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Compulsory Sterilization: Equal Protection and the Quality of Life

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NOTES

COMPULSORY STERILIZATION: EQUAL PROTECTION AND THE QUALITY OF LIFE—*North Carolina Ass'n for Retarded Children v. North Carolina*, 420 F. Supp. 451 (M.D.N.C. 1975).

INTRODUCTION

Compulsory sterilization statutes grew out of the eugenics movement of the early twentieth century. Eugenic theory maintains that human defects are the result of heredity and that the race can be improved by encouraging procreation of "superior" persons and preventing the procreation of "inferior" persons.[1] This theory was once widely accepted, and at the height of its popularity the Supreme Court upheld the constitutionality of a compulsory sterilization statute.[2] Although the scientific community now largely rejects compulsory eugenic sterilization,[3] the Supreme Court has not reconsidered the matter since 1927.[4] In light of scientific rejection of eugenics as a basis for involuntary sterilization and recent decisions regarding familial and personal autonomy and privacy,[5] the Court could be expected to find compulsory sterilization statutes unconstitutional. Yet a lower federal court, recently presented with a challenge to North Carolina's modern compulsory eugenic sterilization statute,[6] upheld it against equal protection and procedural and substantive due process attacks,[7] although it held that the right to

1. Among the defects eugenicists believed were genetically transmitted and therefore eradicable via sterilization were: insanity, inebriation, drug addiction, and unproductive dependency such as pauperism, economic failure, and orphanism. Kindregan, *Sixty Years of Compulsory Eugenic Sterilization: "Three Generations of Imbeciles" and the Constitution of the United States*, 43 CHI.-KENT L. REV. 123 (1966) [hereinafter cited as Kindregan], *citing* A. MONTAGU, HUMAN HEREDITY 257 (1960).

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

3. *See* notes 12-18 *infra* and accompanying text.

4. The Court did grant certiorari in an eugenic sterilization case, *In re* Cavitt, 182 Neb. 712, 157 N.W.2d 171 (1968), *cert. granted*, 393 U.S. 1078 (1969), but the statute involved, Act of April 11, 1969, ch. 825 § 1, 1969 Neb. Laws 3132, was repealed before argument, and the case was dismissed, 396 U.S. 996 (1970).

5. Roe v. Wade, 410 U.S. 113 (1973) (abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (use of contraceptives by single persons); Griswold v. Connecticut, 381 U.S. 479 (1965) (use of contraceptives by unmarried persons).

6. N.C. GEN. STAT. §§ 35-36 to 35-50 (Cum. Supp. 2A, 1975).

7. The procedural due process argument is considered briefly note 40 *infra*. Substantive due process analysis will not be attempted because such analysis was not made in the court's opinion, and has been virtually abandoned by the Supreme Court, *see* G. GUNTHER, CONSTITUTIONAL LAW, 981, 983-84 (8th ed. 1970), and, arguably, replaced by equal protection analysis. *Id.* at 984; Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1131 (1969).

procreate is fundamental. The statute challenged in *North Carolina Ass'n for Retarded Children v. North Carolina*[8] permits sterilization not only of persons likely to produce a retarded child, but also of persons who would, because retarded, be unable to care for normal children born to them. This was considered an expression of two state interests: a eugenic interest; that is, the prevention of the birth of retarded children, and an interest in prevention of "poor parenting." Using an equal protection analsis, the court found that these state interests were compelling enough to permit interference with a fundamental right.

This note proposes to examine these state interests and to suggest that they, in fact, are not compelling. Additionally, this note suggests that, although the court's construction of the statute has emasculated it with respect to the state's eugenic interest, acceptance of a state interest in preventing "poor parenting" allows sterilization of citizens on the basis of a theory of questionable constitutionality.

II. BACKGROUND

The eugenics movement was initiated in 1904 by Sir Francis Galton and fueled by the rediscovery of Gregor Mendel's work in plant genetics.[9] At the height of the theory's popular acceptance, the Supreme Court upheld a compulsory sterilization statute in *Buck v. Bell*.[10] Justice Holmes, writing for the Court, expressed the beliefs of the day:

> It would be strange if [the public welfare] could not call upon those who already sap the strength of the state for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.[11]

Since *Buck* was decided, genetic research has weakened rather than strengthened the case for eugenic sterilization. There are three

8. 420 F. Supp. 451 (M.D.N.C. 1976). This case is part of a much larger class action by the Association and the United States as plaintiff-intervenor. *See* note 38 *infra* and accompanying text.

9. Bligh, *Sterilization & Mental Retardation*, 51 A.B.A.J. 1059, 1060 (1965); Annot., 74 A.L.R.3d 1210, 1212 (1976).

10. 274 U.S. 200 (1927).

11. *Id.* at 207.

major reasons why such sterilization is unsound. First, the genetic causes of the vast majority of defects are unknown.[12] Second, sterilization of the retarded reaches only those with *expressed* defects,[13] and most retarded children are born to apparently normal parents who "carry" defective genes.[14] Third, sterilization does not take account of genetic mutation, either natural or environmentally induced.[15] As early as 1936, the theory that mental retardation was in all cases hereditary was criticized,[16] and, in 1937, the American Medical Association rejected compulsory eugenic sterilization.[17] One text on the subject states that "[t]he present consensus is that most eugenical sterilization fails in its purpose because it is not firmly based in scientific knowledge."[18]

The law of human rights has also changed rather radically since *Buck* was decided. Four years before *Buck*, the Court said that the term "liberty" in the fourteenth amendment "denotes not merely freedom from bodily restraint but also [for example] the right . . . to marry, establish a home and bring up children. . . ."[19] Later, in striking a *criminal* sterilization statute, the Court said:

> Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize . . . 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. There is no exception for the individual whom the law touches. Any experiment which the state conducts is to his irreparable injury. He is forever deprived of a basic liberty.[20]

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12. Vukowich, *The Dawning of the Brave New World—Legal, Ethical & Social Issues of Eugenics*, 1971 U. ILL. L. FORUM 189, 195-97 [hereinafter cited as Vukowich]; Matousch, *Eugenic Sterilization— A Scientific Analysis*, 46 DENVER L.J. 631, 634-44 (1969) [hereinafter cited as Matousch].

13. *See* note 12 *supra*.

14. It is estimated that a least eighty percent of all retarded children are born to normal parents. One often-quoted figure for retarded children born to retarded parents is eleven percent. A. DEUTSCH, THE MENTALLY ILL IN AMERICA 374 (2d ed. 1949), *cited in* AMERICAN BAR FOUNDATION STUDY, THE MENTALLY DISABLED & THE LAW 214 (rev. ed. S. Brakel & R. Rock 1971) [hereinafter cited as A.B.F. STUDY].

15. *See* note 12 *supra*.

16. REPORT OF THE COMMITTEE OF THE AMERICAN NEUROLOGICAL ASS'N FOR THE INVESTIGATION OF EUGENICAL STERILIZATION, *summarized in* 1 AM. J. OF MED. JURIS. 253 (1938), *cited in* Kindregan, *supra* note 1, at 139.

17. REPORT OF THE AMERICAN MEDICAL ASS'N COMMITTEE TO STUDY CONTRACEPTIVE PRACTICES, A.M.A. PROC. 54 (1937), *cited in* Kindregan, *supra* note 1, at 137.

18. J. THOMPSON & M. THOMPSON, GENETICS IN MEDICINE 261 (1966), *cited in* Pre-trial Brief of the United States at 162, North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451 (M.D.N.C. 1976).

19. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

20. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). That statute was held violative of equal protection because it provided for the sterilization of persons convicted of larceny but

The Court has thus frequently stressed that familial and personal privacy and autonomy are fundamental rights;[21] these rights have more recently been enunciated in the Court's contraception[22] and abortion[23] decisions. "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[24]

In response to these changes in scientific opinion and in the legal climate, many states have repealed their sterilization laws and few states retaining such statutes actually use them[25]—not so North Carolina. That state passed a sterilization statute before *Buck*[26] and over the years has been very active in eugenic sterilization.[27] Moreover, North Carolina in 1974 enacted a new compulsory sterilization statute which was the subject of controversy in *North Carolina Ass'n for Retarded Children v. North Carolina*.[28]

III. The Statute

The sterilization statute, sections 35-36 through 35-50 of the North Carolina general statutes,[29] became effective January 1, 1975.

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not of those convicted of embezzlement.

21. *Id.*; Stanley v. Illinois, 405 U.S. 645, 651 (1972); Loving v. Virginia, 388 U.S. 1, 12 (1967); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

22. Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

23. Roe v. Wade, 410 U.S. 113 (1973).

24. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (emphasis in the original).

25. A.B.F. Study, *supra* note 12, at 208-09, 220-25.

26. N.C. Code Ann. §§ 7221, 7222 (1931) (this statute was enacted in 1919).

27.

Year	1963	1959	1949	1943
National total	467	614	1500	1638
N. C. total	240	260	249	1152
% of national total performed in N. C.	51%	42%	17%	70%

Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 Ohio St. L.J. 591, 633 (1966). It is interesting to note that between 1962 and 1964 thirty percent of North Carolina's sterilizations were performed on minors aged ten to nineteen. *Id.* at 621.

28. 420 F. Supp. 451 (1976).

29. N.C. Gen. Stat. (Cum. Supp. 2A 1975). Pertinent portions of the statute follow:

> § 35-36. Sterilization of mental defectives in State institutions. — The responsible director . . . of any institution . . . is hereby authorized to petition the district court of the county in which such institution is located for the sterilization operation of any mentally ill or retarded resident or patient thereof as may be considered in the best interest of the mental, moral, or physical improvement of the resident or patient, or

It applies to all mentally retarded persons in North Carolina, whether or not institutionalized.[30] The statute imposes a duty on

for the public good . . . .

§ 35-37. Sterilization of mental defectives not in State institutions. — 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 retarded resident of the county, not a resident or patient of any State institution, . . . considered in the best interest of the mental, moral, or physical improvement of such resident, or for the public good . . . .

§ 35-39. Duty of petitioner. — It shall be the duty of such petitioner promptly to institute proceedings as provided by this Article in any of the following circumstances:

(1) When in his opinion it is for the best interest of the mental, moral, or physical improvement of the patient . . . .

(2) When in his opinion it is for the public good that such patient . . . be sterilized.

(3) When in his opinion such patient . . . 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.

(4) When requested to do so in writing by the next of kin or legal guardian of such patient . . . .

§ 35-40. Contents of petition. — The petition shall contain allegations of the results of psychological or psychiatric tests supporting the assertion that such person is subject to the provisions of this Article; shall contain the statement of a physician who has examined such person affirming whether or not there is any known contraindication to the requested surgical procedure; . . . and shall contain the written consent or objection of the next of kin, the legal guardian or, if there is not next of kin and no known legal guardian, a guardian ad litem who shall be appointed by the district court judge and who shall make investigation and report to the court before the hearing shall commence. The petition should also contain the consent or objection of the person upon whom the sterilization operation is to be performed. In the event that the [retarded person] is not capable of giving consent or objection, there must be a certification by the petitioner that the procedure has been explained to the person upon whom the operation is to be performed.

§ 35-41. Copy of petition served on patient. — At least 20 days prior to the hearing on the petition . . . a copy of such petition must be served upon [the person to be sterilized] and to the legal or natural guardian, guardian ad litem, or next of kin of the [person to be sterilized].

§ 35-43. Hearing before the judge of district court. — Should the petitioner, the person subject to the petition, or any other interested party request a hearing, a hearing shall be held in the district court before the judge without a jury. In the absence of written objection filed with the court by the [retarded person], the court may render judgment without the appearance of witnesses. . . . The respondent shall be entitled to examine the petitioner's witnesses and shall be entitled to present evidence in his own behalf. . . . If the judge . . . shall find from the evidence that [the alleged subject] is subject to it and that because of a physical, mental, or nervous disease or deficiency which is not likely to materially improve, the person would probably be unable to care for a child or children, or because the person would be likely, unless sterilized, to procreate a child or children which probably would have serious physical, mental, or nervous disease or deficiencies, he shall enter an order and judgment [authorizing sterilization].

30. N.C. GEN. STAT. §§ 35-36, 35-37 (Cum. Supp. 2A 1975). The statute by its terms

either the county director of social services or the director of the institution to institute sterilization proceedings when:

—in his opinion it is in the retarded person's best interests;
—in his opinion it is for the public good;
—in his opinion such person would, unless sterilized, produce a defective child or a child for whom he could not care due to his retardation;
—requested to do so by the retarded person's guardian or next of kin.[31]

A sterilization petition must be filed with the state district court and must contain the written consent or objection of both the retarded person and his guardian or next of kin.[32] If there is no guardian or next of kin, a guardian ad litem will be appointed who must make an investigation and report to the court. If the retarded person is incapable of giving consent or objection, the procedure must be explained to him.[33] The petition must be served on the retarded person. He has the right to a hearing on request,[34] the right to counsel,[35] the right to cross examination,[36] and the right to appeal for trial de novo before a jury.[37]

IV. Decision

North Carolina Ass'n for Retarded Children v. North Carolina is only a fragment of a much larger class action in which the plaintiff Association and the United States as plaintiff-intervenor sought to litigate many rights of mentally ill and retarded persons in North Carolina. By the time of the hearing, the legislature had changed or repealed most of the statutes relating to treatment and training of retarded children and all questions except those relating to the sterilization statute as applied to mentally retarded persons were severed and remanded to the District Court for the Eastern District of North Carolina.[38]

The court began its examination of the statute by finding unconstitutional as an "arbitrary and capricious delegation of unbridled power" subsection four of section 35-39, which mandated insti-

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applies also to mentally ill persons, but this three-judge court considered the statute only as it applies to the mentally retarded. 420 F. Supp. 451, 453 (M.D.N.C. 1976).

31. N.C. Gen. Stat. § 35-39 (Cum. Supp. 2A 1975).
32. *Id.* § 35-39.
33. *Id.* § 35-40.
34. *Id.* § 35-43.
35. *Id.* § 35-45.
36. *Id.* § 35-43.
37. *Id.* § 35-44.
38. 420 F. Supp. 451, 453 (M.D.N.C. 1976).

tution of sterilization proceedings at the request of the individual's guardian or next of kin. The court reasoned that such confidence in all guardians and next of kin to act in the retarded person's best interests was "misplaced,"[39] but did not specify a constitutional basis for this holding. The court then reviewed the procedural provisions of the statute and found them sufficient under the due process clause, noting that other sections of North Carolina law would also provide subpoena power, reporting, and transcripts for appeal.[40]

Probably most significant was the court's interpretation of the findings of fact requirement under section 35-43 before sterilization could be ordered. The court held, as a matter of statutory construction, that a judge must find that the subject is likely to engage in sexual activity without the use of contraceptives, and is therefore likely to impregnate or be impregnated and produce a retarded child or a child for whom he could not care.[41]

> [I]t must have been the sense of the legislature to require only that which is necessary, and unless sexual activity and inability or unwillingness to utilize contraception is indicated by the evidence, there would be no occasion for resort to sterilization.[42]

Further, "[f]ailure to prove predictability [of the birth of a defective child or the likelihood that the parent would be unable to care for his child] would require, of course, denial of an order authorizing sterilization."[43]

Citing *Skinner v. Oklahoma*[44] and *Eisenstadt v. Baird*,[45] the court held that the right to procreate was fundamental. North Carolina's interests, however, were found sufficiently compelling to justify invasion of that right and satisfy the equal protection clause.[46]

V. ANALYSIS

The court's decision can perhaps best be approached by means

39. *Id.* at 456.

40. *Id.* at 457. Although the procedural safeguards are undoubtably adequate for the normal citizen, they are arguably inadequate for the mentally retarded. The statute has a decided bias toward proceeding without a hearing; hearings will be held only at the written request of the retarded person or his guardian or next of kin. The minimum twenty-day notice is perhaps inadequate—gathering evidence and securing expert testimony in such a short period of time would be difficult for even a nonretarded person. Efficacy of counsel may also be affected by the brief notice period.

41. *Id.* at 456.

42. *Id.* at 457.

43. *Id.* at 458. The standard of proof required is "clear, strong, and convincing." *Id.* at 457.

44. 316 U.S. 535 (1942).

45. 405 U.S. 438 (1972).

46. 420 F. Supp. at 458.

of an equal protection analysis,[47] both because that appears to be the district court's method of analysis and because it is the approach more recently taken by the Supreme Court when dealing with fundamental rights.[48] The district court in this case isolated two state interests: a eugenic interest—preventing the birth of retarded children, and an interest in preventing "poor parenting."

A. The Eugenic Interest

A comparison of section 35-39 of the statute and the district court's interpretation of those sections reveals how drastically the court has restricted the state's eugenic interest. This narrow construction indicates an intention to stop the sterilization of children, persons not sexually active, and those able to use contraceptives.[49] The court stated that it adopted this construction purely as a matter of statutory interpretation,[50] but surely it was required to avoid an overbreadth challenge under the equal protection clause. Equal protection considerations undoubtably entered into the court's decision, although the court did not mention them.

This construction may virtually preclude issuance of a sterilization order on purely eugenic grounds. The court itself acknowledged that the requisite predictability will be possible in only rare cases,[51] and an effective defense at a hearing should be greatly aided by the scientific uncertainty in this area. If there is no hearing, the information provided by the petition described in the statute[52] may be inadequate to permit a judge to make the required findings of fact

47. Equal protection is concerned with means-end analysis; that is, whether state classifications of citizens are rationally related to the state's purpose in making the classification. Basically, a classification is valid if it includes "all [and only those] persons who are similarly situated with respect to the purpose of the law." Tussman & tenBrock, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949); *see* Reed v. Reed, 404 U.S. 71, 75-76 (1971). Ordinarily, a state classification need only be somehow rationally related to its purpose. A classification which infringes upon a fundamental right, however, is subject to strict scrutiny and to prevail, a state must show a "compelling" interest. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152-55 (1973); Eisenstadt v. Baird, 405 U.S. 438, 460 (1972); Shapiro v. Thompson, 394 U.S. 618, 634 (1969); Cantwell v. Connecticut, 310 U.S. 296, 307-08 (1940).

48. Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965). *See* Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. REV. 716 (1969).

49. The sterilization of such persons is a very real problem. *See* A.B.F. STUDY, *supra* note 14, at 209-12; REPORT OF THE PRESIDENT'S COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN & THE LAW 94-110 (Kindregan et al. eds. 1976) [hereinafter cited as PRESIDENT'S COMMITTEE REPORT].

50. 420 F. Supp. at 456-57.

51. 420 F. Supp. at 454-55.

52. N.C. GEN. STAT. § 35-40 (Cum. Supp. 2A 1975).

and again a sterilization order would be denied.

Although this narrow construction is a marked improvement upon the statute as written, a major question remains—why is the state's interest in preventing the birth of a retarded child compelling enough to justify sterilization? The court, in its ultimate findings of fact, conceded that the statute will not apply to even a majority of the plaintiff class and that the scientific evidence shows that eugenic sterilization will have little if any impact on the problem the state seeks to solve.[53] It is true that, ordinarily, states are accorded great latitude in experimenting with solutions to perceived problems,[54] but it is also true that the usual deference accorded to state legislative enactments is not applicable to laws affecting fundamental rights.[55] Our society does not, after all, sterilize normal parents who produce retarded children, or normal persons who sexually molest mentally deficient persons. Singling out the mentally retarded as subjects of eugenic sterilization has all the hallmarks of "invidious discrimination"[56] violative of the fourteenth amendment.

B. Preventing "Poor Parenting"

The statute's second aim is the prevention of "poor parenting," a potentially more dangerous rationale for the sterilization of the mentally retarded. The court's approval of this state interest would allow sterilization of large numbers of the mentally retarded, and has implications far beyond discrimination against that relatively small segment of the population.

Initially it should be noted that many mentally retarded persons are adequate parents. "The fact is . . . that the retarded do marry and generally do not seem to be very much different from more intelligent people in their performance as spouses and parents."[57] The author of one study of the retarded as parents concluded that "[t]he mentally deficient parent emerges . . . not as a different kind of parent but as a more vulnerable one. . . . His mental deficiency was not the primary factor determining his inadequacy as a parent."[58] And, it is a matter of common knowledge that

53. 420 F. Supp. at 454.

54. Williamson v. Lee Optical, 348 U.S. 483 (1955).

55. Kramer v. Union Free School District, 395 U.S. 621, 627 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

56. United States v. Caroline Products Co., 304 U.S. 144, 152 n.4 (1933). One paper has analogized the mentally retarded to blacks as a "discrete and insular minority" subject to invidious discrimination. PRESIDENT'S COMMITTEE REPORT, *supra* note 49, at 98-99.

57. T. JORDAN, THE MENTALLY RETARDED 135 (3d ed. 1972).

58. Mikkelson, *Down's Syndrome at a Young Maternal Age: Cytological and Geneological Study of Eighty-One Families*, 31 ANN. HUM. GENET. 51, 69 (1967), *quoted in* T. JORDAN,

intellectually gifted people can be, and sometimes are, poor, even abusive, parents.[59] Many normal persons are emotionally incapable of caring for their children.[60]

The court's decision does not limit the statute's application to the severely retarded or make any distinctions at all between levels of retardation.[61] Nor does the court give any clear explanation of the criteria to be used in deciding who would not be an adequate parent, or even a definition of "adequate." Neither the statute by its terms, nor the court's construction of it, is limited to preventing child neglect and abuse as those terms are traditionally defined in the legal system.[62] The court in its findings of fact spoke of "an environment which blocks or shrinks the mental and intellectual development of a child."[63] Surely many home environments may shrink the intellectual development of a child. The fact is that society has no widely accepted definition of "good" or "adequate" parenting. So long as children are not abused or neglected in the legal sense, child raising has largely been left to parents.[64]

Admittedly, it would be difficult to evaluate mentally retarded individuals as prospective parents;[65] it would be difficult to evaluate

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THE MENTALLY RETARDED 132 (3d ed. 1972). The primary factor was the number of children in the family. *Id.*

59. *See, e.g.*, Fox, Brown & Hubbard, *Medical & Legal Aspects of the Battered Child Syndrome*, 50 CHI.-KENT L. REV. 45, 51-53 (1973).

60. *Id.*

61. Ninety percent of the retarded are only "mildly" retarded and can, with training, be self-sufficient. Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 CALIF. L. REV. 917, 928 (1974), *citing* NAT'L ASS'N FOR RETARDED CHILDREN, FACTS ON MENTAL RETARDATION 4 (1971).

62. *See, e.g.*, The Child Abuse Prevention & Treatment Act, Pub. L. No. 93-247, § 3 (Jan. 31, 1974) (defining "child abuse and neglect": "[T]he physical or mental injury, sexual abuse, negligent treatment or maltreatment of a child under the age of 18 by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or well being is harmed thereby. . . ."

63. 420 F. Supp. at 454.

64. Compulsory education, for example, is universal, but the Supreme Court has even limited the states in their regulation of how children must be educated. Pierce v. Society of Sisters, 268 U.S. 510 (1925) (states may not require children to attend public schools); Meyer v. Nebraska, 262 U.S. 390 (1923) (states may not forbid instruction in a foreign language).

65. [A]n investigation of the adequacy of mentally retarded persons to serve as parents is an extremely difficult endeavor. First of all, the skills that constitute adequacy of any parent have yet to be agreed upon. Once certain skills have been identified, it becomes possible not only to rate the presence of such skills in mentally retarded persons but to teach the mentally retarded those requisite skills. In rating the skills, care must be taken to rate the group of normals comparable in socioeconomic background and occupational status. Both groups should be rated blind with regard to the rater's knowledge as to which subjects are labeled as mentally retarded. . . . It would be critical to include or determine other variables mentioned previously: recent assessment of adaptive and intellectual behavior, number of years institutionalized,

any individual as a prospective parent. The statute remains so broad and vague that it leaves judges too much latitude to make sterilization decisions on the basis of personal prejudices against or mistaken beliefs about the mentally retarded in violation of fourteenth amendment due process.[66] Despite the court's decision to the contrary, the statute also violates the equal protection clause of that amendment, because retarded parents are in many cases being treated differently than non-retarded parents simply because they are retarded, not because they are less adequate parents.[67]

The most dangerous implications of accepting this interest in preventing "poor parenting" arise from the fact that the statute manifests a belief in a state interest in the "quality of life."[68] This goes beyond traditional notions of a state interest in the health and general welfare of the already-born or even of a state prenatal care program for expectant mothers, for example. The theory is that the state has an interest in protecting as yet unborn children from a "poor" life and that, by logical extension, the state may decide that if a child's life will not meet some unarticulated standard there will be no life.[69]

This theory is evident in the North Carolina statute's second aim and in the court's mention of "an environment which blocks or shrinks the mental and intellectual development of a child."[70] Who

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whether supportive services are available and used, whether spouse is presently in the home, use of family planning methods, quality of marital relationship, and age difference between husband and wife.

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66. The "void for vagueness" and overbreadth methods of analysis in substantive due process have traditionally been used in criminal cases. *See* Aptheker v. Secretary of State, 378 U.S. 500 (1964); N.A.A.C.P. v. Alabama, 377 U.S. 288 (1958); Cantwell v. Connecticut, 310 U.S. 296 (1940). Involuntary sterilization, however, is such a drastic invasion of personal liberty that statutes permitting it must be narrowly drawn. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963).

67. [T]he Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. . . . The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the objective of the legislation, so that all persons similarly circumstanced shall be treated alike."

Reed v. Reed, 404 U.S. 71, 75-76 (1971).

68. Two recent cases adopting this rationale are *In re* Moore, 289 N.C. 95, 221 S.E.2d 307 (1976); Cook v. State, 9 Ore. App. 224, 495 P.2d 768 (1972).

69. *See* PRESIDENT'S COMMITTEE REPORT, *supra* note 49, at 112-13.

70. 420 F. Supp. at 454.

will set the standards for life of acceptable quality and what will they be? How intelligent need a child be, how physically perfect, how wealthy his parents to meet the state's requirements? Also frightening is the ease with which this sort of thinking could be used against the poor, racial minorities, or any group of which the majority was suspicious.

The state's articulated interests do not appear to be served to any appreciable extent by sterilization, but perhaps there are unarticulated reasons for this sort of legislation. Preventing additional economic burdens on the state is one rationale for sterilization which has been hinted at by courts[71] and alleged by commentators,[72] but economic justifications should not suffice for infringing upon a fundamental right.[73] In short, neither of North Carolina's articulated state interests actually appear to be compelling ones, nor does any other legitimate state interest in the involuntary sterilization of the mentally retarded suggest itself.

Additionally, assertion of the power to sterilize has implications that require careful consideration. If a state may sterilize without consent, may it not impose less drastic restrictions on the right to procreate, such as non-consensual contraception and/or abortion?[74] Although the Supreme Court has held that an individual may *choose* contraception or abortion,[75] it is an entirely different matter for the state to *compel* contraception or abortion. Yet a theory which allows a state to sterilize would surely also allow other, temporary, interferences in the matter of procreation.

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71. "The People of North Carolina . . . have a right to prevent the procreation of children who will become a burden on the State." *In re* Moore, 289 N.C. 95, 108, 221 S.E.2d 307, 312 (1976); *In re* Cavitt, 182 Neb. 712, 000, 157 N.W.2d 171, 177 (1968) (The court noted that Cavitt and her eight children were "provided for largely by public aid."); *In re* Simpson, 180 N.E.2d 206, 208 (Ohio P. Ct. of Zanesville County 1962) (The court mentioned "additional burdens upon the county and state welfare departments" if persons such as Simpson continued to have children.)

72. PRESIDENT'S COMMITTEE REPORT, *supra* note 49, at 96; A.B.F. STUDY, *supra* note 14, at 217.

73. In Shapiro v. Thompson, 394 U.S. 618, 623 (1969), Justice Brennan wrote for the Court:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such purpose by invidious distinctions between classes of its citizens.

74. Amniocentesis, a medical procedure in which the amniotic sac surrounding the fetus is punctured and amniotic fluid withdrawn for analysis, makes possible the prediction of deformities in that fetus in many instances. One writer, at least, advocates the use of this technique and abortion of a defective fetus as a eugenic measure. Vukowich, *supra* note 12, at 228-29.

75. Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

VI. CONCLUSION

In the end we must ask ourselves, why sterilize the mentally retarded without their consent at all? Sterilization of these people will not in even a majority of cases prevent the birth of defective children or the abuse and neglect of normal children. The state interests here do not seem to be even rational, in light of present scientific knowledge, let alone compelling enough to justify interference with a fundamental right. Although it is the mentally retarded who are being discriminated against, they are not the only potential victims of the philosophy underlying the statute. If a state can sterilize without consent, arguably it can require contraception and abortions without consent. And if the state has sufficient interest in the "quality of life" to allow involuntary sterilization of mentally retarded potential parents, arguably it also has an interest in interfering in the procreation decisions of the poor, the ignorant and the physically infirm. "The 'quality of life' ethic, in essence, rests on the principle that 'some are more equal than others,' that unequal capacity or potentiality provides grounds for discriminatory treatment. At stake here is the fundamental moral, and hence legal, equality of human beings as human beings."[76]

Michele Gressel

76. PRESIDENT'S COMMITTEE REPORT, *supra* note 49, at 113.