the regulations may thus be presumed negligent under section 669 of the California Evidence Code, if such violation was the proximate cause of injury to a person of the type and class for whom the statute was enacted to protect.<sup>152</sup>

Because of the small number of published sterilization abuse cases and the newness of the sterilization regulations, there have been no published cases involving the applicability of section 669 to the sterilization regulations. The sterilization regulations are included in the California Administrative Code, however, and analogous cases have held other Administrative Code regulations to be per se standards for purposes of section 669.<sup>153</sup> Therefore, section 669 should apply to sterilization regulations as well.

The primary issue is determining whether the act was a violation of the regulations.<sup>154</sup> Because the sterilization regulations are specific as to what is required of a physician before and during a sterilization operation, the plaintiff should have to prove only a slight variance from the regulations to trigger the pre-

lic entity; (2) The violation proximately caused death or injury to person or property; (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

(b) This presumption may be rebutted by proof that: (1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.

Section 669 codifies a common law presumption frequently applied in California. See *Alarid v. Vanier*, 50 Cal. 2d 617, 621, 327 P.2d 897, 898 (1958).

152. CAL. EVID. CODE § 669(a)(2)-(4) (West Supp. 1980).

153. Safety orders and similar regulations of the Public Utilities Commission and the Railroad Commission have been given the same effect as statutes for the purpose of finding negligence per se. See *Nevis v. Pacific Gas & Elec. Co.*, 43 Cal. 2d 626, 629, 275 P.2d 761, 763 (1954); *Langazo v. San Joaquin Light & Power Corp.*, 32 Cal. App. 2d 678, 683, 90 P.2d 825, 828 (1939). For a list of cases involving administrative regulations held applicable to the negligence per se theory, see B. WITKIN, 4 SUMMARY OF CALIFORNIA LAW § 534 (8th ed. 1974).

154. CAL. EVID. CODE § 669(a) (West Supp. 1980) provides that the violation must proximately cause death or injury to the person or property. It appears that the physician's surgical act of sterilizing a woman "proximately causes" the injury, since the "injury" is the loss of the ability to bear children. Therefore, in a sterilization case, the proximate cause element of § 669 should be met.

sumption provided by section 669. There is little guidance as to what degree of variance from the regulations would be required to establish negligence per se.

Section 669 provides that the person suffering injury must be a member of the class for whose protection the regulations were adopted.<sup>155</sup> The class protected under the sterilization regulations consists of the "sterilized patients" who were sterilized without informed consent or without adherence to all of the procedures provided in the Administrative Code.<sup>156</sup> Realistically, the protected classes are the indigent, the uneducated, minorities, and non-English speaking; the abuse of individuals within these vulnerable groups provoked the enactment of the regulations.<sup>157</sup>

The presumption of negligence per se can be rebutted by proof that the physician acted in a manner that was reasonable and justifiable under the circumstances.<sup>158</sup> At trial, therefore, the ultimate question is whether the physician was negligent rather than whether s/he violated the regulation, and proof of justification or excuse would negate the existence of negligence.<sup>159</sup> Courts generally recognize that in emergencies or unusual conditions it may be difficult if not impossible to comply with statutory requirements, and that statutes are subject to implied qualifications or exceptions which may excuse the violation.<sup>160</sup> Yet the regulations already provide for emergency situa-

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155. CAL. EVID. CODE § 669(a)(4) (West Supp. 1980).

156. 22 CAL. ADMIN. CODE, §§ 51163(a)(1)(A), 51305.1-8, 70037.1, 70707.1-9 (1977).

157. See *Cal. Medical Ass'n v. Lackner*, No. 268099 (Cal. Super. Ct., Sacramento County, Apr. 24, 1978) at 11 (citing *Relf v. Weinberger*, 372 F. Supp. 1196 (D.D.C. 1974) *on remand sub nom. Relf v. Mathews*, 403 F. Supp. 1235 (D.D.C. 1975) as reasoning for statute).

158. CAL. EVID. CODE § 669(b)(1) (West Supp. 1980). The California Supreme Court elaborated on situations which might justify violating a regulation: "In our opinion the correct test is whether the person who has violated a statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." *Alarid v. Vanier*, 50 Cal. 2d 617, 624, 327 P.2d 897, 900 (1958).

159. Procedurally, the determination of whether the alleged injury resulted from an occurrence prevented by § 669, and of whether the injured party was of the class of persons protected by this section are questions for the judge, while the determination of whether the defendant violated this section and whether the violations caused the injury are questions for the jury. See generally *Fuentes v. Panella*, 120 Cal. App. 2d 175, 183, 260 P.2d 853, 858 (1953).

160. It is the general rule that in cases of emergency, or unantici-

tions.<sup>161</sup> Some commentators feel that the legislation was drafted to leave little room for professional judgment and resulting disparities as to what a patient should be told during the informed consent process.<sup>162</sup> Because the government has specifically outlined the legal standard for informed consent for sterilization, full compliance with the regulations should theoretically absolve a physician of liability. The negligence per se theory is not available in cases arising prior to the sterilization regulations and for sterilizations not performed on Medi-Cal patients or performed in health facilities.<sup>163</sup>

2. General Negligence: Cases may arise in which the alleged involuntary sterilization took place prior to the promulgation of federal or California regulations or from sterilizations not covered by regulations.<sup>164</sup> It would therefore be necessary to sue under a general negligence theory<sup>165</sup> without regard to the regulations, relying on the common law rules established for informed consent.<sup>166</sup> In those instances, a physician or surgeon

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pated conditions where some immediate action is found necessary for the preservation of the life or health of a patient and it is impracticable to first obtain consent to the operation or treatment which the surgeon deems to be immediately necessary, the surgeon is justified in extending the operation to remove and overcome such conditions without the express consent of the patient thereto.

*Preston v. Hubbell*, 87 Cal. App. 2d 53, 57-58, 196 P.2d 113, 115 (1948).

161. 22 CAL. ADMIN. CODE §§ 51305.2, 70707.1 (1977).

162. STERILIZATION STUDY, *supra* note 26, at 33.

163. See note 58 *supra* and accompanying text.

164. The California regulations became effective on December 1, 1977. The federal regulations were effective March 8, 1979.

165. In *Rowland v. Christian*, 69 Cal. 2d 108, 111-12 70 Cal. Rptr. 97, 99-100, 443 P.2d 561, 563-64 (1968), the California Supreme Court re-examined negligence liability in California and came to the conclusion that § 1714 of the California Civil Code is the foundation of negligence law in California. Section 1714 provides:

Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except to far as the latter has, willfully or by want of ordinary care, brought the injury upon himself.

CAL. CIV. CODE § 1714 (West 1973). Section 1714 establishes the general principle that "[a]ll persons are required to use ordinary care to prevent others being injured as the result of their conduct," and "in the absence of statutory provision declaring an exception to the fundamental principle . . . , no such exception should be made unless clearly supported by public policy." *Rowland v. Christian*, 69 Cal. 2d at 112, 70 Cal. Rptr. at 100, 443 P.2d at 564.

166. For a discussion of women's health care and informed consent see Comment,

must exercise the degree of skill or care set by doctors of good standing practicing in the locality,<sup>167</sup> with regard to obtaining informed consent to the surgery. In 1972 in *Cobbs v. Grant*,<sup>168</sup> the California Supreme Court defined the standards for informed consent to an operation. The court held that where a physician fails to inform a patient of any material risk, benefit, or alternative involved in a proposed treatment, and one of those risks subsequently causes injury to the patient, the failure to obtain an informed consent makes the physician liable to the patient for negligence.<sup>169</sup>

The *Cobbs* court held that an integral part of the physician's overall obligation to the patient is a "duty of reasonable disclosure of the available choices with respect to proposed therapy,"<sup>170</sup> and of "the dangers inherently and potentially involved in each."<sup>171</sup> The court further held that the weighing of 1) the risks inherent in a procedure, 2) the risks of a decision not to undergo the treatment, and 3) the probability of success, against the subjective fears and hopes of the patient, is not an expert skill. Such evaluation and decision are nonmedical judgments reserved to the patient alone.<sup>172</sup> Thus, the patient's right to make an informed decision shapes the physician's duty to inform. That right can be exercised effectively only if the patient possesses adequate information to make an intelligent choice. Although the *Cobbs* standard of informed consent is applicable to all operations, there have been no cases in which it was applied to sterilization. It appears most of the procedures outlined in the California sterilization regulations would be required.<sup>173</sup>

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*Women's Health Care and Informed Consent: Who Should Decide What Is Best for Women—Patients or Doctors?*, 9 GOLDEN GATE U.L. REV. 553 (1978-79).

167. See generally B. WITKIN, *supra* note 153, at §§ 514-17.

168. 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

169. *Id.* at 240, 104 Cal. Rptr. at 512, 502 P.2d at 7. See also Comment, *supra* note 166 at 567-70.

170. *Id.* at 243, 104 Cal. Rptr. at 514, 502 P.2d at 10. Although the court used the term "therapy" during its discussion of informed consent, subsequent cases have interpreted the *Cobbs* definition of informed consent to be applicable to medical treatment other than just "therapy." See Comment, note 166 *supra*, at 568 n.90, for a summary of recent cases.

171. 8 Cal. 3d at 243, 104 Cal. Rptr. at 514, 502 P.2d at 10.

172. *Id.*

173. See text accompanying notes 65-86 *supra*.

*Battery*

Another cause of action which may be available to a sterilization abuse plaintiff is battery.<sup>174</sup> Battery is defined as a "willful and unlawful use of force or violence upon the person of another."<sup>175</sup> When a person has been subjected to an operation without her consent, the operation may constitute a battery.<sup>176</sup> Nevertheless, courts have not always agreed that an operation performed without informed consent constitutes battery rather than negligence.<sup>177</sup> The *Cobbs* court provided guidance, stating:

Where a doctor obtains consent of the patient to perform one type of treatment and subsequently performs a substantially different treatment for which consent was not obtained, there is a clear case of battery . . . .

However, when an undisclosed potential complication results, the occurrence of which was not an integral part of the treatment procedure but merely a known risk, the courts are divided on the issue of whether this should be deemed to be a battery or negligence . . . .

. . . [T]he trend appears to be towards categorizing failure to obtain informed consent as negligence.<sup>178</sup>

Thus, surgical sterilization of a patient who had not given informed consent would be considered a battery. However, this is

174. Battery is the traditional action in which medical malpractice cases have been brought, based on the "unprivileged touching" theory. In *Valdez v. Percy*, 35 Cal. App. 2d 485, 491, 96 P.2d 142, 145 (1939), the court stated: "It is firmly established as the law that where a person has been subjected to an operation without his consent such an operation constitutes technical assault and battery." This theory is still good law. See *Cobbs v. Grant*, 8 Cal. 3d at 239, 104 Cal. Rptr. at 511, 502 P.2d at 7; *Berkey v. Anderson*, 1 Cal. App. 3d 790, 803, 82 Cal. Rptr. 67, 76-77 (1969) (malpractice action where consent was given for performance of a procedure no more complicated than electromyograms plaintiff had previously undergone, but the procedure performed was a myelogram involving a spinal puncture, a much more complicated procedure). See also *Estrada v. Orwitz*, 75 Cal. App. 2d 54, 57-58, 170 P.2d 43, 45-46 (1946) (where court held it was battery (assault) and negligence when a dentist engaged to extract one tooth and extracted five others).

175. CAL. PENAL CODE § 242 (West 1970).

176. *Valdez v. Percy*, 35 Cal. App. 2d at 491, 96 P.2d at 145 (1939).

177. See *Cobbs v. Grant*, 8 Cal. 3d 229, 239, 104 Cal. Rptr. 505, 511, 502 P.2d 1, 7 (1972) for list of cases which held differing views on whether lack of informed consent is negligence or battery.

178. *Id.* at 239-41, 104 Cal. Rptr. at 511-12, 502 P.2d at 7-8.

limited to situations where the physician or surgeon exceeded the patient's consent or performed surgery different from that to which the patient had consented.<sup>179</sup>

The issue of battery arises primarily in the case of emergency situations, where courts have held that a fictional implied consent authorizes a physician to perform operations without actual consent.<sup>180</sup> This implied consent theory has been held applicable to sterilization operations;<sup>181</sup> therefore, the primary issue at trial is whether the circumstances under which a sterilization was performed constituted an emergency situation.

The plaintiff's advantage in a battery action is that the defendant physician may not raise a medical community standard as a defense; the plaintiff need only prove a touching and lack of consent.<sup>182</sup> Furthermore, the physician may be held liable for punitive damages in a battery action since battery is an intentional tort.<sup>183</sup> A battery action is more likely to exist for operation performed prior to enactment of the sterilization regulations in 1977. Because there were no standardized procedures or prescribed consent forms for sterilizations before that time, there is a greater chance that informed consent was not obtained.

### *Other Considerations in State Tort Actions*

1. *Statute of limitations:* Before 1970 in California, the rule was that the statute of limitations began to run one year

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179. *Id.*

180. *Preston v. Hubbell*, 87 Cal. App. 2d 53, 57-58, 196 P.2d 113, 115-16 (1948). See cases collected at 61 AM. JUR. 2d *Physicians & Surgeons* § 159 (1972).

181. *Kritzer v. Citron*, 101 Cal. App. 2d 33, 38, 224 P.2d 808, 811 (1950). The court noted that "[a]ny language . . . that there is an implied consent . . . is an obvious fiction. In reality the person whose right is invaded has not . . . expressed any or apparent assent." *Id.* at 39, 224 P.2d at 812. In *Kritzer*, the issue was whether the physician had authorization to perform a sterilization following delivery of the plaintiff's third child. There was written consent from both the patient and her husband (the court noted that consent of the patient alone was sufficient); however, plaintiff contended that written consent was conditioned upon defendant's first having performed the caesarian section which was not performed. *Id.* The physician testified to the contrary—that the patient consented to the sterilization between the birth and the surgery. This testimony was corroborated by a physician who witnessed the conversation. Therefore, the court upheld that lower court ruling for the physician. *Id.*

182. *Cobbs v. Grant*, 8 Cal. 3d 229, 240, 104 Cal. Rptr. 505, 512, 502 P.2d 1, 8 (1972).

183. *Id.*

from the time a cause of action was or should have been discovered (often called the discovery rule).<sup>184</sup> This ruling was applicable where a patient was aware that an operation took place but only later discovered the operation had been unnecessary; the statute of limitations did not begin to run until the patient learned that the operation was unnecessary.<sup>185</sup> Courts have also held that the statute of limitations would not begin to run as long as the physician-patient relationship continued, absent actual discovery of negligence.<sup>186</sup>

The common law rules were modified in 1970 when the Cali-

184. *Huysman v. Kirsch*, 6 Cal. 2d 302, 57 P.2d 908 (1936). This was an action by a patient and her husband against a physician who left a drainage tube in the patient's body for more than 20 months following a hysterectomy. The court held that the negligence of the physician continued until the tube was removed, and also that the operation was not complete until all appliances used had been removed. *Id.* at 310-11, 57 P.2d at 912. In addition, the court cited a worker's compensation case, *Marsh v. Industrial Accident Comm'n*, 217 Cal. 338, 351, 18 P.2d 933, 938 (1933), in which it had held that the statute did not begin to run against the claim until the employees knew the cause of their injury, or by reasonable care and diligence should have known. 6 Cal. 2d at 312, 57 P.2d at 912-13. The court stated that if this principle were applied to the present action, the same result would follow, since the patient had no knowledge of the presence of the tube in her body until it was finally removed by the physician. *Id.*

185. *Hundley v. St. Francis Hosp.*, 161 Cal. App. 2d 800, 327 P.2d 131 (1958) (action by a patient against a surgeon who had removed part of her uterus and remaining fallopian tube and ovary, thus rendering her sterile). In *Hundley*, the patient testified that the doctor informed her that the surgery was necessary because of certain pathology found. However, the evidence was clear that no pathological abnormality was found in any of the tissues removed. The court held that since the disclosure of unauthorized surgery was accompanied by a presentation negating the existence of a cause of action for battery, the surgeon could not contend that the statute began to run when the patient learned that the surgery had gone beyond the scope of her consent. *Id.* at 806-07, 327 P.2d at 135.

186. In *Huysman v. Kirsch*, 6 Cal. 2d 302, 309, 57 P.2d 908, 911 (1936), the court held that it would be an improper burden on the patient to hold that in order to prevent the statute from running against her right of action, she must sue while following the advice of the surgeon on which she relied. In *Hundley v. St. Francis Hosp.*, 161 Cal. App. 2d 800, 327 P.2d 131, (1958), the court rejected the surgeon's claim that plaintiff's malpractice cause of action was barred by the one-year statute of limitations because it was shown that the physician-patient relationship continued until a date less than one year before the bringing of the action, and that the patient did not discover until or after the date that the surgeon's negligence had caused the injury to her. *Id.* at 805-06, 327 P.2d at 135. The court pointed out that, as to malpractice actions, the rule was clear that "while the physician-patient relationship continues the patient is not ordinarily put on notice of the negligent conduct of the physician upon whose skill, judgment, and advice [s/he] continues to rely"; and that, "in the absence of actual discovery of the negligence, the statute does not commence to run during such period." This is true "even though the condition itself is known to the patient, so long as its negligent cause and its deleterious effect is not discovered." *Id.*

ifornia legislature enacted section 340.5 of the Code of Civil Procedure.<sup>187</sup> This section provided that the statute of limitations for professional medical negligence was four years from the date of injury or one year after plaintiff discovered or should have discovered the injury with reasonable diligence, whichever occurred first.<sup>188</sup> The statute would be tolled for any period during which the physician had failed to disclose any act, error, or omission which was known or should have been known by use of reasonable diligence. The impact of this legislation was to establish an absolute maximum of four years on the statute of limitations whereas before no absolute maximum existed. In 1975, section 340.5 was amended to shorten the statutory period; it provides that actions for negligence must be commenced within three years of the date of injury or one year after the date the injury was or should have been discovered, whichever occurs first.<sup>189</sup> The 1975 amendments had a significant effect on the limitations period; under the prior statute the four years could be tolled only if the defendant failed to disclose any act, error or omission of which s/he knew or should have known. The amended version provides that the statute can be tolled upon proof of fraud, intentional concealment, or by the presence of a non-therapeutic foreign body in the plaintiff.<sup>190</sup> The change in the statute most relevant to a sterilization abuse action is that the prior statute of limitations also applied to actions for rendering professional services without consent—a provision absent from the 1975 amended statute. Hence, if a plaintiff proceeds on an intentional tort theory, i.e., battery, on grounds of lack of informed consent, the new statute of limitations apparently would not be applicable.<sup>191</sup> No published cases have tested this theory.

There have been several recent cases in which the courts have interpreted the meaning of the 1970 amended version of section 340.5.<sup>192</sup> The courts have held that nondiscovery of a

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187. For a summary of § 370.5 as enacted in 1970, see *Review of Selected 1970 California Legislation*, 2 PAC. L.J. 333 (1971).

188. *Id.*

189. CAL. CIV. PROC. CODE § 340.5 (West Supp. 1980).

190. *Review of Selected 1975 California Legislation*, 7 PAC. L.J. 546 (1976).

191. *Id.*

192. *Bispo v. Burton*, 82 Cal. App. 3d 824, 828-30, 147 Cal. Rptr. 442, 443-45 (1978); *Bellah v. Greenson*, 81 Cal. App. 3d 614, 623-24, 146 Cal. Rptr. 535, 540-41 (1978); *Wells Fargo Bank v. Superior Court*, 74 Cal. App. 3d 890, 895-900, 141 Cal. Rptr. 836, 837-41 (1977); *Larcher v. Wanless*, 18 Cal. 3d 646, 657-58, 135 Cal. Rptr. 75, 81-82, 557 P.2d 507,

negligent act delays the onset of the statutory period.<sup>193</sup> Concealment does not toll the one year period if discovery of the unauthorized surgery has occurred.<sup>194</sup>

2. *Consent forms:* Prior to the enactment of sterilization regulations in 1977, no consent form was required and no guidelines existed as to what elements were necessary for informed consent. Presently, because the California regulations may not apply to non-Medi-Cal sterilizations, there will be essentially no requirement that a physician use a consent form for privately funded sterilizations. The form is required for state and federally funded sterilizations.

In the past, hospitals and physicians used a variety of consent forms; they were often "general" or "blanket" forms which gave physicians unlimited authority and discretion without specifying the particular operation or procedure contemplated.<sup>195</sup> Some courts have held that a patient is presumed to comprehend the nature, terms, and effect of a consent to treatment form to which written consent has been given.<sup>196</sup> In one California case a consent form granting authorization to a surgeon to "administer and perform all and singular any treatments or operation . . . which may now or during the contemplated services be deemed advisable or necessary" was construed to permit the surgeon to remove infected parts of a woman's fallopian tubes during an appendectomy, thus rendering her sterile.<sup>197</sup>

Other jurisdictions have not taken such a generous view of blanket consent forms. In *Rogers v. Lumbermens Mutual Casualty Co.*,<sup>198</sup> surgeons were found liable for performing a "precautionary" hysterectomy during an appendectomy because the court considered the consent form to be "so ambiguous as to be

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513-14 (1976); *Sanchez v. South Hoover Hosp.*, 18 Cal. 3d 93, 95, 132 Cal. Rptr. 657, 659 553 P.2d 1129, 1131 (1976).

193. *Id.*

194. *Sanchez v. South Hoover Hosp.*, 18 Cal. 3d 93, 97, 132 Cal. Rptr. at 660, 553 P.2d at 1132.

195. D. HARNEY, *MEDICAL MALPRACTICE* § 2.2(B), at 48 (1973).

196. See *Karp v. Cooley*, 349 F. Supp. 827, 835 (S.D. Tex. 1972); *Grannum v. Bernard*, 70 Wash. 2d 304, 307-09, 422 P.2d 812, 814-15 (1967).

197. *Danielson v. Roche*, 109 Cal. App. 2d 832, 835, 241 P.2d 1028, 1030 (1952).

198. 119 So. 2d 649 (La. App. 1960).

almost completely worthless."<sup>199</sup> It appears that courts will view consent forms as one factor to consider in determining whether a patient truly gave informed consent.<sup>200</sup> One commentator describes consent forms as bearing little relation to the "free and informed consent" desired of a patient and asserts that the written consent merely should be considered as one item of evidence in the total physician-patient relationship on the issue of informed consent, with its importance weighed by the jury.<sup>201</sup>

The use of consent forms should not be an issue for sterilizations performed for HEW and Medi-Cal patients since specific consent forms are required by federal and California regulations.<sup>202</sup> Failure to use the prescribed forms would probably be considered negligence per se.<sup>203</sup> It is uncertain what effect these prescribed forms will have on sterilizations performed without government funding. There have been no published cases on the issue of what kind of consent form will be required for these sterilizations. It appears that if a victim of an alleged involuntary sterilization could show that the physician's consent form was so ambiguous and general as compared to the forms required for government subsidized sterilizations, she would have a good chance of prevailing on the issue of informed consent. Theoretically, the consent form required by the sterilization regulations should be the guide for all sterilizations, regardless of funding.

#### IV. CONCLUSION

The availability of and legal requirements for sterilization as a form of birth control have undergone several changes in the past few years. It is important for a practicing attorney confronted with a sterilization abuse case to be aware of the background of sterilization, and the events and circumstances which led to the promulgation of both federal and state regulations.

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199. *Id.* at 652.

200. See *Valdez v. Percy*, 35 Cal. App. 2d 485, 491, 96 P.2d 142, 145 (1939). See also *Gray v. Grunnagle*, 423 Pa. 144, 166-67, 223 A.2d 663, 669 (1966); *Cooper v. Roberts*, 220 Pa. Super. 260, 268, 286 A.2d 647, 649 (1971).

201. D. HARNEY, *supra* note 169, § 2.2(B), at 50.

202. 42 C.F.R. §§ 50.205(a)-(c), 441.258 (1979); 22 CAL. ADMIN. CODE §§ 51305.6, 70707.6 (1977).

203. See text accompanying notes 150-63 *supra*.

Women have been sterilized without their informed consent; instances of sterilization abuse received publicity throughout the Seventies. These instances of sterilization abuse were often more insidious than past instances of involuntary sterilization, often called eugenic sterilization, which involved forced sterilization of criminals and the mentally incompetent. The targets of sterilization abuse have generally been women from the more vulnerable groups in our society, specifically minorities and the poor. Essentially, sterilization abuse means that a woman's decision to give up the ability to have children has been made under pressure from physicians and hospital personnel, because physicians provided incomplete information about the surgical procedure, its effects and alternatives, or because the woman did not understand the significance of her action, because of lack of education, cultural differences, or language barriers. In the context of "reproductive choice"—the right to control one's own body—the significance of sterilization abuse becomes more apparent.

As a result of the publicized instances of sterilization abuse, HEW established regulations governing sterilizations performed under federal family planning services. The regulations only affect whether the physician will be reimbursed for the sterilization. California established similar but more comprehensive regulations in 1977. The regulations covered sterilization for Medi-Cal patients and privately funded sterilizations performed in health facilities. In January, 1980, the California Department of Health announced its intention to repeal the sterilization regulations as they apply to privately funded sterilizations performed in health facilities and to amend the Medi-Cal regulations in order to comply with the federal regulations. This represents a major policy change in California in that privately funded sterilizations will no longer be legislatively regulated.

The regulations are useful in setting a standard of care for sterilizations. A woman sterilized without informed consent may have a remedy under either federal or state law. The federal remedy is available when the sterilization is performed by someone "acting under color of state law." Section 1983 of the Civil Rights Act provides remedies for abuses of official authority which result in the deprivation of a constitutional right, privilege and immunity. Because the right to procreate and the right to make decisions concerning reproductive choice are recognized

as fundamental rights protected by the Constitution, an action under section 1983 is available in a sterilization case.

A plaintiff may bring an action in state court under the traditional negligence and battery theories. The negligence cause of action may be proved in two ways: 1) negligence per se: alleging a violation of the sterilization regulations and 2) general negligence: establishing a duty under common law principles of negligence and informed consent. The battery action, also based on a lack of informed consent, is limited to situations where a physician obtains the consent of the patient to perform one treatment but subsequently performs a sterilization for which consent was not obtained. This action will arise most often in cases of alleged emergencies, where courts have often held that a fictional implied consent authorized the physician to perform the sterilization.

Although it appears that some of the factors which contributed to the many instances of sterilization abuse may be less significant now that regulations have been developed, the problem still exists. Studies conducted after the effective date of the HEW regulations revealed non-compliance with the regulations by hospitals and physicians as late as 1979, and inadequate enforcement by HEW. Moreover, the California regulations, which had been applicable for both federally and privately funded sterilizations, will no longer apply to privately funded sterilization. It is hoped that the publicity surrounding sterilization abuse and the subsequent regulations will cause physician attitudes to change concerning their respect for a woman's right to make her own decision regarding reproductive choice.