

Compulsory Sterilization: A Re-examination

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NOTES AND COMMENTS

COMPULSORY STERILIZATION: A RE-EXAMINATION

[I]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.¹

Thus did the United States Supreme Court, speaking through Mr. Justice Holmes, sustain the idea of compulsory sterilization legislation and approve the philosophy underlying its enactment.

The Court's sanction of the ideals of sterilization legislation provided the advocates of racial improvement with new ammunition in their crusade against what they considered to be the growing trend toward racial degeneracy in the United States.² Despite the apparent finality of the Court's pronouncement, the battle against compulsory eugenic sterilization is still being waged in scientific, religious and political spheres.³

Prior to the nineteenth century, castration was the only method by which a person could be effectively sterilized.⁴ However, this method was not used as a penalty for crime in the United States because of its undesirable side effects and the radical nature of the operation.⁵ Toward the end of the nineteenth century, a new procedure was developed to sterilize males.⁶ The vasectomy, as it was called, was quick, easy and produced none of the side effects which had been a bar to the use of castration.⁷ At approximately the time the vasectomy was developed, the salpingectomy was discovered as a method of sterilizing women.⁸ Neither operation was detri-

⁴ *Id.* at 20.

⁵ *Id.* at 20-22.

⁶ GOSNEY & POPENOE, *STERILIZATION FOR HUMAN BETTERMENT* 15 (1929).

⁷ The vasectomy is simply an interference with the transmission of spermatozoön and the secretions of the testicles from being ejaculated. This is accomplished by a bilateral ligation and excision of each seminal duct, also called the vas deferens. LANDMAN, *HUMAN STERILIZATION* 207-08 (1932). The operation is accompanied by little pain or mental shock and is followed by a recuperative period of less than a week. *Id.* at 209.

⁸ Zenoff, *Reappraisal of Eugenic Sterilization Laws*, 10 CLEV.-MAR. L. REV. 149, 150 (1961). The salpingectomy is accomplished by bilaterally removing parts of, or the entire, oviducts, also called the uterine or fallopian tubes. Thus the

¹ *Buck v. Bell*, 274 U.S. 200, 207 (1927).

² WHITNEY, *THE CASE FOR HUMAN STERILIZATION* 101 (1934).

³ O'Hara & Sanks, *Eugenic Sterilization*, 45 GEO. L.J. 20, 35-40 (1956).

mental to physical health, nor did they produce any diminution of sexual drive.⁹ Thus, easy methods had been found for sterilizing mental defectives and criminals.

The first attempt to pass compulsory sterilization legislation occurred in Michigan in 1897, but the bill failed to win legislative approval.¹⁰ A similar bill was passed by the Pennsylvania legislature in 1905, but was subsequently vetoed by the governor.¹¹

In 1907, Indiana became the first state to enact compulsory sterilization legislation.¹² This statute was eugenic in purpose and affected inmates of state institutions who were rapists, criminals, idiots or imbeciles.¹³ Other states were quick to follow Indiana's example. Within the thirteen years from 1907 to 1920 seventeen states enacted sterilization laws.¹⁴ The following decade saw ten additional states added to the list.

The constitutionality of these statutes was immediately in issue. One such statute was upheld in *State v. Feilen*, wherein the Washington appellate court concluded that sterilization was not cruel and unusual punishment.¹⁵ However, other state courts

declared sterilization statutes unconstitutional on a variety of grounds. *Williams v. Smith*¹⁶ declared the Indiana law unconstitutional as a denial of due process since it provided for neither the cross-examination of experts nor the admission of evidence to show that the appellee did not fall within the statute's classification. Oregon's compulsory sterilization law was declared unconstitutional on similar grounds.¹⁷ In Iowa, a similar statute was struck down as unconstitutional since it denied due process of law in that it provided no opportunity for a hearing or cross-examination, and since it prescribed cruel and unusual punishment.¹⁸ New Jersey's law was held invalid because it denied equal protection of the law to epileptics.¹⁹

Thus, the period between the first sterilization legislation in Indiana and the determination by the Supreme Court in 1927 was one of flux. Laws were passed, struck down by the judiciary on various procedural grounds, and then re-enacted to meet the requirements established by the courts.²⁰ It remained for Mr. Justice Holmes in *Buck v. Bell*²¹ to settle the issues in favor of compulsory sterilization.

The *Buck* case involved a Virginia statute which provided for the sterilization of inmates of state-supported institutions, who were found to be afflicted with an heredi-

ovum is prevented from entering the uterus. The recuperation period here is considerably longer than in the case of the vasectomy (two weeks hospitalization and a convalescence period of several months). LANDMAN, *op. cit. supra* note 7, at 209-10.

⁹ Donnelly & Ferber, *The Legal and Medical Aspects of Vasectomy*, 81 J. UROLOGY 259, 260-61 (1959).

¹⁰ Zenoff, *supra* note 8, at 151.

¹¹ *Id.* at 151-52.

¹² O'Hara & Sanks, *supra* note 3, at 22.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ 70 Wash. 65, 126 Pac. 75 (1912). *But see* Mickle v. Henrichs, 262 Fed. 687 (D. Nev. 1918).

¹⁶ 190 Ind. 526, 131 N.E. 2 (1921).

¹⁷ See Landman, *The History of Human Sterilization in the United States—Theory, Statute, Adjudication*, 23 ILL. L. REV. 463, 478 (1929).

¹⁸ Davis v. Berry, 216 Fed. 413 (S.D. Iowa 1914).

¹⁹ Smith v. Board of Examiners of Feeble-Minded, 85 N.J.L. 46, 88 Atl. 963 (1913). See also *In re Thompson*, 169 N.Y. Supp. 638 (Sup. Ct. 1918).

²⁰ See Zenoff, *supra* note 8, at 152-53.

²¹ 274 U.S. 200 (1927).

tary form of insanity or imbecility.²² Carrie Buck was such an inmate. Mr. Justice Holmes accepted as an established fact that Carrie, her mother, and her illegitimate daughter were all imbeciles. He analogized the laws providing for compulsory sterilization to those providing for compulsory vaccination. Since the latter were considered a valid exercise of the police power, so, too, were the former. Mr. Justice Holmes neglected to consider that while the sanction for disobeying the compulsory vaccination law was a small fine,²³ here, the "offender" had no choice but to comply.²⁴ Moreover, while vaccination operates to *preserve* life, sterilization results in irreparable *destruction* of a part of the body,²⁵ with its consequential psychological effect upon the victim.²⁶

The *Buck* case precipitated a flood of new state compulsory sterilization laws.²⁷ In the ten years which followed, twenty

²² *Id.* at 205-06.

²³ See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

²⁴ See Gest, *Eugenic Sterilization: Justice Holmes vs. Natural Law*, 23 TEMP. L.Q. 306, 308 (1950).

²⁵ *Ibid.*

²⁶ For a discussion of the effects of sterilization upon the mind of the victim, see *Mickle v. Henrichs*, *supra* note 15. Another criticism of the decision lies in the facts upon which it is predicated. Justice Holmes found Carrie Buck to be an imbecile, but it appears that she was, in fact, a moron. Coogan, *Eugenic Sterilization Holds Jubilee*, 177 CATHOLIC WORLD 44, 45 (1953). In psychological terminology there is a difference between the imbecile, the moron, and the idiot. According to the Binet Intelligence Scale the moron has an I.Q. between 50 and 69, with a mental age of 8 to 12 years; the imbecile has an I.Q. between 20 and 49, with a mental age of 3 to 7 years; and at the bottom of the scale is the idiot, with an I.Q. of 19 or less, and a mental age between 0 and 2 years. WHITE, *THE ABNORMAL PERSONALITY* 452 (3d ed. 1964).

²⁷ Zenoff, *supra* note 8, at 153.

such statutes were enacted, most of them closely patterned after the Virginia law upheld in *Buck*.²⁸

Since the *Buck* decision, only one compulsory sterilization case has come before the United States Supreme Court.

In *Skinner v. Oklahoma*²⁹ the Court voided an Oklahoma statute which provided for sterilization of "habitual criminals." Mr. Justice Douglas, speaking for the Court, found that the statute was unconstitutional since it contravened the equal protection clause of the fourteenth amendment. He did not rule on the substantive issue considered in *Buck*, but referred to it in his rationale, stating that:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far reaching and devastating effects. . . . [T]here is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of basic liberty.³⁰

Mr. Justice Jackson, concurring, also alluded to the substantive problem of the case, saying that "there are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority. . . ." ³¹ But Justice Jackson concurred with the majority, in resolving the problem upon the narrower issue of equal protection.

The *Skinner* decision, although it did not overrule *Buck*, seems, at least, to have

²⁸ *Ibid.*

²⁹ 316 U.S. 535 (1942).

³⁰ *Id.* at 541.

³¹ *Id.* at 546 (concurring opinion).

cast doubt upon the validity of compulsory sterilization statutes.³² This uncertainty, coupled with the American public's distaste for the abuses of compulsory sterilization in Nazi Germany, and with a re-examination of fundamental beliefs concerning heredity, has dampened the zeal of the advocates of compulsory sterilization, and has turned the climate of opinion.³³ The statistics reflect this change in attitude. There were 22,000 compulsory sterilizations performed in the United States between 1941 and 1956. Over 9,200 occurred between 1941 and 1946; 7,100 between 1946 and 1951; and 6,100 between 1951 and 1956.³⁴ Since 1956, the number of sterilizations performed has also been reduced. In 1962 the number of sterilizations throughout the United States was only 488 and in 1963 the number dropped to 467.³⁵

During the 1930's a number of eugenicists had admired the sterilization program in Nazi Germany.³⁶ In their quest for racial betterment, they professed that

no planned social order is attainable without consideration of the people we want to have forming the race of the future. Inevitably the question arises, how are we to achieve the desired effect? And the answer is: Cut off the useless classes by preventing their reproduction, and increase the better. . . .³⁷

³² See Zenoff, *supra* note 8, at 154-55.

³³ O'Hara & Sanks, *Eugenic Sterilization*, 45 GEO. L.J. 20, 36-37 (1956).

³⁴ *Id.* at 35.

³⁵ Human Betterment Association for Voluntary Sterilization, Inc., *Sterilizations Performed* (Feb. 1964). The author of this pamphlet has since changed its name to the Association for Voluntary Sterilization, Inc., and is on record as opposing compulsory sterilization legislation.

³⁶ O'Hara & Sanks, *supra* note 33, at 37.

³⁷ WHITNEY, *THE CASE FOR HUMAN STERILIZATION* 12-13 (1934).

Recent scientific advancements have cast grave doubts as to the accuracy of the eugenic theories underlying the demand for sterilization laws.³⁸ Scientific studies have indicated major flaws in the methodology of older reports which "proved" that bad hereditary strains were a genetic certainty.³⁹ Moreover, new psychological data has tended to show that some diseases long thought to be hereditary are not, in fact, transmitted by inheritance.⁴⁰

Religious groups have voiced their opposition to sterilization statutes.⁴¹ The Catholic Church has strongly condemned such laws on the ground that officials have no right to interfere with the integrity of the human body.⁴² Jewish groups have also been in strong opposition to such legislation⁴³ and, although some Protestants have been found among the advocates of compulsory sterilization, the Fundamentalist sects have joined with Catholics and Jews in condemning these laws.⁴⁴

It appears that the argument which maintains that sterilization will halt degeneracy, and will serve as an effective bulwark against sex offenses seems to be due for re-examination. Since modern ster-

³⁸ See Zenoff, *Reappraisal of Eugenic Sterilization Laws*, 10 CLEV.-MAR. L. REV. 149, 158-59 (1961).

³⁹ See LANDMAN, *HUMAN STERILIZATION* 186-89 (1932), wherein he is critical of the methodology used in the famous studies of the Kallikak and Jukes families; LAZARUS, *ADJUSTMENT AND PERSONALITY* 222-23 (1961).

⁴⁰ O'Hara & Sanks, *supra* note 33, at 37.

⁴¹ See *Symposium—Morals, Medicine and the Law*, 31 N.Y.U.L. REV. 1157, 1181-84, 1210-12 (1956).

⁴² Pope Pius XI, *Casti Connubii*, in *FIVE GREAT ENCYCLICALS* 96-97 (1939).

⁴³ *Symposium—Morals, Medicine and the Law*, *supra* note 41, at 1210-12.

⁴⁴ O'Hara & Sanks, *supra* note 33, at 38.

ilization does not effect sexual drive or ability, sex offenders subjected to sterilization would be able to indulge in criminal acts without fear of pregnancy or of need for contraceptives. Thus, female mental defectives, so inclined, could engage freely in prostitution without the fear of bearing children.⁴⁵ Similarly, a rapist's ability to have intercourse is not affected by sterilization and consequently, such an operation would produce only the limited benefit of precluding offspring without lessening his capacity to commit illicit acts.

The legal aspects of sterilization laws must also be re-examined. The Supreme Court in *Griswold v. Connecticut*,⁴⁶ struck down a state statute which barred the distribution of information on birth control devices and prohibited the use of such

devices. The Court, speaking through Mr. Justice Douglas, found a constitutional right of marital privacy with which the state may not interfere. It can be argued that an individual's right to procreate is no less important than his right of marital privacy. In fact, the former seems an inextricable component of the latter, and thus, the state should be unable to deprive its citizens of their ability to procreate.

Compulsory sterilization laws are historical mistakes. While normally the law takes some time to utilize new scientific achievements, in this area the courts have continuously applied eugenic theories which have not been fully proven. The United States Supreme Court would probably not hesitate today to strike down sterilization laws on the grounds that they contravene the protection of the individual afforded by the Constitution and reflect a concept repugnant to the social conscience of America.

⁴⁵ See Landman, *Sterilization—Legislation and Decisions*, 23 ILL. L. REV. 465, 469 (1922).

⁴⁶ 379 U.S. 926 (1965).

TELEVISIONING JUDICIAL PROCEEDINGS—A DENIAL OF DUE PROCESS?

The emergence of television as a major medium of reporting judicial proceedings has raised the issue of whether the televising of pretrial activities and the presence of television equipment in the courtroom constitutes an obstruction of justice. On June 7, 1965, the United States Supreme Court held that the televising of the criminal proceedings against Billie Sol Estes

was a denial of "a fair trial in a fair tribunal." While the decision in *Estes v. Texas*¹ has settled some disputes, it has highlighted the necessity of resolving questions still unanswered. A conflict between the orderly administration of justice and the historical right to a public trial provides the substance of the problems to be solved.

¹ 381 U.S. 532 (1965).