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In Re Moore: The Sound and the Fury and the Scalpel

The North Carolina General Statutes § 35-36 through § 35-50 (1976) provide for the sterilization of the mentally ill and the mentally retarded, institutionalized or not institutionalized. The statutes provide that the petitioner may be a director of a state institution, director of social services, or the next of kin or legal guardian of the individual who acts through the institution director or director of social services. Such individuals petition the appropriate district court for a sterilization operation order. Consent may be given by the person upon whom the operation is to be performed, her or his next of kin, legal guardian, or a guardian ad litem appointed by the district court. Notice of the hearing or the petition is served upon the patient and the guardian or next of kin. Upon request, a hearing is granted and there is a right to appeal to the superior court. The person subject to the statute has a right to counsel at all stages of the proceedings and counsel will be appointed in cases of indigency.

North Carolina enacted its first sterilization laws in 1919.[1] After a successful constitutional attack on procedural due process grounds, in *Brewer v. Valk*,[2] the statutes were rewritten to satisfy procedural requirements.

By comparison with the rest of the country, North Carolina sterilizes a great number of individuals. In 1963, with a population of not quite five million, North Carolina sterilized 240 persons, while California, with a population of eighteen million, performed 17 sterilizations.[3] Of the reported sterilizations in 1963, 51% of them took place in North Carolina.[4] These statistics indicate that North Carolina utilizes its sterilization laws relatively frequently. A recent North Carolina case, *In re Moore*,[5] re-examined these statutes.

On May 21, 1975 the director of the Forsyth County Department of Social Services petitioned the court for an order authorizing the sterilization of Joseph Lee Moore, a minor, pursuant to North Carolina General Statutes § 35-36 through § 35-50 (1976). Accompanying the petition was the written consent of Joseph Lee Moore and his mother, and a psychological report which indicated that Joseph was presently functioning at a moderately retarded level of intelligence; with an intelligence quotient of under 40 and a

1. *Statutory Changes in North Carolina*, 7 N.C.L. REV. 392 (1929); *Statutory Changes in North Carolina*, 11 N.C.L. REV. 253 (1933).
2. 204 N.C. 186, 167 S.E. 638 (1933).
3. Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591, 600 (1966).
4. *Id.* at 601.
5. 289 N.C. 95, 221 S.E.2d 307 (1976).

test-age score of 8. The petitioner found Joseph to be a proper subject for sterilization based on the criteria given in the above statutes, *i.e.*, he believed that unless sterilized, Joseph would likely procreate a child or children who would probably have serious physical, mental or nervous diseases or deficiencies. As required by statute, a statement by an examining physician to the effect that there was no contra-indication that Joseph could withstand the surgery accompanied the petition.

The respondent, Joseph Moore, through his guardian ad litem and attorney, filed a motion to quash the petition alleging that North Carolina General Statutes § 35-36 *et. seq.*, were unconstitutional. Forsyth Superior Court allowed the motion, finding said statutes unconstitutional. The state gave notice of appeal to the court of appeals and the respondent petitioned the North Carolina Supreme Court to hear the matter prior to determination by the court of appeals. The petition was allowed on August 27, 1975.

On appeal, the respondent attacked the statutes on the grounds that they were violative of the substantive and procedural aspects of the due process clause of the fourteenth amendment to the United States Constitution and the law of the land clause of article I, section 19, of the North Carolina Constitution. Further, respondent alleged that the statutes denied him equal protection of the law, were unconstitutionally vague and arbitrary, and provide for cruel and unusual punishment.

The court, in an opinion by Justice Moore, upheld the statutes as constitutional. Citing *Buck v. Bell*,[6] the court stated that the state had a valid and compelling interest in the future life of the unborn child and in the welfare of the parent—sufficient to justify the state's right to sterilize retarded or insane persons.[7] Using the same reasoning as a recent Nebraska case[8] on the same issue, the court stated that the people of North Carolina have the right to prevent the procreation of children who will become a burden on the state.[9] For these reasons, the statutes were found non-violative of the substantive aspect of the due process clause.

Procedural due process requirements were found to be satisfied because the statutes provide for notice, a hearing on request, the right to appeal, counsel at every stage of the proceedings, appointed counsel in cases of indigency, a court appointed guardian ad litem if there is no next of kin or legal guardian, and a right of cross-examination if a hearing is requested. The respondent asserted that the state should provide, in cases of indigency, the necessary funds to obtain a medical expert on his behalf. The court stated that such a procedural safeguard was adequately covered by North Carolina General Statute § 7A-454 (1976) which allows the court, in its

6. 274 U.S. 200 (1926).
7. 221 S.E.2d 307, 313.
8. *In re Cavitt*, 182 Neb. 712, 157 N.W.2d 171 (1968).
9. 221 S.E.2d 307, 311-313.

discretion, to approve a fee for an expert witness to testify for an indigent person.[10] The allegation of cruel and unusual punishment was summarily dismissed by the court as inapplicable in a civil proceeding.[11]

The legislative classification in question was upheld as reasonably related to the purposes of the statute and therefore non-violative of the equal protection clause of the Constitution. The court found that the object of the statutes is to prevent the procreation of children by a mentally ill or retarded person "who because of physical, mental, or nervous disease or deficiency which is not likely to materially improve, would probably be unable to care for a child . . . or who would likely, unless sterilized, procreate a child . . . who probably would have serious physical, mental, or nervous diseases or deficiencies."[12]

In support of his contention that the statutes were vague and arbitrary, respondent submitted that the statutes provide no adequate judicial standard to aid the court in its decision whether to authorize a sterilization. Without such a standard, the respondent alleged, the statute is unconstitutionally vague and arbitrary.[13] The court found to the contrary, holding that the statute is presumed valid, that the term "mentally defective" is capable of being understood with the help of experts in the field, and therefore, the statutes were not unconstitutionally vague or arbitrary.[14]

The principles of eugenics, a means of race improvement via hereditary quality manipulation, are ancient in origin. Since at least the time of Plato's *Republic*, philosphers and scientists have advocated various methods of selective breeding designed to improve the human race.[15] In the United States eugenics manifested itself in the form of compulsory sterilization laws. It was believed that mental retardation, mental illness, epilepsy, criminal tendencies and sexual perversions were hereditary and that sterilization would rid society of "inferior" persons. The sterilization movement reached its peak in the early 1900's, influenced by the theories of Sir Francis Galton and a rediscovery of Mendel's law of heredity and its application to human beings. The famous studies of the Kallikaks and the Jukes by H. H. Goddard and R. L. Dugdale, respectively, allegedly "proving" the hereditary qualities of mental retardation, disease, crime, immortality, and pauperism, stirred public interest and increased the demand for gene planning. With the development of simple surgical procedures that could accomplish sexual sterilization, without attendant hormonial aberrations, theory could be put into practice. The first compulsory sterilization law was passed by Indiana in 1907.[16] By 1942, thirty-two states had passed similar laws, but

10. *Id.* at 310, 311.
11. *Id.* at 315, 316.
12. *Id.* at 312-314.
13. *Id.* at 314.
14. *Id.* at 315.
15. Vukowich, *The Dawning of the Brave New World—Legal, Ethical, and Social Issues of Eugenics*, 1971 U. ILL. L. F. 190 (1971).
16. Annot., 53 A.L.R.3d 960 (1973).

to date only twenty-nine states have retained eugenic sterilization laws.[17] By the late 1920's, a combination of public sentiment against eugenic measures, and scientific demonstrations of the fallaciousness of the basis of such measures, severely weakened the eugenic movement in the United States. People became even more hostile toward eugenic planning when it was learned that hundreds of thousands were sterilized and millions murdered during the Nazi regime in order to "improve and purify the race".[18]

Although the general public grew to dislike the theory of eugenics, that theory had been the basis for the enacted sterilization statutes and, for the most part, these statutes remained a part of the public laws. Court decisions concerning the constitutionality of eugenics sterilization have continued to be based on the premise that the underlying eugenics theory is sound. Because of this supposed soundness these statutes have been held non-violative of the substantive aspects of the due process clause of the fourteenth amendment to the United States Constitution. The case most often cited for support, and cited in *Moore*, is *Buck v. Bell*.[19] In *Buck* the United States Supreme Court upheld, for the first time, the right of a state to sterilize retarded or insane persons. The Virginia sterilization statute in question provided for the sterilization of a feeble-minded inmate of a state institution where it was found that she or he would be a probable potential parent of a child with the same or similar affliction, that she may be sterilized without harming her general health, and her and society's welfare would be promoted by her sterilization. In the majority opinion, Justice Holmes stated that at various times the best citizens are called upon for their lives and therefore it would be strange if those who sap the strength of the state could not be called on for the lesser sacrifice of sterilization. Further, he wrote that it would be better to prevent the "unfit" from continuing their kind rather than to let them starve because of their mental deficiency or be executed for a crime.[20]

The court used the rational relationship test, even though a fundamental right was involved. This case is still cited by courts for support of the state's right to sterilize the mentally ill and the mentally retarded;[21] even though the standard currently used in cases involving fundamental rights is much more stringent.

An underlying issue not disputed by the Court in *Buck* or questioned by the North Carolina court in *Moore*, is the validity of the eugenic basis of the

17. THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW, at 97 (1976).
18. Vukowich, *supra* note 15, at 190.
19. 274 U.S. 200 (1926).
20. *Id.* at 207.
21. Skinner v. Oklahoma, 316 U.S. 535, 544 (1942); In re Cavitt, 182 Neb. 712, 157 N.W.2d 171, 174 (1968); Brewer v. Valk, 204 N.C. 186, 167 S.E. 638 (1933); In re Opinion of the Justices, 230 Ala. 543, 162 So. 123, 128 (1925).

statutes in question. Today, facile conclusions regarding genetic causes of a particular condition are seldom made. Perhaps the largest problem in determining the cause of a specific disorder, which could result in compulsory sterilization, is that it is often difficult or impossible to distinguish genetic causes from environmental causes.[22] Secondly, 80-90% of known retardates are born to normal parents.[23] More than 250 causes of mental deficiency have been identified to date and yet, in approximately 75% of the cases of retardation, no specific cause can be ascertained.[24] Justice Holmes also stated that society was being "swamped with incompetence",[25] referring to the myth of prolific reproduction attributed to mentally retarded individuals. However statistics indicate that the insane and the mentally retarded have significantly low rates of reproduction.[26] Many retarded persons are physically unable to bear or beget children.[27] Among the major premises of eugenics is that the total number of mental defectives in society will be reduced. Yet current genetic and scientific knowledge indicate that the total number of disordered persons in society will not be substantially reduced by such methods.[28]

There is agreement among modern geneticists that hereditary transmission of mental defects is much less significant than previously believed.[29] The diversity of opinion, and the blatant contradiction of data on the validity and effectiveness of eugenic sterilization, raise serious question as to whether eugenics sterilization is a reasonable exercise of the state's police power. If the purpose of the statute is proper, *i.e.* protection of the health, safety, and welfare of the genes of society, does eugenic sterilization bear a real and substantial relation to the accomplishment of that purpose? In light of such an abundance of contradictory scientific information an affirmative reply appears doubtful.

In order to satisfy substantive due process requirements the state must use the least onerous means to accomplish their objectives. There are indeed less burdensome means which could be used; for example, temporary contraception, segregation during reproductive periods, and eugenic abortion upon evidence of a damaged fetus.[30]

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22. Environmental causes include trauma (prenatal, natal and postnatal), disease, metabolic disturbances (phenylketonuria, galactosemia, etc.), toxic agencies, brain lesion, etc. 21 AM. JUR. PROOF OF FACTS *Sexual Sterilization* § 59 (1968).
23. Murdock, *Sterilization of the Retarded: A Problem or a Solution*, 62 CAL. L. REV. 917, 926 (1974).
24. B.J. ENNIS & P.R. FRIEDMAN, LEGAL RIGHTS OF THE MENTALLY HANDICAPPED, at 20 (1973).
25. 274 U.S. at 207.
26. 21 AM. JUR. PROOF OF FACTS *Sexual Sterilization* § 48 (1968).
27. Murdock, *supra* note 23, at 934.
28. 21 AM. JUR. PROOF OF FACTS *Sexual Sterilization* § 55 (1968).
29. *Id.* at § 64.
30. Murdock, *supra* note 23, at 927.

The second major premise of the sterilization statutes is the assumption that mentally retarded individuals will be inadequate parents. These popular prejudices and stereotypes that automatically attach to the group portray mental retardates as less than human.[31] However, there is current scientific knowledge which indicates that the mentally retarded are not necessarily poor parents and that they do not necessarily provide poor environments.[32] Almost 90% of persons classified as retarded are in fact only mildly retarded, which includes persons who, through special education, can usually be brought to self-sufficiency.[33] Leo Kanner, an eminent child psychiatrist, in his book, A MINIATURE TEXTBOOK OF FEEBLEMINDEDNESS, said:

> In my twenty years of psychiatric work with thousands of children and their parents, I have seen percentually at least as many "intelligent" adults unfit to rear their offspring as I have seen "feebleminded" adults. I have . . . and many others have . . . come to the conclusion that to a large extent independent of the I. Q., fitness for parenthood is determined by emotional involvements and relationships.[34]

The difficulty arises in predicting who will be an unfit parent before they become parents. The North Carolina statutes concerning neglected or abused children base the determination of parental unfitness on the psychological and physical well being of the child already in existence.[35] The object of the North Carolina sterilization statute, as stated in *Moore*, allows for compulsory sterilization to prevent those who would *probably* be unable to care for a child or children.[36] However, no one would dispute the fact that not all unfit parents are mentally retarded. If the purpose of the statute is to eliminate unfit, parents, it is under-inclusive if it is only aimed at those that have been designated "mentally defective". At the same time, the statute is unnecessarily broad because not all mental retardates are unfit parents. The state's interest may not be achieved by "means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[37]

A second prong of the "unfitness" premise is concerned with generations of "welfare families". Because of the immense competition over tax dollars, eugenic theories for compulsory sterilization have often given way to fiscal and psychological ones.[38] These bases have been attacked in two recent cases, *Cook v. Oregon*[39] and *Cox v. Stanton*.[40]

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31. THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *supra* note 17, at —.
32. 21 AM. JUR. PROOF OF FACTS *Sexual Sterilization* § 55 (1968).
33. Murdock, *supra* note 23, at 927.
34. L. KANNER, A MINIATURE TEXTBOOK OF FEEBLEMINDEDNESS, at 4, 5 (1949) *cited in* Ferster, *supra* note 3, at 623.
35. N.C. GEN. STAT. §§ 110-118, 110-119 (1976).
36. 221 S.E.2d at 311, 312.
37. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1964).
38. THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, *supra* note 17, at 96.
39. 495 P.2d 768 (Or. App. 1972).
40. 381 F.Supp. 349 (1974).

In *Cook v. Oregon*, the plaintiff alleged that the Oregon statute which allowed for compulsory sterilization of individuals whose children will become neglected or dependent as a result of their parents inability by reason of mental illness or mental retardation to provide adequate care, denied equal protection of the laws to indigent parents.[41] The Oregon Court of Appeals upheld the statute, and stated that the state was concerned that the proper environment be provided for the child, not with the financial status of the parents, and therefore found no denial of equal protection of the laws to indigent persons.[42]

In *Cox*, the North Carolina plaintiff alleged that she was pressured into consenting to a sterilization by her welfare worker—under threat that otherwise she and her family would be removed from the welfare rolls. Secondly, although she consented to a tubal ligation (a temporary sterilization procedure) a permanent bilateral salpingectomy was performed instead.[43] The court never decided these issues, however, because the applicable statute of limitations barred the cause of action and, further, since she had been sterilized, she had no standing to challenge the constitutionality of the sterilization statutes.[44]

The possible abuses of such statutes, using an anti-welfare rationale, are apparent and is emphasized by the two cases cited above. A state interest in saving money, rather than spending it on those who would become wards of the state, has never justified interference with a fundamental right.

In *Moore*, the respondent alleged that all of his procedural due process safeguards had not been satisfied because the statute did not give him the right to an expert witness to testify on his behalf, paid for by the state. The court may, in its discretion, provide for an expert witness for indigent persons. In *Moore*, this was found to be sufficient to meet procedural due process requirements.[45] According to North Carolina General Statute § 35-40 (1976) the petition for sterilization must contain allegations of the results of psychologic and psychiatric tests supporting the assertion that the individual is subject to the statutes. The potential conflict arises because of the possibility of diverse results when administering psychological tests and, secondly, because the tests may be conducted by the same institution or petitioner who seeks the sterilization order.

The usual tests given to children and teenagers is the Stanford-Binet and the usual test given to adults is the Wechsler-Bellevue.[46] Unfortunately, I. Q. test scores are influenced by many factors; such as motivation, test-taking attitudes, verbal facility, examiner's incompetence, spasticity, deaf-

41. 495 P.2d at 770.
42. *Id.* at 771.
43. 381 F.Supp. at 351.
44. *Id.* at 355.
45. 221 S.E.2d at 310.
46. 21 AM. JUR. PROOF OF FACTS *Sexual Sterilization* § 62 (1968).

ness, and blindness, socio-cultural variables, anxiety, and other factors largely unrelated to intelligence.[47] Testing errors are not uncommon. Carrie Buck, the "imbecile" sought to be sterilized in *Buck*, was found to be a moron, a higher intellectual classification than an imbecile. Her mother was also found to be a moron, not an imbecile, and Carrie's daughter (the alleged "third generation imbecile"),[48] originally diagnosed and classified as an imbecile by a Red Cross Nurse when the child was only a month old, was later considered to be "very bright".[49] To further highlight the frequency of inaccurate diagnosis, the authors of MODERN CLINICAL PSYCHIATRY wrote that they:

> are familiar with the case of a child whose admission to the public school system was refused because of his alleged imbecility as demonstrated by psychometric tests. The boy's parents, knowing that he was not feebleminded, sent him to a private school, where he soon demonstrated that he was of superior intelligency. At the usual age he entered a university, from which he graduated with honors.[50]

Another example of the problem of inaccurate diagnosis was recently found in *Dennison v. State*,[51] where a claimant successfully brought an action for false imprisonment; for his unlawful confinement in the state's correctional hospital after being erroneously classified as a "low grade moron". Subsequent to the claimant's discharge, independent tests administered by three highly qualified psychologists "conclusively established that he possessed average intelligence and that he could not possibly have been a low grade moron at some other point in his life."[52]

Another danger of relying on test results that conclude "mental deficiency" is that such a label does not always survive into adulthood. A widely accepted conclusion regarding the incidence of mental retardation is that at some time in their life 3% of the United States population (more than six million Americans) will function in the mentally retarded range. However, probably no more than 1% of the population are technically mentally retarded at any given time. The primary period of identification is between the ages of six and twelve, and about two-thirds of those diagnosed as mentally deficient lose this label during late adolescence or early adulthood.[53] Interestingly, 30% of those sterilized in North Carolina between 1962 and 1964 were children between the ages of 10 and 19.[54]

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47. Roos, *Mentally Retarded Citizens: Challenge for the 1970's*, 23 SYRACUSE L. REV. 1059, 1070 (1972).

48. 274 U.S. at 207.

49. 21 AM. JUR. PROOF OF FACTS *Sexual Sterilization* § 63 (1968).

50. NOYES & KOLB, MODERN CLINICAL PSYCHIATRY, at 282 (1963) cited in 21 AM. JUR. PROOF OF FACTS *Sexual Sterilization* § 63 (1968).

51. 49 Misc.2d 933, 267 N.Y.S.2d 920 (1966), *rvsd on other grounds* in 280 N.Y.S.2d 31 (1967).

52. *Id.* at 923.

53. B.J. ENNIS & P.R. FRIEDMAN, *supra* note 24, at 20.

54. Ferster, *supra* note 3, at 622.

The above difficulties encountered in testing indicate the necessity for thorough evaluation of the subject of the sterilization petition. If the subject has his own expert witness, contradictory data, abuses, errors and mitigating circumstances would be brought to the attention of the court. This procedural safeguard does not seem inappropriate when a fundamental right is involved.

CONCLUSION

The courts, including the North Carolina Courts, continue to use *Buck v. Bell* as support for the reasonableness of the state's police power to sterilize the mentally ill and the mentally retarded, regardless of the difference in the standard use by *Buck* Court and the one currently used by the United States Supreme Court. The courts have continued to uphold laws based on data which has consistently been challenged and contradicted by verifiable scientific information. With such a shaky foundation, the reasonableness of this exercise of the police power is indeed difficult to justify.

Should mentally retarded individuals be protected less than others because of their intellect? Or should it be to the contrary, the retarded seen as an insular minority—a suspect classification, to be protected from hasty generalizations and treatment as if they were less than human? They should at least be afforded the protection given to others. Legislation affecting their fundamental rights should be subject to the strictest scrutiny and its bases and purposes critically examined to determine if it is based on scientifically verifiable data instead of human prejudice and fear.

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