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# Compulsory Sterilization of the Mentally Ill and Retarded: In re Sterilization of Moore

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# NOTES

## Compulsory Sterilization of the Mentally Ill and Retarded: In re Sterilization of Moore

The director of the Forsyth County Department of Social Services, pursuant to the North Carolina compulsory sterilization statute,[1] filed a petition with the county district court seeking a court order for sterilization of Joseph Lee Moore. The director alleged that unless sterilized Moore would likely procreate children afflicted with serious physical, mental, or nervous diseases or deficiencies.[2] In a motion to dismiss the petition respondent alleged that the North Carolina statute violated his right to procedural and substantive due process, denied him equal protection of the law, and was unconstitutionally vague.[3] Both the district court and the superior court which heard the matter de novo upheld respondent's challenge. On petitioner's appeal the case came before the North Carolina Supreme Court. *Held, reversed*: In light of the extensive procedural protections accorded the subject of a sterilization, the North Carolina compulsory sterilization statute for mentally ill and retarded persons represents a reasonable and valid exercise of the police power which violates neither the right to substantive due process nor equal protection, and is not unconstitutionally vague. *In re Sterilization of Moore*, 289 N.C. 95, 221 S.E.2d 307 (1976).

### I. Compulsory Sterilization of the Mentally Handicapped: Statutes, Science, and the Courts

At the close of the nineteenth century four scientific developments composed the theoretical basis for compulsory sterilization of the mentally hand-

1. N.C. Gen. Stat. §§ 35-36 to -50 (Supp. 1975). Section 35-39 provides:

> The county director of social services . . . is hereby authorized to petition the district court of his county for the sterilization operation of any mentally ill or mentally retarded resident of the county . . . .
>
> . . .
>
> (3) When in his opinion such . . . non-institutionalized individual would be likely, unless sterilized, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency; or, because of a physical, mental, or nervous disease or deficiency which is not likely to materially improve, the person would be unable to care for a child or children.

The present statute represents a portion of the major revision of North Carolina statutes dealing with the mentally incompetent by which the 1973 legislature sought to incorporate more extensive due process safeguards. *See generally* Comment, *North Carolina's New Mental Health Laws: More Due Proces*, 52 N.C.L. Rev. 589 (1974).

2. Included in the petition were the results of psychological tests indicating that the 16-year old Moore had a full scale I.Q. of under 40 (compared with the general population mean of 100) and a test age of 8. Report of Psychological Evaluation Done at Child Guidance Clinic, July 28, 1975. Of the sterilizations performed under an earlier North Carolina statute between 1962 and 1964, 30% were performed on children between the ages of 10 and 19. Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 Ohio St. L.J. 591, 621 (1966).

3. A fifth challenge, that the statute constituted cruel and unusual punishment, was summarily rejected by the court since the procedure in question was not imposed as punishment for a crime nor applied to those convicted of a crime.

icapped:[4] Sir Francis Galton's theories of eugenics,[5] popular notions of Darwinism, the rediscovery of Mendel's work on inheritance, and the development of relatively safe and effective surgical techniques for the sterilization of men and women. Attempts were immediately made to translate this untried theory into law. By 1907 Indiana had enacted the first law providing for compulsory sterilization of mental defectives.[6] Judicial approval was slower in coming.[7] Not until 1925 did a state supreme court uphold such a statute.[8]

In 1927 the United States Supreme Court addressed the question in *Buck v. Bell*,[9] upholding a Virginia statute against an attack alleging that involuntary sterilization of the mentally retarded denied equal protection of the law and violated due process. Justice Holmes employed the reasonable relationship test[10] in summarily dismissing the allegation that involuntary sterilization of institutionalized mental defectives denied equal protection. The principal issue was whether the statute comported with substantive due process. Justice Holmes first emphasized the scrupulous procedural protections accorded those subject to the law. These protections included notice, the opportunity to appear at the agency hearing, and the right to a trial de novo in the circuit court.[11] In light of these protections and the relationship between the end to be achieved and the means provided by the statute, the judgment of the Court was not to be substituted for that of the legislature.[12]

Justice Holmes, analogizing the position of mental defectives under the Virginia statute to that of citizens who were required to sacrifice their lives in war or to submit to compulsory vaccination for the public welfare,[13] found that the state could legitimately "prevent those who are manifestly unfit from continuing their kind."[14] The assumptions underlying the decision were clear:

4. Ferster, *supra* note 2, at 591-92.

5. The eugenics theory asserted that man could improve the quality of the species by promoting the procreation of the best men or preventing the procreation of the defective. Biological eugenics was based on the concept that those who are defective transmit this deficiency through genetic channels. Environmental eugenics was based on the premise that those who are defective provide an inadequate nurturing environment which in turn produces deficient offspring. For a complete discussion of the theory see N. KITTRIE, THE RIGHT TO BE DIFFERENT 298 (1971).

6. Ind. Acts of 1907, ch. 215, cited in O'Hara & Sanks, *Eugenic Sterilization*, 45 GEO. L.J. 20, 22 (1956).

7. For early decisions holding state compulsory sterilization laws unconstitutional see Williams v. Smith, 190 Ind. 526, 131 N.E. 2 (1921); Smith v. Board of Examiners of Feebleminded, 85 N.J.L. 46, 88 A. 963 (Sup. Ct. 1913); *In re* Thomson, 103 Misc. 23, 169 N.Y.S. 638 (Sup. Ct.), *aff'd mem. sub nom.* Osborn v. Thomson, 185 App. Div. 902, 171 N.Y.S. 1094 (1918).

8. Smith v. Command, 231 Mich. 409, 204 N.W. 140 (1925); Buck v. Bell, 143 Va. 310, 130 S.E. 516 (1925), *aff'd*, 274 U.S. 200 (1927). The Michigan statute authorized sterilization of mental defectives but not the insane. The Virginia statute, however, authorized sterilization of the insane, the feebleminded, and epileptics.

9. 274 U.S. 200 (1927).

10. *See* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). For an excellent discussion of equal protection analysis see Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

11. 274 U.S. at 206-07.

12. *Id.*

13. Both analogies have been sharply criticized by the commentators. When citizens are compelled to give their lives in war, there is "a necessity and an urgency that causes us to sacrifice men in self-defense which is wholly lacking in the case of eugenic sterilization." O'Hara & Sanks, *supra* note 6, at 29-30. When citizens require immunization against smallpox, the etiology of the disease is well established and the bodily invasion is minimal. *See* AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW 213 (S. Brakel & R. Rock eds. 1971).

14. 274 U.S. at 207.

(1) the mechanisms of heredity in mental deficiency are clearly established and provable; (2) society is threatened with the imminent prospect of being "swamped with incompetence"; and (3) as opposed to the sacrifices of the "best citizens," the loss of the procreative right is a "lesser sacrifice" to the mentally deficient.[15]

*Buck* did not quell the controversy surrounding compulsory sterilization. Within ten years of the decision serious doubts concerning the scientific validity of the eugenics theory were raised in the medical community.[16] Research demonstrated the extreme complexity and uncertainty involved in the inheritance of mental illness and retardation.[17] Moreover, inquiry into the nature of mental disorders revealed a broad spectrum of ability, proclivity, and comprehension among those grouped as mental defectives.[18] Finally, evolution of constitutional theory and analysis has established a new framework within which the compulsory sterilization laws must be considered.

This approach was exemplified in *Skinner v. Oklahoma*,[19] the only other Supreme Court decision dealing directly with the constitutionality of an involuntary sterilization law. In that case the Court sustained an equal protection challenge to a state statute permitting sterilization of habitual criminals for eugenic reasons. Although explicitly reserving judgment on the issue of substantive due process, the Court held that procreation represents a basic liberty and that any attempt by the state to interfere with that liberty would be subject to strict scrutiny.[20] Since *Skinner* the Court has firmly established

15. *Id.* In the decade following *Buck* twenty states enacted eugenics sterilization laws. Note, *Human Sterilization*, 35 IOWA L. REV. 251, 253 n.12 (1950). In almost all of the relatively few cases reaching appellate courts the *Buck* decision has been relied upon to uphold such laws. A complete collection of such cases may be found in Annot., 53 A.L.R.3d 960 (1973).

16. *See* COMMITTEE FOR INVESTIGATION OF EUGENICAL STERILIZATION, AMERICAN NEUROLOGICAL ASSOCIATION, REPORT 178-83 (1936). The committee concluded that in view of the lack of scientific knowledge about heredity any sterilization law should be purely voluntary.

17. For a discussion of the complex scientific data in the area see Note, *Eugenic Sterilization—A Scientific Analysis*, 46 DENVER L.J. 631 (1969). *See also* MENTAL RETARDATION: A HANDBOOK FOR THE PRIMARY PHYSICIAN, REPORT OF THE AMERICAN MEDICAL ASSOCIATION CONFERENCE ON MENTAL RETARDATION (1969). Basically the studies indicate:

(1) Although over 200 causes of mental retardation are known (including biological, psychological, and socio-cultural factors), aside from a very few rare and specific disorders, the role of heredity in mental deficiency is not clear. Hereditary causation in mental illness is even more uncertain.

(2) While mentally retarded parents tend to have a higher incidence of mentally retarded children, up to 89% of their children are not retarded.

(3) Conversely, 80-90% of mentally defective children are born to normal parents who, although they cannot be identified, presumably carry recessive genes for mental retardation. Thus, assuming mental retardation is hereditary, it has been estimated that even if all the mentally retarded were sterilized, the number of mentally retarded in the next generation would fall by only 11%.

(4) In view of mutagens in the environment complete elimination of mental retardation may be impossible.

18. *See* COMMITTEE FOR INVESTIGATION OF EUGENICAL STERILIZATION, *supra* note 16, as reported in Ferster, *supra* note 2: "There is nothing to indicate that mental disease and mental defect are increasing, and from this standpoint, there is no evidence of a biological deterioration of the race." *Id.* at 602. Among the profoundly and severely retarded, who are often sterilized and must be institutionalized in any case, the sexual drive is usually quite limited. MENTAL RETARDATION: A HANDBOOK FOR THE PRIMARY PHYSICIAN, *supra* note 17, at 50. Sexually inappropriate behavior of the mildly retarded, who constitute 90% of the retarded, is attributable in part to a lack of sexual education. Roos, *Psychological Impact of Sterilization on the Individual*, 1975 LAW & PSYCH. REV. 45, 48.

19. 316 U.S. 535 (1942).

20. *Id.* at 541. Procreation was held to be fundamental to the existence and survival of man. Thus, the subject of a sterilization procedure is deprived forever of a basic liberty.

procreation as a fundamental right.[21] Further, the Court's 1973 decision in *Roe v. Wade*,[22] while focusing primarily on a woman's right to undergo an abortion voluntarily, incorporated the procreative right into the constitutionally protected right of privacy.[23]

## II. IN RE STERILIZATION OF MOORE

Respondent first challenged the involuntary sterilization statute on the grounds that the statute's failure to provide funds for obtaining medical experts on behalf of the sterilization subject and to require cross-examination in the hearing procedure violated procedural due process. In response to these arguments the North Carolina Supreme Court first stressed the extensive procedural protections afforded respondent, which include notice, right to counsel at all stages, right to a hearing de novo in the superior court, and a further right of appeal to the higher courts.[24] The court then pointed out that while the sterilization statute does not on its face provide funds for the services of expert witnesses on behalf of indigents, other provisions of the North Carolina General Statutes allow the court discretion to approve payment of state funds for such services.[25] Further, while the right of cross-examination is not mandated in every sterilization hearing, the respondent or his court-appointed counsel has only to object in writing to the petition in order to be fully afforded that right.[26] Measured against the yardstick of due process laid out in *Buck*,[27] the provisions of the North Carolina statute were held to exceed the minimum requirements of procedural due process.

The court's analysis of respondent's substantive due process challenge is confusing. The court identified the compelling state interests[28] underlying the North Carolina sterilization statute as the potential life of the child and the health of the parent,[29] precisely those interests found in *Roe* to outweigh the individual's right to privacy.[30] Although the exact nature of the state's interest in the potential life of the child is never clearly defined, the court's citation to *Cook v. State*[31] suggests that the state's interest lies in part in ensuring fit

21. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

22. 410 U.S. 113 (1973).

23. *Id.* at 152. In the face of these developments only 19 of the original 32 states passing compulsory sterilization statutes have maintained them. C. LEVY, THE HUMAN BODY AND THE LAW 32, 78 (1975). Although an estimated 70,000 persons have been sterilized under such laws, the numbers have dropped steadily in the last 30 years. However, in 1963 North Carolina alone accounted for over half the sterilizations performed in the United States under such a law. HUMAN BETTERMENT ASSOCIATION, 35TH ANNUAL COMPILATION (1963).

24. N.C. GEN. STAT. §§ 35-36 to -50 (Supp. 1975).

25. *Id.* § 7A-454 (1969).

26. *Id.* § 35-43 (Supp. 1975).

27. 274 U.S. at 206-07.

28. What precisely constitutes a compelling state interest has never been fully defined by the United States Supreme Court. It has been suggested that it must be based on a threat of *immediate* and significant harm to a vital state interest. *See* Comment, *Sterilization of Mental Defectives: Compulsion and Consent*, 27, BAYLOR L. REV. 174, 179 (1975).

29. 289 N.C. at 101, 104, 221 S.E.2d at 311, 313.

30. 410 U.S. at 162. The identification of interests which the court seeks to establish is dubious. In *Roe* the majority held that the state's interest in the potential life of the child did not reach the compelling point until the fetus became viable in the last trimester of pregnancy. *Id.* at 163. Moreover, that interest was in preserving rather than preventing prenatal life. *Id.* at 150.

31. 9 Ore. App. 224, 495 P.2d 768 (1972). The court in that case held that the state's concern for the general welfare extended to future generations and could support sterilization of a mentally ill or retarded person unable to provide a proper environment for a child.

parents for future generations. While this interest is undoubtedly legitimate,[32] denying life to future generations in order to protect them from unfit parents seems anomalous.[33]

The court identified another aspect of this interest by asserting that the state has a right to prevent the procreation of children who will become a burden upon the state.[34] In fact, this interest, as the court's citations to *In re Cavitt*[35] and *Buck* demonstrate, is actually a resurrection in another guise of the scientifically dubious biological eugenics justification. Although respondent's amicus curiae had made a frontal assault upon the scientific validity of the eugenics justification,[36] the court ignored this line of argument and instead relied heavily on the *Buck* decision. The result is the substitution of precedent for a consideration of the evidence.

The second compelling interest identified by the court is the state's interest in protecting the health of the mentally ill or retarded person who may be able to function marginally outside an institution only if he is not burdened by the responsibility of children.[37] Noting that such an individual may be incapable of determining his inability to assume such a burden, the court emphasized that the sterilization procedure does not harm the individual's sexual function, but only prevents procreation.[38]

Having thus determined the state's interests to be compelling, the court omitted full consideration of less restrictive alternatives.[39] The court did suggest that when an individual is unable to practice other forms of birth control, sterilization becomes the only available remedy. Nevertheless, the court by no means required such a finding in a hearing on the sterilization petition.[40]

The treatment of the equal protection challenge[41] is even more curious. The court clearly confined review to the "old" equal protection model of reasonable relationship between means and ends.[42] Nowhere did the court advert to

32. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 652 (1972).

33. *See* note 39 *infra* and accompanying text. Data cited in Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 CALIF. L. REV. 917, 930 (1974), indicates that early intervention through social programs which displace the adverse environmental factors of children with low I.Q. mothers appears successful in preventing retardation due to environmental deprivation.

34. 289 N.C. at 103, 221 S.E.2d at 312.

35. 182 Neb. 712, 157 N.W.2d 171 (1968). The court held that to preserve the race the legislature could limit procreation of those whose "socially injurious tendencies" were hereditary.

36. Brief for North Carolina Civil Liberties Union Legal Foundation, Inc., as Amicus Curiae at 6, *In re* Sterilization of Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

37. 289 N.C. at 104, 221 S.E.2d at 313.

38. *Id.*

39. Brief, *supra* note 36, at 9. Among the alternatives advanced by respondent were expansion and improvement of traditional psychiatric treatment, medical treatment and prevention of mental retardation, therapeutic abortions, genetic counselling, the use of IUDs, and birth control pills.

40. The terms of the statute seem to indicate that some consideration of less restrictive alternatives is called for: "If the judge of the district court shall find from the evidence that . . . the person would be likely, *unless* sterilized, to procreate . . . he shall enter an order . . . authorizing the physician . . . to perform the operation." N.C. GEN. STAT. § 35-43 (Supp. 1975) (emphasis added).

41. Respondent had argued that the statute denied equal protection because it was in fact applied only to indigents, and was underinclusive because it did not apply to pheno-typically normal persons who might produce mentally ill or retarded children. The court did not deal specifically with these contentions.

42. 289 N.C. at 104, 221 S.E.2d at 313; *see* note 10 *supra.*

the strict scrutiny review which the Supreme Court explicitly mandated in *Skinner*.[43] Defining the object of the statute in question to be the prevention of procreation by those mentally handicapped persons who would be unable to care for a child or who would bear children who would also be mentally handicapped, the court simply held that the classification employed was reasonable.[44] Noting that the North Carolina statute does not differentiate between classes of mentally ill or retarded persons, the court asserted that, while no cases hold sterilization of all mentally handicapped persons to deny equal protection, many cases hold otherwise.[45] The principal citation in support of this finding is, predictably, *Buck v. Bell*. Yet *Buck* established only that a statute authorizing sterilization of mental defectives within institutions, not those outside institutions, did not deny equal protection of the law.

In response to respondent's contention that the statute provides an inadequate standard for the court to determine when sterilization is required,[46] the court cited *Parker v. Levy*[47] and *Arnett v. Kennedy*[48] to support the proposition that some degree of uncertainty is permissible so long as the terms of the statute can be complied with sufficiently.[49] Although admitting that the statute contains "germs of uncertainty," the court concluded that the triers of fact could comply with its terms when aided by experts in the field.[50] The court further construed the statute so as to require the petitioner in a sterilization proceeding to prove by clear, strong, and convincing evidence that a sterilization order is proper.[51]

## III. CONCLUSION

Although compulsory sterilization of the mentally ill and mentally retarded has continued to decline,[52] the decision of *In re Sterilization of Moore* demonstrates that the concept of involuntary sterilization for eugenic purposes still has legal vitality. However, the North Carolina Supreme Court's failure to deal with the difficult scientific and legal problems presented by compulsory sterilization of the mentally handicapped reveals that the decision is based on precedent rather than careful legal reasoning. Ultimately, that precedent is

43. 316 U.S. at 541.

44. 289 N.C. at 104, 221 S.E.2d at 313.

45. *Id.* In fact, the court cited only two such cases: Buck v. Bell, 274 U.S. 200 (1927); Smith v. Command, 231 Mich. 409, 204 N.W. 140 (1925).

46. Specifically, respondent objected to the wording of N.C. GEN. STAT. § 35-43 (Supp. 1975): "If the judge . . . shall find . . . that the person . . . would *probably* be unable to care for a child . . . or because the person would be *likely*, unless sterilized, to procreate a child . . . which *probably* would have serious physical, mental, or nervous diseases . . . he shall enter an order . . . authorizing the physician . . . to perform the operation." (Emphasis added.)

47. 417 U.S. 733 (1974). The Court in that case sustained a statute authorizing the court-martial of an officer "for conduct unbecoming a gentleman" because the words had a 200-year history of interpretation in a military context.

48. 416 U.S. 134 (1974). In that case, which did not involve a fundamental right, the Court upheld a statute allowing the removal of federal employees "for such cause as will promote the efficiency of the service."

49. *See* Ferster, *supra* note 2, at 614 for a discussion of the degree to which enforcement of state sterilization statutes has been dependent upon the attitudes of officials toward eugenic sterilization. "Georgia's annual sterilization rate dropped from 112 in 1959 to an all time low of seven operations in 1963. There were no changes in the sterilization law during that period. 'The changes have been in the philosophy of the superintendent. . . .' " *Id.*

50. 289 N.C. at 108, 221 S.E.2d at 315.

51. *Id.*

52. *See* note 23 *supra*.