8-30-2015

The Eugenics Movement in North Carolina

Elizabeth Lea Troutman
Unaffiliated Authors - Independent, etroutman@brookspierce.com

Alfred L. Brophy
University of Alabama - School of Law, abrophy@law.ua.edu

The Eugenics Movement in North Carolina

Alfred L. Brophy[1] **and**
Elizabeth Troutman[2]

Abstract

"The Eugenics Movement in North Carolina" places North Carolina into the social, political, and legal context of the movement in the United States that resulted in the sterilization of more than thirty thousand people from the 1920s through the 1960s. We sketch the social and political arguments that were mobilized to support sterilization, as well as the arguments judges developed alongside these arguments from the 1910s through the 1930s. State courts slowly accepted sterilization until the United States Supreme Court's decision in 1927 in *Buck v. Bell.* Then courts and legislatures around the United States more readily accepted it, even as legal scholars expressed reservations about sterilization. North Carolina was one of those states that embraced sterilization. The machinery of the state went into facilitating sterilization. The Eugenics Board of North Carolina, the state board in charge of reviewing petitions from public health officials for sterilization, produced pre-printed forms to facilitate the approval of sterilization. They presided over the petitions and routinely granted the vast majority of them. The few sterilization orders that were challenged in court were also routinely upheld.

For nearly two decades, until the United States' entrance into World War II, sterilization was broadly accepted by courts. But the United States Supreme Court's decision in *Skinner v. Oklahoma* in 1942 began to turn the tide against sterilization, as did unease with a procedure that was reminiscent of what was happening in Germany during the War. Yet, even after *Skinner v. Oklahoma* and after World War II ended, as the rest of the nation began to abandon sterilization, sterilizations continued in North Carolina.

We conclude with a discussion of the recent legislation in North Carolina to provide modest payments to the victims of the state's sterilization program. In particular we discuss the design of a payment regime and how the legislature can justify payments for this concentrated episode of state infringement on personal liberty. And we suggest that the North Carolina legislation may provide a model for future legislative action aimed at payments for people sterilized involuntarily in other states.

[1] Judge John J. Parker Distinguished Professor of Law at the University of North Carolina, Chapel Hill. Contact the author at abrophy@email.unc.edu or 919.962.4128. We would like to thank Mark Dorosin, Greg Dorr, Daniel M. Filler, Gregg Polsky, Dana A. Remus, and Norman Stein. James Bartow, Kellie Corbett, Tate Holland, and Anna Tison assisted us with research.

[2] Associate, Brooks Pierce, Greensboro, North Carolina. J.D., University of North Carolina School of Law; M.P.P., Duke University Sanford School of Public Policy; B.A., Princeton University.

The Eugenics Movement in North Carolina

In 1943 Harvard Law School Professor Thomas Reed Powell published a lengthy analysis of the constitutionality of compulsory vaccination and sterilization in the *North Carolina Law Review*.[3] Powell was trying to provide guidance on just what the Constitution permitted in terms of public health measures, from vaccination through sterilization. The article reads very much like the opinion of a legal realist. There are several references to how ambiguous the law is and how difficult it is to predict what will happen in subsequent cases. "If all this seems sadly vague and amorphous to those who extract certainties out of test tubes, it can only be answered that of such is the kingdom of jurisprudence," Powell wrote towards the end of the article.[4] He thought that the twin Supreme Court precedents of *Buck v. Bell*[5] in 1927 and *Skinner v. Oklahoma*[6] in 1942 offered little "light on what they or their successors would do with milder measures, except to make clear that they would be zealous in insisting upon strong scientific support for the necessity and the efficacy of prophylactic prescriptions and upon adequate procedural safeguards in picking the persons subjected to them."[7] Later Powell observed that *Skinner v. Oklahoma*, which struck down Oklahoma's law that permitted sterilization of those convicted of three felonies, would not be a "stumbling block in the way of any sane public health program however much it may intrude on privacy and preclude self-determination."[8]

Powell's article was published while North Carolina was in the midst of a decades-long program of sterilization. Several years after that Duke Law Professor James Bradway -- a famous figure in the development of legal aid and also clinical education[9] -- published a brief article that summarized North Carolina's law regarding involuntary and voluntary sterilization. He included the good news for physicians that they were immune from civil liability for participation in what Bradway termed involuntary sterilizations (those ordered by the Eugenics Board), "except in the case of negligence in the performance of said operation."[10] Both Powell and Bradway were part of the intellectual support of the eugenics movement. They were part of a sophisticated intellectual defense of a system that drew substantial political support in North Carolina and throughout the United States, from the early twentieth century to the post-World War II era.[11]

In recent years, the story of sterilization has been told in increasing detail. Those legal histories begin with the early twentieth-century cases that often successfully challenged

---

[3] Thomas R. Powell, *Compulsory Vaccination and Sterilization: Constitutional Aspects*, 21 N.C. L. REV. 243 (1943).

[4] *Id*. at 264.

[5] 274 U.S. 200 (1927).

[6] 316 U.S. 535 (1942).

[7] Powell, *supra* note 3, at 263.

[8] *Id*. at 264.

[9] *See* Guide to the John S. Bradway Papers, 1914-1949, Duke Library Special Collections, available at: http://library.duke.edu/rubenstein/findingaids/uabradjs/ (discussing Bradway's importance to legal education).

[10] John S. Bradway, *The Legality of Human Sterilization in North Carolina*, 11 N.C. MEDICAL J. 250 (1950).

[11] *See, e.g.*, PHILLIP A. REILLY, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES (1991).

sterilization,[12] to *Buck v. Bell*[13] to *Skinner v. Oklahoma*,[14] to the growing realization of the long tail the movement had, up into the 1970s.[15]

In North Carolina and the rest of the nation, public knowledge and anger at the history of forced and coerced sterilization has grown dramatically since the early 2000s. A number of events occurred in the early 2000s to lead to increased awareness. For instance, the movement for reparations and historical work saw a dramatic increase in efforts across a broad spectrum to increase knowledge of historical injustices. And knowledge of sterilization has increased as well. In May 2002 Virginia's governor Mark Warner apologized for Virginia's role in sterilization;[16] that was followed shortly by Oregon governor's John Kitzhaber December 2002 apology for Oregon's role in sterilization. That was followed with apologies in January 2003 by South Carolina Governor Jim Hodges and in March 2003 by the California state senate and subsequently Governor Davis as well.[17] The growth in knowledge in North Carolina began with the work of historian Johanna Schoen, whose research formed the basis for the *Winston-Salem Journal*'s serial coverage beginning around 2002.[18] In 2002 North Carolina Governor Mike Easley issued an apology to victims.[19] Other states were pursuing similar efforts as well. The Georgia legislature apologized in March 2007[20] and the Indiana State Health Commissioner apologized in April

---

[12] Stephen Siegel, *Justice Holmes,* Buck v. Bell, *and the History of Equal Protection*, 90 MINN. L. REV. 106 (2005).

[13] PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* (2008).

[14] VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR-TRIUMPH OF AMERICAN EUGENICS (2008).

[15] JOHANNA SCHOEN, CHOICE & COERCION, BIRTH CONTROL, STERILIZATION, AND ABORTION IN PUBLIC HEALTH AND WELFARE (2004); GREGORY MICHAEL DORR, SEGREGATION'S SCIENCE: EUGENICS AND SOCIETY IN VIRGINIA (2008).

[16] *Virginia Governor Apologizes for Eugenics Llaw,* USA TODAY (May 2, 2002). http://www.usatoday.com/news/nation/2002/05/02/virginia-eugenics.htm

[17] http://articles.latimes.com/2003/mar/12/local/me-sterile12

[18] The serial coverage began in December of 2002, when the *Winston-Salem Journal* published "Against Their Will." The articles can be found here: http://www.journalnow.com/specialreports/againsttheirwill/. *See also* SCHOEN, *supra* note 15, at 393-94.

[19] Governor Easley wrote, "On behalf of the state I deeply apologize to the victims and their families for this past injustice, and for the pain and suffering they had to endure over the years." Jon Elliston, *The State's Sterilizations,* INDY WEEK (Dec. 18, 2002), available at http://www.indyweek.com/indyweek/the-states-sterilizations/Content?oid=1188229

See Kevin Begos, Danielle Deaver, & John Railey, *Easley Apologizes to Sterilization Victims,* WINSTON-SALEM JOURNAL (December 13, 2002).

[20] The Georgia Eugenics Resolution. S. Res. 247, 149th Gen. Assem., Reg. Sess. (Ga. 2007). March 27, 2007 (reciting that "BE IT RESOLVED BY THE SENATE that the members of this body express their profound regret for Georgia's participation in the eugenics movement and the injustices done under eugenics laws, including the forced sterilization of Georgia citizens.").

2007.[21] Similarly, the United Methodist Church apologized in 2008 for their support of eugenics.[22]

I. The North Carolina Reparations Act

For nearly a decade after Governor Easley's apology, some in North Carolina quietly pursued a strategy of compensation to those who had been sterilized.[23] Then, in 2011, Governor Beverly Purdue established a "Governor's Task Force to Determine the Method of Compensation for Victims of North Carolina's Eugenics." The Task Force recommended that each now-living person who was sterilized receive $50,000. The estates of those who have already passed away will receive nothing under this plan. While one might think that the victims would have no children, a significant number of people who were sterilized had already had children.

In 2012 supporters of compensation introduced a bill, to be funded with ten million dollars, to provide each "qualified recipient" with $50,000. A "qualified recipient" was defined broadly as: "An individual who was asexualized or sterilized under the authority of the Eugenics Board of North Carolina in accordance with Chapter 224 of the Public Laws of 1933 or Chapter 221 of the Public Laws of 1937, and who was living on May 16, 2012."[24] So anyone -- without distinction regarding the circumstances -- who was sterilized by order of the Eugenics Board and survived until March 2010 would be entitled to compensation. That is important because the nature of the sterilizations that took place under the auspices of the Eugenics Board varied widely, from people who were sterilized involuntarily and without even permission of their families, to people who were sterilized with the permission of their families, to people who themselves sought out sterilization as a method of family planning. One scholar has estimated that perhaps twenty percent of the sterilizations that took place after 1960 fell into the later category.[25] The bill passed in the North Carolina House, but was defeated in the Senate in June 2012.[26]

---

[21] Ken Kusmer, *Indiana Apologizes for Role in Eugenics*, WASHINGTON POST (April 13, 2007) http://www.washingtonpost.com/wp-dyn/content/article/2007/04/13/AR2007041300259_pf.html

[22] United Methodist Church Repentance for Support of Eugenics. http://www.umc.org/what-we-believe/repentance-for-support-of-eugenics

[23] *North Carolina Sterilization Victims Closer to Getting State Compensation*, ASHEVILLE CITIZEN-TIMES (May 22, 2012).

[24] An Act to Provide Monetary Compensation to Persons Asexualized or Sterilized under the Authority of the Eugenics Board of North Carolina, HB 947, available at: http://www.ncga.state.nc.us/Sessions/2011/Bills/House/PDF/H947v4.pdf. H.B. 947, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011).

The bill excluded compensation as available assets for determination of eligibility for government assistance programs; it also provided for redacted records of the Eugenics Board for public inspection. § 143B-426.56, § 132-1.23.

[25] SCHOEN, *supra* note 15, at 121.

[26] An Act to Provide Monetary Compensation to Persons Asexualized or Sterilized under the Authority of the Eugenics Board of North Carolina, S.B. 800, available at: http://www.ncga.state.nc.us/Sessions/2011/Bills/Senate/PDF/S800v1.pdf.

In 2013 a bill was again in the North Carolina legislature to provide payments to sterilization victims.[27] There was serious question whether anything had changed in the North Carolina Senate. North Carolina State Senator Phil Berger said that "with budgetary constraints, it's not appropriate."[28] He also recalled of the 2012 debate that "There was no ability to develop consensus on one particular path forward."[29] And yet, somehow, the North Carolina legislature found ten million dollars for a public fund for reparations to sterilization victims.[30] That statute has some important limitations; it established a fund and capped liability at $10 million. No matter how many people are ultimately able to satisfy the requirements for compensation, the liability will never go above (or below) $10 million. Thus, the more people who are deemed eligible the smaller the payout to each claimant.

The statute also defines eligibility rather narrowly. Only people who were sterilized involuntarily and pursuant to North Carolina's Eugenics Board are eligible; this limits claimants in ways that the 2012 bill did not.[31] There are two key limiting principles in that Act and both of those latter limiting principles may prove important. First, because only people who were sterilized pursuant to state action by the Eugenic Board are eligible, people who were sterilized involuntarily but outside of the authorization of the Board are left without recourse. That is, the people who were sterilized involuntarily but outside of the Board's approval are ineligible. Second, only those who were sterilized "involuntarily" are eligible and that means that the definition of "involuntary" is critical. Some people sought the Eugenics Board's approval for family planning purposes and they are, thus, ineligible. To help resolve this, the Act establishes a presumption that those who were minors or competent are presumed to have been sterilized involuntarily; those who were both adults and competent are presumed to have been sterilized voluntarily.[32] In each case that presumption could be rebutted by a preponderance of the evidence. Just what will suffice for those who were sterilized as competent adults will be a difficult and important issue, for it is entirely possible that a number of competent adults were coerced into agreeing to sterilization.[33] Proving that at this point may be rather difficult and those people might then be left without recourse. The decision of whether someone is a qualified recipient is made by the North Carolina's Industrial Board. But even with those important and significant limiting principles, the Act provides an precedent for further reparations in other states.

This article returns to North Carolina's legal history with sterilization to understand just how it is that our state embraced sterilization and to understand the role of the state in sterilization.

---

[27] An Act to Provide Monetary Compensation to Persons Asexualized or Sterilized under the Authority of the Eugenics Board of North Carolina, SB 421, available at: http://www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S421v1.pdf

[28] Joanna Valk, *Berger Has Concerns about Availability of Funds for Eugenics Victims* (March 1, 2013), available at: http://www.wnct.com/story/21760014/berger-eugenics-funding-unlikely-to-pass-sentate

[29] Mark Binker, *McCrory's Budget: Picking Three Fights* (March 20, 2013), available at: http://www.wral.com/mccrory-s-budget-picking-three-fights/12247453/

[30] NC General Statutes § 143B-426.50 to § 143B-426.57; Valerie Bauerlein, *North Carolina to Compensate Sterilization Victims: State Sets $10 Million Pool to Pay Subjects in Eugenics Program*, WALL STREET JOURNAL (July 26, 2013).

[31] § 143B-426.50.

[32] *Id.*

[33] *See infra* discussing question of coercion in context of "voluntary" sterilization.

How did the state select people for sterilization, approve sterilization, and carry it out. At the end of this article we suggest that it ought to attend to the circumstances of individual sterilizations. Finally we make the case for limited legislative action in other states and provide several factors why the legislature may act in this case without necessarily opening other reparations claims.

II. The Eugenics Era

A. The Sterilization Mindset, 1910s and 1920s

The idea of state-compelled sterilizations emerged with strength in the 1910s from several lines of thought. First, there was a search for scientific solutions to human problems. Among the first works in the United States was Harvard University zoology professor Charles Davenport, who wrote in the first decade of the twentieth century about eugenics as *"The Science of Human Improvement by Better Breeding*."[34]

For many, eugenics was not just about human improvement; it was about saving the state money. Paul Popenoe, a eugenics activist educated at Occidental College and later Stanford University, and University of Pittsburgh Professor Roswell Hill addressed arguments in favor of eugenics across a broad spectrum in their textbook *Applied Eugenics* published in 1918.[35] In one part they built on work that dealt with the issue of the supposed inheritance of mental deficiency. Henry Goddard's 1912 book *The Kallikak Family: A Study in the Heredity of Feeble-Mindedness* had done much to popularize the idea that mental ability and criminal tendencies were inherited traits and that people of low intelligence and those pre-disposed to crime were more likely to have children than those of high intelligence.[36] Goddard's book was followed in 1915 by a study of the "Juke" family by Arthur Estabrook.[37] Vignettes about families like the Kallikaks and the Jukes were so popular, that they were repeated by local officials seeking to support the case for sterilization.[38]

In 1922 the North Carolina State Board of Public Welfare conducted a study of a family it labeled the "Wake Family" (they were given this pseudonym because they lived in Wake County, where the state capital of Raleigh is located).[39] After recounting the origins of the parents and the

---

[34] CHARLES DAVENPORT, EUGENICS—THE SCIENCE OF HUMAN IMPROVEMENT BY BETTER BREEDING (New York, Henry Holt & Co. 1910).

[35] PAUL POPENOE & ROSEWELL HILL JOHNSON, APPLIED EUGENICS xi (1918).

[36] HENRY H. GODDARD, THE KALLIKAK FAMILY: A STUDY IN THE HEREDITY OF FEEBLE-MINDEDNESS (1912).

[37] ARTHUR HOWARD ESTABROOK, THE JUKES IN 1915 **(**1916).

[38] *See, e.g.*, BIENNIAL REPORT OF THE STATE BOARD OF CHARITIES AND PUBLIC WELFARE, DECEMBER 1, 1920 TO JUNE 30, 1922 99 (1922) (discussing the "Wake" family). There was, in fact, a small genre of literature that explored the problems across several generations of families. *See, e.g.*, CHARLES DAVENPORT & ARTHUR H. ESTABROOK, THE NAM FAMILY: A STUDY IN CACOGENICS (1912); CHARLES DAVENPORT & FLORENCE H. DANIELSON, THE HILL FOLK. REPORT ON A RURAL COMMUNITY OF HEREDITARY DEFECTIVES (1912). *See also* MARK H. HALLER, EUGENICS: HEREDITERIAN ATTITUDES IN AMERICAN THOUGHT 108 (1963) (summarizing several family studies).

[39] BIENNIAL REPORT OF THE STATE BOARD OF CHARITIES AND PUBLIC WELFARE, DECEMBER 1, 1920 TO JUNE 30, 1922 99 (1922).

problems with their five children, the report concluded with an appeal to prohibiting people like the "Wake Family" from having children. It was an appeal based on utility and economics:

> The tragedy of this story is not so much the drunkenness and immorality this feebleminded family is responsible for, but the sheer waste--the lack of any sort of worth-while contribution to society. ... Twenty thousand dollars or more has probably been as heedlessly poured out on this family.
>
> Had Joe and Mary been refused a marriage license on the ground of feeblemindedness--as is done in a number of states--and sent to an institution, the State would have been spared much expense and trouble. Had they been rendered incapable of having children they could not have been more diseased than they are, and still society would have been spared a second generation of their kind.[40]

Fifteen years later, when the Eugenics Board published a pamphlet in 1938 to explain the reasons behind eugenics, explain the basic procedures, and provide forms for public health officials to use in petitioning the Eugenics Board for permission to sterilize individuals, it turned to the example of the Wake Family to show the costs of public welfare and the cost savings of sterilization. It concluded. "At the end of 1922 it was found that the family had cost the public at least $20,000. ... For the cost of around $100.00 the father and mother of these children could have been sterilized."[41] Popenoe and Johnson's college textbook stated the problem in stark economic terms. The financial burden of caring for "defectives and delinquents … is becoming a heavy one; it will become a crushing one …. The burden can never be wholly obliterated, but it can be largely reduced by a restriction of the reproduction of those who are themselves socially inadequate."[42] And they argued that restrictions on personal liberty were necessary for the preservation of the race.[43]

Works like Edward Gosney and Paul Popenoe's *Sterilization for Human Betterment* told of the opportunities for harnessing science to improve lives.[44] Gosney and Popenoe's book, published in 1929, after California had already several several thousand people, dealt with the state's experience with eugenics. By minimizing the harms to individuals and by focusing on the cost saved to California taxpayers, they made the case for sterilization more generally. The need for sterilization, oddly, had resulted from improving standards of medical care, which meant that

---

[40] *Id.* at 102-03.

[41] R. EUGENE BROWN, EUGENICAL STERILIZATION IN NORTH CAROLINA: PURPOSE, STATUTORY PROVISIONS, FORMS, AND PROCEDURE 10 (1938), available at: http://digital.ncdcr.gov/cdm/compoundobject/collection/p249901coll22/id/417353/rec/3
R. EUGENE BROWN, EUGENICAL STERILIZATION IN NORTH CAROLINA. A BRIEF SURVEY OF THE GROWTH OF EUGENICAL STERILIZATION AND A REPORT ON THE WORK OF THE EUGENICS BOARD OF NORTH CAROLINA THROUGH JUNE 30, 1935 (1935), available at http://digital.ncdcr.gov/cdm/compoundobject/collection/p249901coll22/id/417353/rec/16

[42] POPENOE & JOHNSON, *supra* note 35, at 173.

[43] *Id.* at 174.

[44] E.S. GOSNEY AND PAUL POPENOE, STERILIZATION FOR HUMAN BETTERMENT: A SUMMARY OF THE RESULTS OF 6,000 OPERATIONS IN CALIFORNIA, 1909-1920 (1929).

people who in previous generations would have died now lived to have children.[45] The book's thesis was that "we need constructive charity along with out present patchwok variety that tends to increase the burdens of race degeneracy and family suicide." That is, they wanted a policy that stopped some from having children and encouraged others of "good stock" to have more.[46]

Second, the eugenics literature also lamented the decline of the white race. Paul Popenoe and Roswell Hill Johnson's 1918 college textbook *Applied Eugenics* opened in apocalyptic terms with reference to the demographic catastrophe of the recently closed World War and the threatened decline of the white race.[47] Johnson, born in 1877, was a sometimes professor at the University of Pittsburgh. Popenoe and Johnson, however, just presented a compact argument that had been developed extensively by others. Even before the Great War, there was a robust literature warning of the decline of white supremacy. Madison Grant's *The Passing of the Great Race,* published in 1916, was an important popular work that raised the fear that the Nordic race was being overwhelmed, particularly in the United States.[48]

Grant's argument was amplified after the war by other literature that warned of non-European people increasing in proportion to Europeans in the wake of the World War.[49] One of the most dramatic examples of this literature was Lothrop Stoddard, *The Rising Tide of Color Against White Supremacy* published in 1920 by Charles Scribner's. The introductory paragraph laid out the dire situation, as Stoddard saw it, of the decline of the power of people of European descent. Europeans had as recently as 1914 dominated Europe, North American, and Australia. "Judged by accepted canons of statecraft, the white man towered the indisputable master of the planet. Forth from Europe's teeming mother-hive the imperious Sons of Japhet had swarmed for centuries to plant their laws, their customs, and their battle-flags at the uttermost ends of the earth." Moreover, people of European descent colonized and controlled parts of South America and Africa and even parts of Asia. Stoddard presented a story of white supremacy. "Even where white populations had not locked themselves to the soil few regions of the earth had escaped the white man's imperial sway, and vast areas inhabited by uncounted myriads of dusky folk obeyed the white man's will."[50] Much had changed in only a few years. The power of people of European descent was declining and something needed to be done about this. The answer was found partly in eugenics.

Stoddard had begun life criticizing the Haitian Revolution, which had freed Haiti from slavery and French colonialism[51] and then moved to larger topics. That Scribner's, an important trade press, published *The Rising Tide of Color* signaled that he aimed at a wide audience. One indicator that Stoddard reached a public audience is his appearance in Fitzgerald's *The Great Gatsby*. Tom Buchanan's character in that novel, a man who was known more for his impulsive

---

[45] *Id.* at v.

[46] Id.

[47] PAUL POPENOE & ROSEWELL HILL JOHNSON, APPLIED EUGENICS xi (1918).

[48] MADISON GRANT, THE PASSING OF THE RACE; OR, THE RACIAL BASIS OF EUROPEAN HISTORY (1916). *See also* JONATHAN PETER SPIRO, DEFENDING THE MASTER RACE: CONSERVATION, EUGENICS, AND THE LEGACY OF MADISON GRANT (2009).

[49] Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900-1930*, 16 L. & HIST. REV. 63 (1998).

[50] LOTHROP STODDARD, THE RISING TIDE OF COLOR AGAINST WHITE WORLD-SUPREMACY (1920).

[51] T. LOTHROP STODDARD, THE FRENCH REVOLUTION IN SAN DOMINGO (1914).

action than his thoughtfulness, mixed Henry Goddard's name with Lathrop Stoddard's book title.[52] That suggests (in addition to Tom Buchanan wasn't very serious as a thinker or reader) that both Goddard's *Kallikak Family* and Stoddard's *Rising Tide of Color* were on Buchanan's mind as examples of the concern for white supremacy so on the minds of Americans in the 1920s. Stoddard made several references to eugenics in *Rising Tide of Color*, including in the conclusion.[53] Echoing W.E.B. DuBois, but viewing the issue from the other side of the color line, Stoddard wrote in his preface "The world-wide struggle between the primary races of mankind the 'conflict of color' as it has been happily termed bids fair to be the fundamental problem of the twentieth century, and great communities like the United States of America, the South African Confederation, and Australasia regard the 'color question' as perhaps the gravest problem of the future."[54]

In the conclusion to *The Rising Tide of Color* Stoddard linked the fate of the white race to that of eugenics. He looked forward to a future when white Americans will "take in hand the problem of race-depredation, and segregation of defectives and abolition of handicaps penalizing the better stock." At that point "it will be possible to inaugurate positive measure of race-betterment which will unquestionably yield the most wonderful results."[55]

The white supremacy literature had two purposes. First, it warned about the need to do something about undesirable non-European people and second it warned about the need for people of European descent to have more children. One theme of Popenoe and Johnson's textbook was that well-educated people (particularly women) were not having enough children. Thus, the eugenics literature was working on a couple of themes at the same time. Part of it was about the need for restrictions on reproduction for some people of all races. Samuel J. Holmes' 1921 book *The Trend of the Race* told of "The fact that defective mentality is strongly transmitted is established beyond the possibility of sane objection, and the particularly disastrous results that are pretty sure to follow from the mating of two mentally defectives have certainly been made sufficiently impressive by the work of recent investigators."[56] But the eugenics literature was also about the particular threat to white people of other races and the concomitant need for white people to reproduce more. The literature was a mixture of white supremacy, state regulation, and patriarchy all at the same time.

---

[52] F. SCOTT FITZGERALD, THE GREAT GATSBY 17 (1925). One wonders whether the fact that Scribner's published Fitzgerald's *The Great Gatsby*, as well as Madison Grant's *Passing of the Great Race* and Stoddard's *Rising Tide of Color*, influenced Fitzgerald's reference to Stoddard.

[53] STODDARD, supra note 46, at 306. *See also* id. at 220 ("Bolsheivism has voiced the proletarianzation of the world, beginning with the white peoples. To this end it not only foments social revolution within the white world itself, but it also seeks to enlist the colored races in its grand assault on civilization.").

[54] *Id.* at v. *See also id.* at 12 (quoting W.E.B. DuBois, *The African Roots of War*, 115 ATLANTIC MONTHLY 713 (May, 1915)).

[55] STODDARD, supra note 46, at 309.

[56] SAMUEL J. HOLMES, THE TREND OF THE RACE: A STUDY OF PRESENT TENDENCIES IN THE BIOLOGICAL DEVELOPMENT OF CIVILIZED MANKIND 40 (1921) (quoted in *Smith v. Command*, 204 N.W. 141, 142 (Mich. 1925)).

Finally, there was an attempt to use the state's power to implement such solutions. All three came together to provide powerful impetus to state-sponsored sterilization of more than thirty thousand people from the 1920s through the 1950s.[57]

B. College Textbooks and the Case for Sterilization

The level of panic revealed in the eugenics and white supremacy literature translated well into arguments for legislative action. The concern over decline of the white race and the need for legislative action was phrased starkly as concern over costs of care and about the decreasing mental ability of American citizens. One can trace the migration of eugenic ideas into public debate by looking at the revised and expanded version of Paul Popenoe's and Roswell Johnstone's textbook, *Applied Eugenics*, from its first edition in 1918 to its second edition in 1933. The book was designed for college students. It made the case for sterilization first with an attack on the common people. Then it turned attention to how the wealthier and better-educated people were being overtaken by the common people. For instance, it focused on the fertility of women educated at elite colleges. The point was that well-educated women were having few children. They had a solution to this problem as well. "Since the great eugenics wastage at the present time is among college-educated women, these need particular help to orient themselves."[58]

In their 1933 revised and expanded version of their textbook *Applied Eugenics* Popenoe and Johnstone provided a series of exercises for students, which were designed to move from the classroom into the realm of advocacy. For instance, they asked, "If you were a legislator, would you think it more important at your first session to work for a sterilization bill, or to get appropriations for additional segregation facilities? Why?"[59]

> Inquire of several persons whom you consider ultra-conservative and several others whom you consider to be radically-minded, whether they approve of eugenics. Classify their answers.[60]
>
> Discuss in some detail the selective nature of deaths from automobile accidents.[61]
>
> "If there is a considerable foreign-born population in your community, tabulate the birth announcements in the newspapers for a few weeks and classify them, so far as can be done by family names, on the basis of their nationality."[62]
>
> Ask 10 students how many brothers and sisters they have. Note how many of them come from families that are large enough to perpetuate themselves.[63]

---

[57] MARK A. LARGENT, BREEDING CONTEMPT: THE HISTORY OF COERCED STERILIZATION IN THE UNITED STATES 80 (2011); Robert J. Cynkar, *Buck v. Bell: Felt Necessities v. Fundamental Values?*, 81 COLUM. L. REV. 1435 (1981).

[58] PAUL POPENOE AND ROSWELL HILL JOHNSTONE, APPLIED EUGENICS 261(2nd ed. 1933).

[59] POPENOE AND JOHNSTONE, *supra* note 58, at 408.

[60] *Id.* at 418.

[61] *Id.* at 406

[62] *Id.* at 407.

[63] *Id.* at 407.

> A philanthropist is contemplating a bequest for the advancement of eugenics. He is in doubt as to whether he should leave this to promote (a) research on the genetics of human traits, or (b) work along educational and legislative lines to put the eugenic program into effect. He asks your advice. What have you to say?[64]

> "What do you think is the superior right: the right of every individual to marry and have children, or the right of society to prevent the reproduction of the unfit? Why?"[65]

The interesting part of this story is that eugenics ideas flowed from popular culture into the legislature and were then approved by courts.[66]

The World War, which had seen such extraordinary growth in the power of the United States and had resulted in such extraordinary destruction of lives and property in Europe, perhaps taught that generation of Americans that it was appropriate for the state to exercise such power. This continued a trend that had begun before the war of government regulation of property and of people – from regulation of business, such as rates in interstate commerce, to protections for workers, to zoning. Much of the regulation was positive in that it protected the otherwise vulnerable. That is certainly how the regulation of maximum hours and minimum wages was viewed by the Supreme Court in the 1910s and how zoning was viewed in the 1920s. There were, however, other times when the power of the state – which often focused on the supposed good to the general public – was allowed to circumscribe the rights of individuals. This is what happened over the course of the 1920s and 1930s as state legislatures enacted legislation to provide for widespread sterilization and as courts began to routinely uphold such legislation.

C. The Legal Mindset, 1910s and 1920s

Such ideas were migrating quickly into the legislative and judicial spheres. The legislation began in 1907 in Indiana.[67] Henry Laughlin was part of translating those ideas about

---

[64] *Id.* at 407.

[65] POPENOE AND JOHNSON, *supra* note 57, at 407.

[66] Popenoe and Johnson's conclusion was that the state would sometimes need to exercise its power coercively. *See* POPENOE AND JOHNSON, *supra* note 57, at 136 ("Every facility shall be available to undesirable parents for the prevention of conception, but when they are unwilling to control their own fecundity, the state will in some cases have to intervene by selective sterilization."). University of California at Berkeley Professor S.J. Holmes' textbook *Human Genetics and Its Social Import* (1936) included a final chapter, "Proposed Measures for Race Betterment." It presented a number of discussion questions, such as "Do you think that any kinds of criminals … should be sterilized on either eugenic or other grounds?" "In general what kinds of persons, if any, should be sterilized?" and "Make a list of feasible measures for promoting race betterment." *Id.* at 385-86.

[67] In chronological order, the eugenics legislation from 1907 to 1945 is as follows: Ind. Acts 377 (1907); Cal. Stat. 1093 (1909); Conn. Acts 1135 Reg. Sess. (1909); Wash. Sess. Laws 899 (1909); Iowa Acts 144 (1911); N.J. Laws 353 (1911); N.Y. Laws 924 (1912); Cal. Stat. 775 (1913); Iowa Acts 209 (1913); Kan. Sess. Laws 525 (1913); Mich. Pub. Acts 52 (1913); N.D.

eugenics into the real of state policy through legislation. His 1922 pamphlet, "Eugenical Sterilization in the United States," presented a model statute as it sought to use eugenics to teach the nation in its "attempts to control both the quantity and quality of its future population."[68] Laughlin acknowledged in 1926 that Michigan and Virginia had already upheld broad eugenics laws[69] and then went on to suggest that the legislation should apply to people in both state institutions and the community.[70] He went on to provide two new model statutes based on what had already been upheld.[71]

Courts had shown some substantial unease with eugenics legislation in the 1910s and early 1920s. They were dealing with both statutes that provided for sterilization of criminals and for sterilization of developmentally disabled people. The analysis of the criminal sterilization statutes was often rather different from the ones for non-criminal sterilization. The former often involved allegations that they were cruel and unusual punishment and often that they were also violations of due process. The latter were challenged most successfully on equal protection grounds – that some similarly situated people were not being sterilized. However, plaintiffs challenging the non-criminal sterilization statutes also often succeeded on due process challenges and occasionally they tried cruel and unusual punishment challenges as well.

The first appellate case to address the constitutionality of sterilization legislation was the Washington Supreme Court's 1912 opinion in *State v. Feilen*, which upheld a statute allowing vasectomies to be performed on men convicted of rape.[72] The Court held that since the crime was

---

Laws 63 (1913); Wis. Sess. Laws 971 (1913); Iowa Acts 255 (1915); Neb. Laws 554 (1915); S.D. Sess. Laws 378 (1916-1917); Cal. Stat. 1623 (1917); Kan. Sess. Laws 443 (1917); N.H. Laws 704 (1917); Or. Laws 518 (1917); Conn. Acts 2725 Spec. Sess. (1918-1919); Ala. Acts 1023 (1919); N.C. Sess. Laws 504 (1919); Wash. Sess. Laws 162 (1921); Ala. Acts 738, 742 (1923); 33 Del. Laws 152 (1923); Mich. Pub. Acts 453 (1923); Mont. Laws 534 (1923); Or. Laws 280 (1923); Va. Acts 569 (1924); Idaho Sess. Laws 358 (1925); Me. Laws 198 (1925); Mich. Pub. Acts 96 (1925); Minn. Laws 140 (1925); Or. Laws 298 (1925); Utah Laws 159 (1925); Ind. Acts 713 (1927); N.D. Laws 433 (1927); Miss. Laws 370 (1928); Ariz. Sess. Laws 114 (1929); 36 Del. Laws 742 (1929); Idaho Sess. Laws 683 (1929); Me. Laws 4 (1929); Mich. Pub. Acts 689 (1929); Neb. Laws 563 (1929); N.H. Laws 161 (1929); N.C. Sess. Laws 28 (1929); Or. Laws 397 (1929); W. Va. Acts 3 (1929); Me. Laws 308 (1930-1931); Ind. Acts 116 (1931); Okla. Sess. Laws 80 (1931); Vt. Acts & Resolves 194 (1931); Me. Laws 119 (1932-1933); N.C. Sess. Laws 345 (1933); Okla. Sess. Laws 84 (1933); Ind. Acts 1502 (1935); N.C. Sess. Laws 806 (1935); Okla. Sess. Laws 94 (1935); Or. Laws Spec. Sess. 55 (1935); S.C. Acts 428 (1935); S.D. Sess. Laws 163 (1935); Ga. Laws 414 (1937); Ind. Acts 1164 (1937); N.C. Sess. Laws 433 (1937); S.C. Acts 161 (1937); Conn. Acts 361 Reg. Sess. (1939); Cal. Stat. 1093 (1940-1941); Mich. Pub. Acts 119 (1941); Mich. Pub. Acts 388 (1943); Utah Laws 247 (1945). There is a somewhat different, shorter list at F.C.N., *Constitutional Law – Police Power – Sterilization of Defectives*, 22 GEORGETOWN L. J. 616, 616 (1933-34).

[68] HENRY LAUGHLIN, HISTORICAL, LEGAL, AND STATISTICAL REVIEW OF EUGENICAL STERILIZATION IN THE UNITED STATES 2 (1926).

[69] *Id*. at 5.

[70] *Id.* at 6.

[71] *Id.* at 64-75.

[72] *See* State v. Feilen, 126 P. 75, 76 (Wash. 1912).

so heinous and vasectomies were relatively painless it was not cruel punishment.[73] A year later the New Jersey Supreme Court struck down a statute that allowed for the sterilization of epileptics, among others, who were inmates at charitable institutions.[74] The Court held that the sub-classification requiring institutionalization was arbitrary to the goal of controlling epilepsy and thus the statute violated the equal protection clause of the Fourteenth Amendment.[75]

In one of these first cases, *Mickle v. Henrichs*, the Nevada Supreme Court provided an extensive articulation of why sterilization is cruel and unusual, on grounds that it infringed a person's basic rights.[76] "[E]ach operation is to destroy the power of procreation. It is, of course, to follow the man during the balance of his life. The physical suffering may not be so great, but that is not the only test of cruel punishment; the humiliation, the degradation, the mental suffering are always present and known by all the public, and will follow him wheresoever he may go. This belongs to the Dark Ages."[77] Here, the Court drew on public humiliation, and even implied that there exists a fundamental right to beget children.

The Southern District of Iowa drew a similar conclusion in its 1914 opinion in *Davis v. Berry*, though the opinion focused more on the degradation of the human body that accompanies sterilization.[78] "True, rape is an infamous crime; the punishment should be severe; but even for such an offender the way to an upright life, if life is spared, should not be unnecessarily obstructed."[79] By arguing that sterilization "obstructs" a person's ability to lead an upright life, the Court conceptualized procreation as fundamental to living life.

Even in cases where the Court deferred to the Legislature, the discussion recognized that sterilization posed a serious threat to a person's bodily integrity. In *State v. Feilen*, the Supreme Court of Washington noted that "we cannot hold that vasectomy is such a cruel punishment as cannot be inflicted upon appellant for the horrible and brutal crime [rape] of which he has been convicted."[80] Even the case where sterilization was upheld, the Court approached the problem as a balancing test between individual liberties and the state's power, a rationale that recognized that even convicted criminals have some basic rights in their sexual choices.

Legal scholars generally view the development of fundamental rights as occurring in the post-*Lochner* era, growing in substance and breadth during the Warren Court of the 1950s and 1960s. However, these early state court approaches to eugenics demonstrate that there existed some sense of fundamental liberties in the 1910s, albeit later swept away in the name of general welfare.

1. Fundamental Rights in Equal Protection Challenges

---

[73] 126 P. 75 at 76-77.

[74] *See* Smith v. Board of Examiners Feeble-Minded, 88 A. 963, 965 (1913).

[75] 88 A. 963 at 966.

[76] Mickle v. Henrichs, 262 F. 687, 690 (D. Nev. 1918).

[77] *Id.*

[78] Davis v. Berry, 216 F. 413, 416 (S.D. Iowa 1914), rev'd, 242 U.S. 468 (1917).

[79] *Id.*

[80] State v. Feilen, 126 P. 75, 78 (1912) (resting decision on the Washington State Constitution's prohibition of "cruel punishment," a slight variation from the Eighth Amendment's language).

Similar early recognition that sterilization was problematic for human rights reasons appeared in Fourteenth Amendment doctrine. Equal protection challenges to sterilization statutes came from people institutionalized for "feeble-mindedness" or other mental health reasons, as opposed to the cruel and unusual punishment challenges furthered by convicted criminals. Courts were quick to note that the State, by having a sterilization option for only those confined to state institutions and not those people with the same ailments living outside institutions, was treating people in the same class differently. In its *In re Thompson* decision in 1918, a New York court held a sterilization board unconstitutional on grounds that "[t]he law certainly denies to some persons of a class and similarly situated the protection which is afforded to others of the same class."[81] In the same year, the Supreme Court of Michigan struck down a similar statute for the same reason, explaining "the Legislature selected out of what might be termed a natural class of defective and incompetent persons only those already under public restraint, leaving immune from its operation all others of like kind to whom the reason for the legislative remedy is normally and equally, at least, applicable, extending immunities and privileges to the latter which are denied to the former."[82] Moreover, these courts found that the class distinction did not accomplish the objectives for which the sterilization program was established, since institutionalized persons were less likely to procreate than non-institutionalized people anyway.[83]

But the discussion often extended beyond the unreasonableness of this distinction into the realm of why sterilization raised such large concerns in the first place. In *In re Thompson*, the New York Court continued its discussion by declaring: "[t]he entire purpose of the enactment seems to be to save expense to future generations in the operation of eleemosynary institutions . . . Such does not seem to this court to be the proper exercise of the police power. It seems to be a tendency almost inhuman in its nature."[84] The Supreme Court of New Jersey likewise labeled its state's sterilization statute *inhuman*:"[t]he palpable inhumanity and immorality of such a scheme forbids us to impute it to an enlightened Legislature."[85]

The New Jersey Supreme Court foreshadowed just how dangerous involuntary sterilization could be for society. "There are other things besides physical or mental diseases that may render persons undesirable citizens, or might do so in the opinion of a majority of a prevailing Legislature. Racial differences, for instance, might afford a basis for such an opinion in communities where that question is unfortunately a permanent and paramount issue."[86] The Court clearly stated that once the government starts sterilizing on "feeble-mindedness" grounds, race and poverty could logically follow as valid reasons to refuse the right of procreation. The prescription

[81] In re Thomson, 169 N.Y.S. 638, 644 (Sup. Ct. 1918) aff'd sub nom. Osborn v. Thomson, 185 A.D. 902, 171 N.Y.S. 1094 (1918).

[82] Haynes v. Lapeer Circuit Judge, 166 N.W. 938, 940 (1918).

[83] Smith v. Bd. of Examiners of Feeble-Minded, 88 A. 963, 966 (N.J. 1913) ("The objection, however, is not that the class is small as compared with the magnitude of the purpose in view, which is nothing less than the artificial improvement of society at large, but that it is singularly inept for the accomplishment of that purpose in this respect, viz., that if such object requires the sterilization of the class so selected, then *a fortiori* does it require the sterilization of the vastly greater class who are not protected from procreation by their confinement in state or county institutions.").

[84] *In re Thomson*, 169 N.Y.S. at 644.

[85] Smith v. Bd. of Examiners of Feeble-Minded, 88 A. 963, 967 (N.J. 1913).

[86] *Smith*, 88 A. at 966.

is eerie now, since the majority of people sterilized in North Carolina were indeed poor and black.[87]

2. **Transition to Procedural Due Process**

After these early cases, however, the tone began to shift. Courts were struggling with the distinction between this new idea of substantive rights, which had not yet been articulated by the Supreme Court, and the simpler option of invalidating statutes on procedural due process grounds. The Iowa Supreme Court's decision in its 1914 *Davis v. Berry* opinion illustrates this tension. "One of the rights of every man of sound mind is to enter into the marriage relation. Such is one of his civil rights, and deprivation or suspension of any civil right for past conduct is punishment for such conduct, and this fulfills the definition of a bill of attainder, because a bill of attainder is a legislative act which inflicts punishment without a jury trial."[88] In one breath, the Court implied that every person has a right to have children (through marital relations), and at the same time, stated that the reason for the sterilization statute's invalidity is the lack of due process afforded by a jury trial. The Court was quick to jump from the idea of liberty to a procedural argument.

Similarly, the Indiana Supreme Court struck down its sterilization statute on grounds that inmates were not afforded due process. The hearings were held in secret and inmates had no opportunity to present evidence or cross-examine witnesses.[89] But in its discussion, the Court wrestled with its inclination to invalidate the statute on individual liberty grounds. "And wholly aside from the proposition of cruel and unusual punishment, and infliction of pains and penalties by the legislative body through an administrative board, it is very plain that this act is in violation of the Fourteenth Amendment to the federal Constitution in that it denies appellee due process."[90] It was almost as if the Courts wanted to make substantive rights arguments, but understood that procedural findings were easier to justify.

3. **The Increasing Acceptance of Sterilization**

The era of judicial skepticism was drawing to a close in the wake of the popular literature on eugenics, the legislation sweeping the country, and law review commentary. A young lawyer in Lynchburg, Virginia, Aubrey Strode, soon to be the lawyer for the state in *Buck v. Bell*, published a short examination and defense of the Virginia statute, "Sterilization for Defectives," in the *Virginia Law Review* in 1924.[91] Strode took up the question of whether the state's police power was broad enough to encompass sterilization. Strode framed this in terms of protecting the people sterilized from procreation. He noted that it was clear that the state could keep institutionalized people in segregation to prevent them from having children. But he asked, "is this the sole remedy available to organized society?"

---

[87] Gregory N. Price and William A. Darity, *The Economics of Race and Eugenic Sterilization in North Carolina: 1958-1968*, 8 ECONOMICS AND HUMAN BIOLOGY 261, at 269 table 4 (2010) (observing that as the percentage of a county's African-American population grew so too did the number of sterilizations in the 1960s).

[88] *Davis*, 216 F. at 419.

[89] Williams v. Smith, 131 N.E. 2 (Ind. 1921).

[90] *Id.*

[91] Aubrey E. Strode, *Sterilization of Defectives*, 11 VA. L. REV. 296 (1925).

> Must such persons languish for life in custody and must the government bear the perpetual burden of thus maintaining them if it would protect itself against the multiplication of their kind and must this he so even when through a simple surgical operation not appreciably dangerous and involving the removal of no sound organs from the body, such persons might be discharged from custody and become self supporting to the great advantage both of themselves and of society?

Strode wondered if "one liberty" may be "thus restored through the deprivation of another liberty?"[92] Strode took a moderate approach; he emphasized that the Virginia statute was based on eugenic principles, but that it only allowed sterilization when there was a judicial determination "the welfare of the inmate also will be promoted thereby."[93] He subsequently acknowledged that "The field here is a broad one involving what were formerly at least regarded as elemental personal rights."[94] Strode's article appeared as he was bringing the *Buck* case as a test of the statute's constitutionality through the Virginia courts.[95]

4. Approving Sterilization in the State Courts

The first major robust defense of eugenics legislation by a state court came from the Michigan Supreme Court in 1925 in *Smith v. Command*.[96] The Court moved systematically through each of the legal challenges to sterilization: reasonable use of the police power, cruel and unusual punishment, equal protection, and procedural due process.

The thrust of the holding in *Smith* was that the law was within Michigan's police power, because controlling feeble-mindedness was in the public interest.[97] The Court started by setting out two issues as conclusive facts: first feeble-mindedness is hereditary, making sterilization an unquestionably effective means to decreasing the defect within the population.[98] Second, feeble-minded people are indisputably "a serious menace to society," because eight times as many live in Michigan as can be institutionalized.[99] These assertions disregard any scientific distinctions that could be made between different types of mental disorders, and assume that institutionalization is the only option for dealing with these individuals.

Under this framework, the Court evaluated the right to beget children against the public interest. The Court recognized that "[i]t is true that the right to beget children is a natural and constitutional right."[100] But quickly reframed the right: "Measured by its injurious effect upon society, what right has any citizen or class of citizens to beget children with an inherited tendency to crime, feeble-mindedness, idiocy, or imbecility?"[101] In sum, it is reasonable for the legislature

---

92 *Id.*
93 *Id.* at 301.
94 *Id.* at 301.
95 LOMBARDO, *supra* note 13, at 112.
96 *See* Smith v. Command, 204 N.W. 141 (Mich. 1925).
97 *Id.* at 141-142.
98 *Id.* at 141.
99 *Id.*
100 *Id.* at 142.
101 *Id.*

to demolish the ability of these people to procreate, because they do not have a right to have children who will certainly have mental defects and will certainly impose a burden on the State. By reframing the right to beget children, the Court was able to quell the lingering questions raised by its predecessors.

The majority next turned to the cruel and unusual punishment issue. Sterilization was found to be analogous to vaccination, and thus not punitive.[102] Part of the rationale for this conclusion was that the operations were not particularly painful to the patients, and thus "the results are beneficial both to the subject and to society."[103] Recognizing that other courts had disagreed with its position, the majority went on to distinguish the Michigan law from other states. This law was unlike the laws at issue in *Davis v. Berry*[104] and *State v. Feilen*,[105] because in those cases the law only imposed sterilization on convicted felons, not people who were institutionalized only for feeble-mindedness.[106] The *Smith v. Board of Examiners* holding was irrelevant in this context because it dealt only with epileptics and did not arrive at the cruel and unusual punishment argument.[107] The law at issue in *Mickle v. Henrichs* was nothing like the Michigan law either because it applied only to people who had raped children under 10 years old.[108]

The majority also handled the contention that the sterilization statute violated the equal protection clause on grounds that it did not apply to all mental defectives.[109] The statute defined the class of people who would be affected by sterilization as follows:

> (a) That the said defective manifests sexual inclinations which make it probable that he will procreate children unless he be closely confined, or be rendered incapable of procreation; (b) that children procreated by said adjudged defective will have an inherited tendency to mental defectiveness; and (c) that there is no probability that the condition of said person will improve so that his or her children will not have the inherited tendency aforesaid.[110]

This classification is actually more narrow than if the statute had enforced sterilization on all mental defectives – it ensures that there is a reason for conducting the sterilization, because the sterilized person's children would also need to be institutionalized for being mentally defective too. Again, the Court compared sterilization to smallpox, finding that it was reasonable for the legislature to apply the statute to people most likely to pass on mental defects, just like the legislature was justified in requiring vaccinations of people most likely to be afflicted with smallpox.[111] In both this argument and the cruel and unusual punishment argument, the Court depicted mental deficiencies as a purely medical problem, thereby facilitating justification of a

---

[102] *Id.* at 142.
[103] *Id.* at 143.
[104] Davis v. Berry, 216 F. 413 (S.D. Iowa 1914).
[105] State v. Feilen, 126 P. 75 (Wash. 1912).
[106] *Smith v. Command*, 204 N.W. 141 at 142.
[107] *Id.* at 142.
[108] *Id.*
[109] *Id.* at 143.
[110] *Smith v. Command*, 204 N.W. at 143.
[111] *Id.*

"medical" remedy through sterilization. Again, the Court has moved the discussion away from fundamental liberty and into a discussion about "procedure," this time a medical procedure.

The Court's equal protection analysis did conclude that a second section of the statute be invalidated, because it applied to mentally defective people who would not be able to care for their children and did not require a finding that the children themselves would be mentally defective.[112] The classification language of this provision was:

> (a) That said defective manifests sexual inclinations which make it probable that he will procreate children unless he be closely confined, or be rendered incapable of procreation; and (b) that he would not be able to support and care for his children, if any, and such children would probably become public charges by reason of his own mental defectiveness.[113]

The Court took issue with the notion that only poor feeble-minded people would be subject to this part of the statute: if they were financially able to support any potential children, then they would not be sterilized. In that sense, the law "carves a class out of the class," making poor feebleminded people subject to different laws than wealthier feeble-minded people.[114] This objection to the law is particularly noteworthy for North Carolina's history, where preventing the procreation of poor people became a major justification for the expansion of the eugenics program in later years.

The Court held that the statute's procedure for identifying people to be sterilized did not violate due process. The procedure required service of process upon the person to be sterilized and his/her relatives (and if no relatives could be found, upon a Guardian ad Litem).[115] In addition, the statute provided several opportunities for the person facing sterilization to contest it, at a hearing, or a jury trial if so requested, and then on appeal.[116] Furthermore, unlike other states where the determination was relegated to a Board or administrative agency, all sterilization proceedings occurred in the courts with the added support of a panel of three physicians.[117] The procedure of the Michigan law later became a model for other estates.

In the end, the *Smith* Court encapsulated its conclusions in the importance of deference to the legislature, recognizing on the one hand that sterilization infringes upon a civil liberty, on the other hand, that "our race" has enormous challenges to sustain itself.

> The Michigan statute is not perfect. Undoubtedly time and experience will bring changes in many of its workable features. But it is expressive of a state policy apparently based on the growing belief that, due to the alarming increase in the number of degenerates, criminals, feeble-minded, and insane, our race is facing the greatest peril of all time. Whether this belief is well founded is not for this court to say. Unless for the soundest constitutional

---

[112] *Id.* at 144.
[113] *Smith v. Command*, 204 N.W. at 143.
[114] *Id.* at 144.
[115] *Id.*
[116] *Id.*
[117] *Id.*

> reasons, it is our duty to sustain the policy which the state has adopted. As we before have said, it is no valid objection that it imposes reasonable restraints upon natural and constitutional rights. It is an historic fact that every forward step in the progress of the race is marked by an interference with individual liberties.[118]

The use of the term "our race" is critical here. *Smith* started out justifying its conclusion with the imposition of the costs of institutionalization on the public fisc, which in many ways differs from the perils of "our race." In their view, the public interest includes not only plain costs, but also the quality of the human race. This was not just about money, and the notions of racial purity that justified sterilization of mental defectives aligned naturally with the notion of racial purity that was starting to take a cultural hold.

Three dissenting justices vigorously objected to the statute on grounds that it violated a unique provision of the Michigan Constitution, requiring that "[i]nstitutions for the benefit of those inhabitants who are deaf, dumb, blind, feebleminded or insane shall always be fostered and supported."[119] Since the statute only applied to those who were segregated with the purpose of releasing them from the state institutions, sterilizing these people would have removed their access to the institutions to which they were constitutionally entitled.[120] Sterilization was a relic of the ancient world, thought Justice Howard Wiest, the author of the dissent. After discussing sterilization in Rome, which had been justified on the costs it saved, he concluded that "This inhuman law was evidently deemed eugenistically essential to the welfare of the Roman Republic. It was eugenics in its infancy, bent on survival of the fittest."[121]

The heart of the Justice Wiest's dissent though was that sterilization violates the cruel and unusual punishment clause. The focus of the discussion was not on case law, but on how barbaric the practice of sterilization is, equivalent to savagery and castration, and rejected by the authors of the Constitution.

> They [the authors of the cruel and unusual punishment clause] struck at the evil evidenced in man's inhumanity in the past, and placed a bar at any renewal thereof, whether in the name of science or penology, eugenics or human procreation regulation by mutilation. They did something more than condemn the cruelties of the past (common decency had done that); they provided future protection, not alone from what had been done by savages vested with authority, but as well all new forms of cruelty, good or bad intentioned, and all old forms disguised under new scientific names and theories, and pressed with the zeal and intolerance of converts obsessed with the fallible wisdom of questionable opinions.[122]

---

[118] *Smith v. Command*, 204 N.W. at 144-45.
[119] *Id.* at 145 (quoting Const. art. 11, § 15).
[120] *Id.*
[121] *Id.* at 147.
[122] Smith v. Command, 204 N.W. at 148.

The dissent emphasized that the cruel and unusual punishment clause is a limitation on the police power applicable to all citizens, not just criminals.[123] And then the dissent contested the scientific conclusions that were the basis for the majority's findings, that feeble-mindedness would be inherited by offspring of a feeble-minded person, relying on a variety of scientific studies disputing this finding.[124] This was an ardent defense of the right to bodily integrity inherent to all citizens, whether criminals, feeble-minded, or not. Though the jurisprudence of individual rights had not yet developed, Justice Wiest referred obliquely to the "inherit right of bodily integrity"[125] in addition to the cruel and unusual punishment clause.[126]

Wholly absent from the dissent's discussion, however, was the question of the public welfare, and the dollars and cents required to perpetuate that public welfare. The majority's analysis in *Smith* was a calculus that weighed the overall cost to the individual against the benefits to society. The purity of the human race was labeled a "benefit" and the offspring of mentally defective people were labeled a "cost." Perhaps the reason the dissent did not convince more future courts, or more judges, is that it did not confront the framework of the *Smith* majority head on. Or that the majority could not be dissuaded from its cold economic calculations. The majority's transition from discussions of substantive rights to a cost-benefit analysis focused on procedure established a type of language that courts could use to analyze sterilization, one that focused on method as opposed to the more nebulous human liberties discussion that predated it.

The legal community chose the majority opinion in *Smith v. Command*, not the lengthy passionate dissent. University of Michigan Law Professor Burke Shartel's article "Sterilization of Mental Defectives," appeared in the *Michigan Law Review* in 1925 in defense and one might also add celebration of *Smith*.[127] Shartel wrote the Michigan law for sterilization and his article was largely an explanation of the statute and also a defense of *Smith v. Command*,[128] which upheld the Michigan sterilization statute only over the vigorous dissent of three justices. He focused on the Michigan's legislature's finding of "facts" regarding the effects of sterilization. Shartel argued that "the court ought to require the facts on the basis of which the constitutionality of a law is assailed to be established by the assailant 'beyond a reasonable doubt.'"[129] Shartel was asking for deference on issues of "fact," whereas the *Virginia Law Review* Note had a broader sense of deference, which entailed deference regarding the scope of the police power (or at least on the "reasonableness" of sterilization, which was central to deciding whether that was sterilization was a valid exercise of the police power).[130] Therein was a huge problem, given the deference that many courts showed to what was "known" about the desirability of sterilization and the costs and benefits of eugenics.

---

[123] *Id.* at 149.

[124] *Id.* at 149-152.

[125] *Id.* at 148.

[126] *Id.* at 149.

[127] Burke Shartel, *Sterilization of Mental Defectives*, 24 MICH. L. REV. 1 (1925). The article was reprinted the next year. *See* Burke Shartel, *Sterilization of Mental Defectives,* 16 J. CRIM. L. & CRIMINOLOGY 537-54 (1926).

[128] Smith v. Command, 204 N.W. 141 (Mich. 1925).

[129] *Id.* at 21.

[130] [Richard S. Leftwich], Note, *Constitutional Law – Eugenical Sterilization Statutes,* 12 VA. L. REV. 419-22 (1926).

Shartel, like many other writers in the 1920s, saw a cost-benefit analysis as an essential part of sustaining a forced sterilization statute. He minimized the problem -- for instance, at one point he wrote that though there are 20,000 "feeble-minded" persons in the state, "[t]his would not be too many to sterilize, considering the population as a whole...."[131] Then, following the lead of the Michigan Supreme Court, Shartel suggested that the issue involved calculating society's need. "If the social need be great enough the state can deprive of liberty (as it does do with the insane, the criminal, the man who objects to vaccination and so on) or it may take life (as it does as a penalty for crime or by drafting into the military service and exposing to death, etc.)."[132] That cost-benefit analysis admitted of little room for humanity.

The next state to uphold a sterilization statute was Virginia. The Virginia Supreme Court's 1925 decision in *Buck v. Bell* involved a Virginia law authorizing sterilization of the feeble-minded, among others.[133] The Court held that since the statute required adequate notice, a hearing and a right to appeal it did not violate due process.[134] Additionally, the Court held that the law was not penal and therefore was not cruel and unusual punishment. The Court also upheld the statute as a valid use of police power.[135] Finally, in examining the equal protection clause The Court determined that there was no class distinction since the institutions are open to all feeble-minded for commitment.

The Virginia Supreme Court decided *Buck v. Bell* on November12, 1925, several months after Michigan's *Smith v. Command*. The Virginia opinion in *Buck* disclosed none of the qualms of the dissenters in *Smith;* however, it also did not have the expansive justification seen in *Smith. Buck* had neither the intra-court conflict, nor was it the vehicle for broad judicial support of sterilization, as was *Smith*. In fact, the Virginia court gave great deference to the legislature. This drew on a well-established judicial deference to legislatures. As Justice George Sutherland wrote in *Adkins v. Children's Hospital* in 1923, "Every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt."[136] And that was the nature of constitutional law at the time, which deferred to legislative judgments about efficacy, even though some, like Harvard Law Professor Thomas Reed Powell, understood that "calm as may be the judicial recitals of these issues of personal liberty, the conflicts are ones that stir men's souls."[137] But Powell was still ahead of his time; the dominant mode of proceeding was to uphold sterilization. And while the *Buck* court found that sterilization would benefit the state it also stated that it would benefit Carrie Buck herself.[138]

5. Approving Sterilization in the U.S. Supreme Court

---

[131] Shartel, *Michigan Law Review, supra* note 127, at 5.

[132] *Id.* at 13.

[133] Buck v. Bell, 130 S.E. 516, 517 (Va. 1925).

[134] 130 S.E. at 518-519.

[135] 130 S.E. at 519.

[136] Adkins v. Children's Hospital, 261 U.S. 525, 544 (1923) (although ultimately concluding that the Act was unconstitutional).

[137] Thomas Reed Powell, *The Supreme Court and the State Police Power*, 17 VA. L. REV. 765, 786 (1932).

[138] *Buck v. Bell*, 130 S.E. 516, 518 (Va. 1925).

The U.S. Supreme Court leveraged *Smith v.* Command's language of methodological calculus when it decided that sterilization programs violated neither the equal protection nor cruel and unusual punishment provisions of the Constitution.[139] *Buck v. Bell* involved a Virginia law authorizing sterilization of the feeble-minded, among others.[140] The Court held that since the statute required adequate notice, a hearing and a right to appeal it did not violate procedural due process.[141] Additionally, The Court held that the law was not penal and therefore was not cruel and unusual punishment. The Court also upheld the statute as a valid use of police power.[142] Finally, in examining the equal protection clause The Court determined that there was no class distinction since the institutions were open to all feeble-minded.

The Virginia Supreme Court's decision had rested primarily on deference to the legislature, noting that "[e]very possible presumption is in favor of the validity of an act until overcome beyond rational doubt."[143] But the U.S. Supreme Court did not rely so closely on legislative deference, instead declaring outright the importance of the State's interests over those of the individual. Justice Holmes emphasized that the rights of an individual to reproduce must be subordinated to the concerns of the State, contrasting the relatively small sacrifice of not being able to have children with the large sacrifice of giving one's life through the military draft.[144]

"We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it 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."[145] The Supreme Court had taken the cost-benefit analysis, of weighing the benefits to society of being free from feeble-minded off-spring against the cost of depriving a person of the right to procreate, to new heights – comparing instead the benefits to protecting national security weighed against the costs of life. In this patriotic, military context, the cost seemed small and the benefits quite large.

D. The Judicial Mindset on Sterilization (1927 – 1942)

1. Gradual Acceptance of Eugenics Programs by State Courts

In the wake of *Buck v. Bell* state legislatures and courts took their cue from the Supreme Court and began upholding sterilization legislation more routinely. An *American Law Reports* article on sterilization observed the central importance of the case. "Since the decision of Buck v. Bell … upholding the Virginia statute involved in that case … judicial opinion has inclined in favor of the constitutionality of such statutes, which, up to the time … has more frequently been declared unconstitutional."[146] There were, however, some remaining procedural problems that had to be worked out. The 1927 North Carolina sterilization legislation, which had no provision for

---

[139] Buck v. Bell, 274 U.S. 200 (1927).
[140] *Buck v. Bell*, 130 S.E. at 517.
[141] *Id.* at 518-519.
[142] *Id.* at 519.
[143] *Id.*
[144] *Buck*, 274 U.S. at 208.
[145] *Id.*
[146] E.W.H., *Asexualization or Sterilization of Criminals or Defectives*, 87 A.L.R. 242, 242-43.

hearings, for instance, was struck down in 1933 in *Brewer v. Valk*.[147] Meanwhile, other courts upheld statutes similar to Virginia's in *Buck v. Bell*.[148]

Sterilization could not be a federal constitutional violation after Buck, but challenges to sterilization laws in state courts continued nonetheless. Buck *v. Bell* had minimized an individual's liberty interest in having children relative to national security interests, and state courts diminished this liberty interest even further. Likewise, *Buck*'s statement that sterilization laws are "not penal" meant that courts consistently construed these statutes, even when they applied only to convicted criminals, as wholly separate from the criminal system. On the other hand, state courts that may have been uncomfortable following the liberty argument of *Buck* protected individuals by requiring more process.

2. Expansion of *Buck* in Substantive Terms

Buck v. Bell eliminated the equal protection argument as a rationale for striking state sterilization laws. The first place where the power of the *Buck* decision became patently apparent was in Kansas. In *State v. Schaffer*, the State asked the court to compel a surgeon at Topeka State Hospital to perform sterilizations required by state law.[149] Unlike most cases where a prisoner contested his own sterilization, this case was about a doctor exercising his right not to perform a surgery with which he had a moral disagreement.[150] This distinction is important because it indicates first of all that dissent existed in the medical community.

The *Schaffer* court could have distinguished the Kansas law at issue from the Virginia law in *Buck* in several ways. In Kansas, if the Head of an institution, including a prison, training school, or sanitorium, "believed" that an inmate had the "baleful potency" to pass on his ailments to offspring, then he was compelled to identify the inmate to the Board of Governors of the institution, who were then compelled to bring the matter to the Eugenics Board.[151] The law therefore left the decision in the hands of the Head of an institution and his own "beliefs." Inmates of the same institution could have been treated differently since there was no standard by which the head of the institution was to determine who qualified for sterilization.[152] The Kansas Court quickly dismissed this equal protection argument, by relying on *Buck's* conclusion that no equal protection violation occurred when institutionalized and non-institutionalized feeble-minded people were treated differently.[153]

Jumping off from *Buck*'s assertion that sterilization was a matter of public health, the *Schaffer* court framed the issue of individual liberty not as it related to the State's police power, but as the State's choice between promoting reproduction and promoting survival:

> Reducing this problem of reconciliation of personal liberty and governmental restraint to its lowest biological terms, the two

[147] Brewer v. Valk, 167 S.E. 638, 641 (N.C. 1933).

[148] *See, e.g.*, State v. Schaffer, 270 P. 604 (Kan. 1928); State v. Troutman, 299 P. 668 (Idaho 1931).

[149] *Schaffer*, 270 P. 604.

[150] *Id.*

[151] *Id.* at 604.

[152] *Id.* at 604.

[153] *Id.* at 604.

> functions indispensable to the continued existence of human life are nutrition and reproduction. Without nutrition, the individual dies; without reproduction, the race dies. Procreation of defective and feeble-minded children with criminal tendencies does not advantage, but patently disadvantages, the race. Reproduction turns adversary and thwarts the ultimate end and purpose of reproduction. The race may insure its own perpetuation and such progeny may be prevented in the interest of the higher general welfare.[154]

For the Kansas Supreme Court, the question was not about the extent to which the State can infringe on an individual's liberty. The question was about the State's own balancing decisions, removing the individual's liberty interest from the discussion.

Thus, by the time the Idaho Supreme Court was deciding the constitutionality of sterilization three years later, the equal protection question had become almost routine. In *Troutman*, the Idaho Supreme Court methodically eliminated each constitutional objection to the state sterilization statute.[155] The *Troutman* court noted that an individual liberty interest may not even exist for the feeble-minded.[156] And similarly, in *In re Main* (1933), the Supreme Court of Oklahoma simply noted that their law was on all fours with the Virginia law in *Buck*, and that the interest of the public good overcame any liberty interest an individual might have.[157] "[A]ssuming that the right to beget children is a natural and constitutional right, yet this right cannot be extended beyond the common welfare."[158]

In sum, in the ten years following *Buck*, state courts expanded the notion that legislation could treat institutionalized and non-institutionalized citizens differently to the notion that any interest an institutionalized person might have in reproduction might not even exist.

Despite the fact *Buck's* holding focused more on equal protection, its language also led state courts to reject arguments that sterilization constituted cruel and unusual punishment.[159] For instance, in *In re Clayton* (1931), the Supreme Court of Nebraska explained that vasectomy is a short operation of only 10 to 15 minutes, not dangerous to the individual's health, that is not necessarily permanent, and the operation does not remove the individual's sexual desire or ability to engage in sexual activity.[160] Coupling Buck's finding that sterilization is inherently not penal with the simplicity of the operation, the Nebraska court was able to avoid the cruel and unusual punishment argument altogether. Once the gentleness of the operation had been established in this

---

[154] *Schaffer*, 270 P. at 605.

[155] State v. Troutman, 299 P. 668, 669-671 (Idaho 1931).

[156] *Id.* at 670 ("If there be any natural right for natively mental defectives to beget children, that right must give way to the police power of the state in protecting the common welfare, so far as it can be protected, against this hereditary type of feeble-mindedness.").

[157] In re Main, 19 P.2d 153, 154 (Okl. 1933).

[158] *Id.* at 156.

[159] Buck v. Bell, 130 S. E. 516, 519 (Va. 1925) ("The act is not a penal statute. The purpose of the Legislature was not to punish but to protect the class of socially inadequate citizens named therein from themselves, and to promote the welfare of society by mitigating race degeneracy and raising the average standard of intelligence of the people of the state.").

[160] In re Clayton, 234 N.W. 630, 632 (Neb. 1931).

light, the Nebraska court could thus avoid questions about the infringement of individual liberty and easily liken the operation to immunizations.[161]

Ten years later (and fifteen years after *Buck*), the Oklahoma state court used a similar logic to justify upholding its sterilizations statute in *Skinner* (the same case that was later reversed by the Supreme Court).[162] In Oklahoma, the sterilization law at issue only applied to convicted criminals, making the contention that the law was not "penal" more problematic. The Oklahoma Supreme Court recognized that it had a choice: construe the statute as penal, and therefore unconstitutional, or construe the statute as the promotion of public health akin to vaccinations, and therefore valid.[163] The Court decided to "assume" the legislative intent was to prevent procreation of people who would then become criminals, in order to avoid invalidating the law.[164] It was *Buck* that gave courts the ability to avoid the difficult issues raised by sterilization by simply finding that sterilization is not penal.

3. Imposing Procedure on Eugenics Programs

The first state to take a stand against sterilization laws on procedural grounds was Utah in 1929. In *Davis v. Walton*, the Utah Supreme Court held that the State failed to show that Davis was "the probable potential parent of socially inadequate offspring likewise afflicted," as required by law.[165] A prison guard alleged he had caught the inmate committing sodomy with another inmate, although the other inmate denied this allegation.[166] On its face, the finding is simply an application of basic principles – the State did not prove the elements required for the sterilization statute to attach. But the Utah court stepped further in criticizing the State. The Court noted that the operation would not help the inmate overcome his "abnormal sexual desire."[167] Furthermore, the sterilization order did not specify which of the 3 operation types was ordered (vasectomy, cutting the nerves, or castration), and so the cruelty of the act could not be assessed.[168] The Utah Court critiqued the practice of sterilization, by discussing the potential cruelty of the operation itself and the retributive nature of the State's decision to sterilize a homosexual (who had no chance of procreating with another man anyway).

Then, a Southern court, the Alabama Supreme Court found procedural problems with its state sterilization statute in 1935.[169] This case differed from others because it was a certified question from the Governor, implying that the Governor took issue with the legislative enactment in the first place, thereby making the Court's position easier. The first step was to distinguish the Alabama law from the Virginia law upheld in *Buck*, which the court did by pointing out that the Alabama legislation denied a right to appeal *de novo* in a court.[170] The Alabama Court then set out several procedural problems related to the lack of notice and opportunity to be heard with the

---

[161] *Id*. at 632.
[162] Skinner v. ex rel. Williamson, 115 P.2d 123 (Okl. 1941).
[163] *Id*. at 126.
[164] *Id*. at 126.
[165] Davis v. Walton, 276 P. 921 (Utah 1929).
[166] *Id*. at 923-924.
[167] *Id*. at 925.
[168] *Id*. at 924.
[169] In re Opinion of the Justices, 162 So. 123, 128 (Ala. 1935).
[170] *Id*.

legislation.[171] But the procedural due process argument necessitated that the Court articulate why process was so important, and thereby hint at the substantive issue:

> We think that the sterilization of a person is such an injury to the person as is contemplated by the quoted provision—just as much so as to deprive him of any other faculty, sense, or limb—and that due process of law means that this cannot be done without a hearing on notice before a duly constituted tribunal or board, and, if this is not a court, then with the untrammeled right of appeal to a court for a judicial review from the finding of the board or commission adjudging him a fit subject for sterilization.[172]

Even with this articulation of the importance of the right to have children, the Supreme Court of Alabama provided guidance to the legislature for creating a valid sterilization statute. Sterilization is an appropriate use of the police power, so long as (1) status determination is constitutionally ascertained and (2) the procedure is not cruel and unusual punishment.[173]

And then, over fifteen years after *Buck*, handed down only months before the Supreme Court struck down Oklahoma's sterilization law in *Skinner*, there was *In re Hendrickson* from the Supreme Court of Washington in 1942.[174] The Washington Court challenged the way the State provided notice to confined people facing sterilization. The law required that the State simply give notice to the feeble-minded person, which the Court contested because by definition that person would not likely understand the procedure against him.[175] The law provided notice to the insane differently than the feeble-minded: the State was to provide notice to the guardian, or the next of kin, but if neither of those existed, to the superintendent of the facility.[176] The Court took issue with this latter provision, because the superintendent of the facility was the same person who would be recommending the Sterilization.[177] The *Hendrickson* Court's desire to strike down the sterilization statute was apparent, because neither of these procedural provisions applied to Hendrickson himself, since notice was provided to Hendrickson's next of kin – in this case his father.[178] The Washington Court twisted itself around to strike down the whole of the statute, holding that because the law was primarily designed to limit procreation by the feeble-minded, the provisions applying to the insane like Hendrickson would not have been enacted without the

---

[171] *Id.*

[172] In re Opinion of the Justices, 162 So. 123, 128 (Ala. 1935).

[173] *Id.*

[174] In re Hendrickson, 123 P.2d 322 (Wash. 1942).

[175] *Id.* at 325-326.

[176] *Id.*

[177] *Id.* at 327 ("Such a situation is contrary to the spirit of our laws and institutions. It is beyond the capacity of human nature for one individual to act fairly, in practical effect, as jailer, prosecutor, judge, and executioner and, at the same time, as guardian or next friend of the insane accused. The statute places a superintendent in an impossible position however fair minded and conscientious he may be. As a practical matter, it does not afford the inmate the kind of notice and opportunity to appear and defend guaranteed by the due process clause.").

[178] *In re Hendrickson*, 123 P.2d at 327.

unconstitutional provision for the feeble-minded.[179] As the dissent pointed out, the Court's reasoning is somewhat unjustified because if the legislature had known other parts of the law inapplicable to a person at bar were unconstitutional, they would have left them out of the law in the first place.[180]

In sum, process became the framework through which courts could discuss the importance of the right infringed by sterilization laws. And it became the way that courts kept the eugenics movement in check in some states. But the flip-side of this reliance on process was the increase in process – and as a result, increase procedure created a mechanized, normalized process for sterilizing people. North Carolina exemplifies how the court's focus on heightened procedure worked to embed a routinized eugenics program in the state, with little room for victims to question what was happening to them.

E. **Gauging Lawyers' Attitudes Towards Eugenics in the 1930s**

There were other voices calling for reason, too. Clarence Ruddy's article in the *Notre Dame Lawyer* in 1927 provided probably the strongest case in a law review in the entire decade of the 1920s against sterilization. A year earlier, Jacob Broches Aronoff wrote in the *St. Johns Law Review* about the reasons for public opposition to eugenics legislation. He thought that it "looks like a heartless method on the part of the tax-paying classes of getting rid of a duty of caring for the helpless and unfortunate of the poorer strata of society...." Ruddy's article appeared just after *Buck v. Bell* was decided; one of the most pernicious aspects of that case, we think, was its legitimation of sterilization. For in the few years after it, law reviews frequently pointed to it to sustain their arguments.

It was not until the 1930s that there began to grew sustained opposition. 1930 began with discussion of yet another book endorsing eugenics based on both its potential to preserve and improve the white race, E.S. Gosney's and Paul Popenoe's *Sterilization for Human Betterment,*[181]which discussed California's supposed success with sterilization. Gosney and Popenoe's handbook included an address by Otis H. Castle to the ABA's annual meeting in 1928.[182] Castle, a Los Angeles lawyer,[183] was also a board member of the Human Betterment League[184] and sometimes lecturer at the University of Southern California's law school.[185]

William Renwick Riddell's review of *Sterilization for Human Betterment* in the *ABA Journal* in 1930 invoked *Buck* and then added that "the appalling prevalence of imbecility and the consequent drain upon the resources of the people have impelled many to consider sterilization of the imbecile as called for ...."[186] Riddell concluded "other jurisdictions may well profit by the example of California." Similarly, University of Illinois Sociology Professor Donald R. Taft's

---

[179] *Id.* (holding that feeble-minded more likely to be released from institutions than insane; feeble-mindedness is inherited at birth where insanity only sometimes is).

[180] *Id.* at 613-614, 123 P.2d at 328.

[181] GOSNEY & POPENOE, STERILIZATION FOR HUMAN BETTERMENT, *supra* note 44.

[182] Otis H. Castle, *The Law and Human Sterilization*, in GOSNEY & POPENOE, *supra* note 44, at 156-77.

[183] Otis. H. Castle, *Legal Phases of Co-Operative Buildings*, 2 S. CAL. L. REV. 1, n * (1928).

[184] *Id.* at 194 (listing board members of the Human Betterment League).

[185] Castle, *supra* note 183, at 1, n.*.

[186] William Renwick Riddell, *Sterilization for Human Betterment*, 16 ABA J. 253 (1930).

review of *Sterilization for Human Betterment* in the *Illinois Law Review* concluded that "Sterilization will eliminate many socially dangerous homes. If, as is quite probable, a race somewhat sounder eugenically also results, we can all rejoice."[187] The *Yale Law Journal* had a mild approach in its review of Gosney and Popenoe, which asked in essence for a "could we please look at the evidence first" approach.[188] The *Harvard Law Review*'s even shorter review of *Sterilization for Human Betterment* concluded with an observation that the imminence of eugenic legislation was disturbing.[189] These were not strong criticisms by any means, but they demonstrated concern about what was coming.

Even though courts were routinely upholding sterilization legislation in the 1930s, many others in the legal profession expressed reservations about such legislation. Looking at law reviews is a good way to get a rough gauge of the legal profession's attitudes towards sterilization. For instance, Jacob Henry Landman's 1932 book *Human Sterilization* was reviewed in a number of journals. Landman, a professor at City University of New York, was somewhat skeptical of sterilization.[190] Often the reviews went beyond his criticism of sterilization. To take a few examples, George Roche's review in the *California Law Review* thought Landman failed to engage fully the moral qualms about sterilization.[191] Roche wrote that "we get the impression that, while consciously rejecting the more extreme and doctrinaire point of view, the author does not always recognize the Devil in disguise."[192] Reviews of Landman's book in the *University of Pennsylvania Law Review*[193] and the *Boston University Law Review*[194] asked to -- in essence -- slow down the eugenics movement.

A review in the *Southern California Law Review* in 1933 began with an epigraph from Nietzsche:

> I teach you the Superman! Man is something that shall be surpassed. What have ye done to surpass him? All beings that have come into the world heretofore have

---

[187] Donald R. Taft, *Book Review*, 24 ILL. L. REV. 944-47 (1930) (reviewing Gosney and Popenoe, *supra* note 44).

[188] Arthur B. Dayton, *Book Review*, 39 YALE L.J. 592 (1929-1930) (reviewing Gosney and Popenoe, *supra* note 44).

[189] *Book Review*, 43 HARV. L. REV. 161, 162 (1929-1930) (reviewing Gosney and Popenoe, *supra* note 44).

[190] For instance, Landman referred to the "alarmist eugenics." J. H. LANDMAN, HUMAN STERILIZATION: THE HISTORY OF THE SEXUAL STERILIZATION MOVEMENT 4 (1932). And he discussed legal problems with sterilization – and some ways to overcome them. *Id.* at 269-84. One key impetus that he identified for eugenics was public opinion. *See id.* at 120.

This added to Landman's earlier article. *The History of Human Sterilization in the United States – Theory, Statute, Adjudication*, 23 ILLINOIS L. REV. 463-80 (1929).

[191] George S. Roche, *Book Review*, 22 CAL. L. REV. 129 (1933) (reviewing LANDMAN, *supra* note 190).

[192] *Id.* at 130.

[193] LeRoy M.A. Maeder, *Book Review*, 81 U. PENN. L. REV. 653 (1932-1933) (reviewing LANDMAN, *supra* note 190).

[194] Sidney S. Grant, *Book Review*, 12 B.U. L. REV. 749 (1932) (reviewing LANDMAN, *supra* note 190).

> created some- thing beyond themselves. Are ye going to be the ebb of the tide? Are ye going back to the animal or ahead to the superman?
>
> Behold, I teach you the superman![195]

With such a beginning, one might have expected support for eugenics; in fact, the review seemed to criticize Landsman for not considering a stronger argument for sterilization:

> Dr. Landman proposes that segregation rather than sterilization might more properly solve the problem of what is to be done with the socially inadequate people. But he does not at all discuss what must be a foremost question in any consideration which presumes that our present arbitrary standards are the ones upon which to build the normal man, and which on the basis of that standard designates certain individuals as mental deficients. I refer to the question of outright extermination of the "unfit." One of the leading reasons assigned for the necessity of human sterilization of the incompetent is state economy. It is urged that caring for these cacogenic persons--whether in hospitals, insane asylums, prisons or institutions for the feeble-minded--costs the State vast sums of money. Besides there is the damage done by defective abroad in society.[196]

Yet, the author of the review, law student Ernestine Tinsley, understood the absurdity of this proposal and that she was using it to undermine the idea of eugenics. For she went on to suggest the idea that if one really embraced such economic rationale that would lead to execution of the "unfit."

> If individuals are so imperfect that society feels it necessary to prevent them from perpetuating themselves in the race lest they burden future generations with the care of their offspring, why not just exterminate them now and rid the State once and for all of the burden? Surely a survey which purports to outline the field of inquiry into the problem of human sterilization and its ramifications is incomplete unless it considers this possibility.[197]

Other law reviews robustly advocated sterilization, however. A serious endorsement came from a student note in the *Kentucky Law Journal* in 1934.[198] Another longer one by University of Kentucky anthropology professor W.D. Funkhouser came later in that volume.[199] Professor Funkhouser concluded:

> In those states where consistent and regular use of the measure has been followed, since it was first legally adopted in 1899, the results are startling even after one generation. No new patients are appearing to fill the slowly decreasing ranks in

---

[195] Ernestine Tinsley, *Book Review*, 6 S. CAL. L. REV. 349 (1932) (reviewing LANDMAN, *supra* note 190) (quoting Nietzsche, Also sprach Zarathustra, I.).

[196] *Id.* at 353.

[197] *Id.* at 353.

[198] *A Sterilization Statute for Kentucky*, 23 KY L.J. 169 (1934).

[199] W.D. Funkhauser, *Eugenical Sterilization*, 23 KY L.J. 511 (1935).

> the asylums and hospitals except those who come from other states. This decrease will of course be greater with each succeeding generation. In fact it is claimed that if sterilization laws could be enforced in the whole United States, less than four generations would eliminate nine-tenths of the feeble-mindedness, insanity and crime of the country.[200]

We can gauge the public's attitudes by looking at the sterilization legislation that swept the country in the 1920s and 1930s.[201] The enthusiasm for sterilization in the general public is captured in the opening paragraph of LeRoy Maeder's review of Landman in the *University of Pennsylvania Law Review*:

> The voluminous literature on human sterilization which has appeared in recent years has been for the most part definitely biased in favor of this procedure and has served to influence a considerable group of people to believe that in general employment of this method as a compulsory eugenic measure will bring about a substantial reduction in the number of socially inadequate, especially the feebleminded. The enthusiasts have succeeded so well in their propaganda that even sober-minded persons have urged the adoption of broad human sterilization legislation as a means of coping with the mentally disordered and deficient, and of reducing the burden of state appropriations to public institutions supporting them.[202]

The point of the survey of law reviews is that, even as the state courts were falling in line behind the Supreme Court's decision *Buck v. Bell*, there was substantial opposition to eugenics in the legal community. That opposition may have helped slow down the movement in state legislatures and also led to the Supreme Court's subsequent unease with sterilization during World War II.

F. *Skinner v. Oklahoma*: Recognizing a Fundamental Right

Fifteen years after *Buck*, in 1942, the Supreme Court struck down a sterilization law in *Skinner v. Oklahoma*.[203] *Skinner* is remembered for its importance in the larger movement towards fundamental rights and the expansion of substantive due process in the 1950s and 1960s.[204]The case was the first to state explicitly the fundamental right to beget children, and to outline a distinction between rational basis review and strict scrutiny. But within the context of the eugenics movement, it is important to remember that *Skinner* carved out a way for *Buck v. Bell* to continue to govern many state sterilization programs.

The problem the Supreme Court found with the Oklahoma sterilization statute was that it excepted certain criminal activity from compulsory sterilization.[205] The Oklahoma law held that

---

[200] A brief review of Landman in the *Idaho Law Journal* was to the same effect. *Book Review*, 3 IDAHO L.J. 91 (1933) (reviewing LANDMAN, *supra* note 190).

[201] *See, e.g.*, *Constitutional Law – Police Power*, GEORGETOWN L.J., *supra* note 67, at 617.

[202] Maeder, *supra* note 193, at 653.

[203] Skinner v. State of Okla. ex rel. Williamson, 316 U.S. 535 (1942).

[204] NOURSE, *supra* note 14.

[205] *Skinner*, 316 U.S. at 541.

people who had been convicted of more than two felonies were to be sterilized if doing so would not injure the individual.[206] Excepted felonies included embezzlement, but not theft. So, Skinner, who had stolen chickens and committed armed robbery twice, would be sterilized, but a person who stole funds from his company (essentially the same act) would not.[207] It is here where the court discussed the extra scrutiny that the equal protection clause requires for laws that infringe on a fundamental right.[208]

However, the Supreme Court specifically noted that it was not overturning *Buck v. Bell*, thereby allowing many state sterilization statutes to remain intact after *Skinner*. *Buck v. Bell* had a "saving feature" that *Skinner* did not – "that 'so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.'"[209] That is, if the legislature's classification is between institutionalized and non-institutionalized feeble-minded people, and sterilization would allow more people to avoid institutionalization, then *Buck*, not *Skinner*, would govern.[210] For that reason, states could continue to sterilize the feeble-minded and insane without running into major equal protection hurdles.

Interpreting the Shift from Buck *to* Skinner

And with the Supreme Court's validation, the question of whether sterilization violated fundamental rights would have to wait until the substantive due process doctrine had developed before it could be revisited. In sum, the judiciary had wavered on recognizing a fundamental human right to have children. But as the law developed, procedural focus gave way to a cost-benefit calculation – one that ultimately subordinated these potential rights to the interests of the State. In this sense, the legal justification for sterilization was rooted in the interest of the government.

There are a few things shifting around the time of *Buck v. Bell*. The case reflects several ideas popular at the time about sterilization, such as that many illnesses are hereditary; there is a significant interest in the state's economic best interest that is balanced against a small interest in the individual – this is before the individual liberty decisions in free expression and personal autonomy. We did not yet have a well-developed sense of personal liberty (other than property). How did African American struggle for civil rights affect this? They're both part of a movement to recognize individuals' claims against the state and the right to be treated as individuals rather than as groups. They are parallel movements for freedom. As the 1956 *Georgetown Law Journal* article points out, *Skinner* and afterwards reflected the growth of individual rights and personal autonomy as an interest that is given significant weight, rather than just a question of balancing the states' economics against a minor right. As happened so often in American law, the march towards liberty was accompanied by an expansion in the value we attached to individuals. Where before World War II eugenicists emphasized the costs to society and minimized the interests of the people who had children. Afterward, that rhetoric was more circumscribed and ultimately there emerged more of a sense of the value of autonomy over reproduction decisions.

---

[206] *Id.* at 541-542.
[207] *Id.*
[208] *Id.*
[209] *Id.* at 541.
[210] *Id.*

III. The North Carolina Mindset

A. The 1929 Sterilization Law and the Court's Procedural Objections

The North Carolina Legislature enacted its first sterilization statute in 1919, authorizing sterilizations for the health and well-being of prison inmates.[211] In 1929, two years after *Buck v. Bell*, North Carolina passed its first sterilization statute that applied outside the prison context. "It shall be the duty of the board of commissioners of any county of North Carolina, at the public cost and expense, to have the operation performed upon any mentally defective or feeble-minded resident of the county, not an inmate of any public institution, upon the petition and request of the next kin or legal guardian of such mentally defective person."[212] The Supreme Court of North Carolina struck down the law for lack of procedural due process in *Brewer v. Valk*, since *Buck v. Bell* had specifically emphasized the importance of both notice and a hearing.[213] "In property rights due process requires a forum with notice and a hearing. It goes without saying that the same must apply to human rights. If the Constitution and laws in relation to due process-notice and hearing which undoubtedly apply to a material thing, they should more so apply to the human element."[214]

Despite the Court's recognition of some "human right" element involved in involuntary sterilization, *Brewer v. Valk* focused on the benefits of sterilization, both to society and to the individual.

> Those welfare organizations and humane officials who appear in the picture are to be commended for their care and interest in this mother and children. . . . To the great credit of this commonwealth, under our Christian civilization, it has established institutions for the feeble-minded, cripple, children, deaf, dumb, and blind, and hospitals for those "whom the finger of God has touched," and other humane undertakings.[215]

The North Carolina Supreme Court's statement took *Buck v. Bell* even one step further by ignoring the rights of the individual to choose whether to procreate and instead lauding the benefits of the process for the individual. The State was in that way portrayed as helping a poor woman who would otherwise not be able to help herself from having more children.

In *Brewer v. Valk*, the North Carolina Supreme Court gave clear directions on how to fix the sterilization statute, while at the same time recognizing that a procedurally compliant eugenice program would have social benefits. The legislature need only provide notice and opportunity to be heard paralleling the provisions of the statute in neighboring Virginia, and the revision would be upheld. Process, not whether or not the individual had a fundamental right to have children, became the focus of the legislature in redrafting the law, and the executive branch in administering the law.

---

[211] N.C. General Session Laws of 1919. Chapter 281.
[212] Public Laws of 1929, c. 34, §§ 2304(i).
[213] Brewer *v.* Valk, 167 S.E. 638, 641 (N.C. 1933).
[214] *Id.* at 640.
[215] *Id.*

B. The 1933 Act

The revised 1933 North Carolina Act provided some additional – but not many -- procedural protections for those who would be sterilized and also grounded the justification in what it claimed was the best interest of the patient or the public good.[216] For those who were institutionalized, the proceedings before the Eugenic Board were initiated by written petition of the "prosecutor" who was generally the superintendent of any "penal or charitable" institution supported by the state. The petition needed to contain the medical history of the person to be sterilized and set forth particular reasons stating why sterilization was recommended. The history was then verified by a physician who had actual knowledge of the case and a social history of the patient's life was included in the petition in order to predict the likelihood of the patient to procreate. A copy of the petition was then served along with written notice to the patient or the patient's guardian stating when the board would hear the petition. The board would then make its decision, and if it determined that sterilization was for "the best interest for the mental, moral or physical improvement of the said patient…or for the public good" then the board was required to approve recommendation.[217]

1. 1935 Pamphlet

Two years after the Act's passage the Eugenics Board of North Carolina published a pamphlet, *Eugenical Sterilizations in North Carolina* that served partly as a propaganda piece and partly as how-to-manual for those seeking to obtain the Eugenics Board's approval for their patients. The pamphlet begins in the same way that Popenoe and Johnson's *Sterilization for Human Betterment* did – by noting that in modern society many people survive who would have died in earlier generations. That is, sterilization serves the supposed purpose that nature once did, of making sure that the unfit did not have children.[218] The parallels in the two works reflects the intellectual colonization of North Carolina by Popenoe's and Johnson's arguments. The pamphlet quotes a Raleigh *News and Observer* editorial supporting sterilization,[219] as well as the State Board of Public Health's study of the "Wake family," which discussed a married couple from Wake County. The husband was believed developmentally disabled and five of their eight children were, likewise, believed disabled. The pamphlet recorded a series of legal, economic, and developmental problems with the parents and children and estimated that the state had spent $30,000 on them in care. It concluded "for the cost of around $100.00 the father and mother of these children could have been sterilized."[220]

The pamphlet also provided summary tables on the number of people sterilized through June 1935 and broke that data down into various categories, such as gender, race, age, and whether those sterilized were in state or county institutions or resided in the community. There were also

---

[216] H.B. 1013 Chapter 224. An Act to Amend Chapter 34 of the Public Laws of 1929 of North Carolina Relating to the Sterilization of Persons Mentally Defective (1933).

[217] *Id.*

[218] BROWN, EUGENICAL STERILIZATION IN NORTH CAROLINA, *supra* note 41, at 5 ("Under Nature's law we bred principally from the top. Today we breed from the top, the middle and the bottom, but more rapidly from the bottom.") (quoting Popenoe and Johnson at v).

[219] *Id.* at 5-6.

[220] *Id.* at 11.

tables detailing some of the types of illnesses of those who were sterilized. The pamphlet's tables – which were periodically updated in biennial reports of the Eugenics Board – reveal that once the Eugenics Board heard a petition that it almost always approved. From the passage of the 1933 Act until June 1935, the Board considered 236 petitions and approved 231 of them. It is unclear how many, if any, of the five rejected petitions involved "consent." Of the 235 petitions approved, there was one appeal and in that one case, the Superior Court upheld the Eugenics Board's decision.[221] By the end of June 1935, 223 operations had been carried out; (this included several dozen that were approved under the 1929 law). Of those, 155 had been for people in either state (140) or county institutions (15); the other 68 resided in the community.[222] The majority were women, (179); only 42 men were sterilized. Of those in state institutions, again the majority were women (n=103); only 37 men were sterilized.[223] Of those outside of institutions, the majority were women (n=63); only 5 men were sterilized.[224] With regard to race, there are some noticeable differences in the types of operations that African American and white men had. Of the 28 African American men sterilized. The method for 20 of those was listed as "castration." Of the sixteen white men, six were castrated. All of the others had vasectomies.[225]

The 1935 pamphlet also reprinted several forms for facilitating approval from the Eugenics Board. The first was a petition for individuals in a state or county institution. The petition recited that sterilization was in the best interest of the patient and that sterilization was for the public good; and that the inmate would "be likely, unless operated upon, to procreate a child or children who would have a tendency to serious physical, mental or nervous disease or deficiency."[226] The petition collected information on the individuals' personal and family history and their medical history. The forms asked for the individual's "record of defects." The list included about a history with (in this order) insanity, feeble-mindedness, epilepsy, convulsions, paralysis, sexual promiscuity, syphilis, gonorrhea, tuberculosis, alcoholism, criminality, suicidal tendency, pauper, drug addict, congenital blindness, acquired blindness, acquired deafness, dumbness, extreme nervousness, chorea (sudenhams), and chorea (Huntingtons).[227] Another, briefer form was used for patients in the community.[228] And another form provided for next of kin to consent.[229] Already, two years after the passage of North Carolina's sterilization law the administrative state was well prepared to smooth the way to sterilization of hundreds of North Carolinians, mostly women, a year.

2. North Carolina Administrative Law

There are, in addition to the statute, two administrative manuals that told state officials how to proceed with sterilization petitions before the Eugenics Board, which was the body that had to give approval for publicly-funded sterilization. The 1948 Administrative Manual is the first one

[221] *Id.* at 16 (appendix A, table 1).
[222] *Id.* at 16, table 2.
[223] *Id.* at 17, table 3.
[224] *Id.* at 18, table 4.
[225] *Id.* at 20, table 9.
[226] *Id.* at 28, form 1.
[227] *Id.*
[228] *Id.* at 30-31, form 2.
[229] *Id.* at 33, form 6a.

that the state produced. It has a brief history of the North Carolina movement for sterilization and points out in particular that North Carolina was influenced by California's experience.[230] The Manual cites the 1935 pamphlet, *Eugenical Sterilization in North Carolina*.[231]

The 1948 manual follows the North Carolina statute in describing who may be sterilized -- the "feebleminded, epileptic, and mentally diseased" -- and the circumstances in which this may happen: "when it is believed that such an operation would be for the best interests of the individual concerned, or for the public good, or when it is believed a child or children might be born who would have a tendency to serious mental or nervous disease or deficiency."[232] Then the manual gives specific instructions regarding who has the responsibility and power to file sterilization petitions -- the executive head of a penal or charitable organization or the county superintendent of public welfare and it gives instructions regarding the forms to use depending on whether the person to be sterilized is institutionalized or resident in the community.

There were two primary forms to begin the authorization process; which one was used depended on whether an individual was institutionalized or resident in the community. Form 1 was for institutionalized individuals; form 2 was for people resident in the community. The instructions for filing out those forms note that "the social information presented by the petitioner should contain all of the circumstances surrounding the person's life insofar as they have a bearing upon ... A. The likelihood of the person to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency, and B. The reasons why it is considered to be for the public good that the individual have the operation."[233] The instructions do not call for specific evidence of why this is in the best interest of the individual, even though the sterilization statute says that is one reason supporting sterilization.

The manual then turns to the issue of consent. It observes that it is easier to get approval from the Eugenics Board if either the individual or an authorized family member consents. There was a form (6B) for individuals who were competent to consent (after 21 years of age; not confined in one of the four state mental hospitals, nor adjudged mentally unsound). For others, where there would be consent of the spouse, parent, next of kin, or guardian, there was another form (6A). If the person to be sterilized was married, then the spouse's consent was needed. If the spouse could not be located, then the victim's next of kin could suffice. If the person to be sterilized was a minor, consent of a parent -- preferably the father -- was needed, or a guardian ad litem if there were no parent.

If the "necessary consents are not secured," then the Eugenics Board had to hold a hearing "in which reasons for and against the operation are heard." All of that leads into the Board's

---

230 http://digital.ncdcr.gov/cdm4/document.php?CISOROOT=/p249901coll22&CISOPTR=417440&REC=2

231 R. EUGENE BROWN, EUGENICAL STERILIZATION IN NORTH CAROLINA (1935) available at: http://archive.org/details/eugenicalsterili00nort

232 MANUAL, THE EUGENICS BOARD OF NORTH CAROLINA (1948). http://digital.ncdcr.gov/cdm/compoundobject/collection/p249901coll22/id/417440

H.B. 1013 Chapter 224. An Act to Amend Chapter 34 of the Public Laws of 1929 of North Carolina Relating to the Sterilization of Persons Mentally Defective (1933).

233 BROWN, EUGENICAL STERILIZATION IN NORTH CAROLINA, *supra* note 41, at 30-31 (reprinting form 2).

decision whether "the petition will be for the best interests of the person named in the petition or for the public good."

A few key questions that emerge from the 148 manual's broad outline. First, what did petitioners do in order to secure "consent"? Second, in what proportion of cases was there "consent"? (Or conversely, in what proportion of cases was there not even the possibly coerced "consent" of the victims or their family members?) Third, what can we learn about the Board's deliberations. When, if ever, did the Board reject a petition when there had been "consent"? What was the nature of the evidence that the Board required in cases where there was no consent? And in what proportion of contested cases did they reject contested petitions? Some data on this is available for 1933 to 1935. Over that time, the Board considered 236 petitions and approved 231 of them. It is unclear how many, if any, of the five rejected petitions involved "consent." Of the 235 petitions approved, there was one appeal and in that one case, the Superior Court upheld the Eugenics Board's decision.[234] Some of the important data this is missing is how the practices varied by the race, gender, and age of the targets of sterilization.[235] Once we have that data we will be in a very good position to know the full depths of the administrative state's imposition on its citizens' fundamental rights.

We desperately need a better picture of how the process worked from the view of petitioners -- the hospitals and the county superintendent of public welfare. That picture should address how the petitioners selected people to suggest for sterilization. We need to know much more, as well, about the mysterious process by which individuals and their families were convinced to agree to sterilization. Finally, we need to know more about how the state reacted in the instances in which the individuals and families would not agree to sterilization.

Some hints of how this process of coercion worked appear in Moya Woodside's 1950 volume, *Sterilization in North Carolina: A Sociological and Psychological Study*. Her book came after sterilization was well on the decline, but she represented an attempt to sustain it. She realized the challenges sterilization faced and thus included a chapter that addressed "difficulties of wider acceptance."[236] It was a final call, about a decade after sterilization had been rejected elsewhere in the United States, and as others were regularly rejecting sterilization. She provides a picture of how the process worked in practice, in conjunction with North Carolina's code. The process began with a petition from the head of an institution or a county welfare official or a petition from a family member attesting that sterilization was in the best interest of society.[237] If there was consent from the individual or a family member then authorization by the board seemed to be easy. And in most instances, apparently, there was consent by either the individual or a family member. Woodside reported that in 1949 all but 10 of the 276 petitions filed with the Eugenics Board had consent forms.[238] In fact, many of the people involved in the process

---

[234] *Id.* at 16 (appendix A).

[235] There is aggregated race, gender, and age data in the Eugenics Board's 1966 biennial report. *See* 16 BIENNIAL REPORT OF THE EUGENICS BOARD OF NORTH CAROLINA, JULY 1, 1964-JUNE 30, 1966 30 (1966) (tables 16 and 17), available at: http://archives.hsl.unc.edu/nchh/nchh-08/nchh-08-016.pdf and at https://archive.org/details/biennialreporteug16nort

[236] MOYA WOODSIDE, STERILIZATION IN NORTH CAROLINA: A SOCIOLOGICAL AND PSYCHOLOGICAL STUDY (1950).

[237] *Id.* at 65-95.

[238] *Id.* at 11-13.

complained about the procedural hurdles to sterilization. That is, it seems as though the health officials at the center of petitioning the Eugenics Board found the procedures burdensome and difficult to meet unless there was consent by the individual or a family member.[239]

Those leave significant questions about what process was used to obtain consent from individuals or family members. Woodside gives some sense of how consent was obtain – what she called education, but her examples reveal that there was often substantial opposition to sterilization by family members.[240] What remains unknown are the number of people sterilized without consent, the number sterilized with consent of a family member, and the number sterilized with their own consent. And then what "consent" means and how it was obtained. The answers to those questions will tell us a great deal about the course of sterilization in North Carolina. We can, of course, infer that many of the "consent" were coerced; though the leading historian of this has estimated that 20% of the consents really were voluntarily sought by patients are part of the normal family planning process.

There is another source of information that is publicly available: it is the procedure manuals created in 1948 and in 1960 for the Eugenics Board. They provide the basic instructions the Eugenics Board provided for determining eligibility. They also give a sense of how the Eugenics Board approached the petitions for sterilization; that is, they give the bare bones of the Board's deliberative process. The 1948 manual focused on the public good in making the case for sterilization. Yet, twelve years later the 1960 manual backed off some of the 1948 manual's statements about desirability of eugenics. It recognized the wide-ranging effects of sterilization -- "these effects will be physical as well as emotional and that there will be both positive and negative factors to consider."[241] And that sterilization should be part of a "broad system of protection and supervision of those individuals unable to meet their responsibilities as parents and citizens. In the plan for sterilization, it is necessary to have the participation of the individual and of his close family connections, as well as the participation of the social worker in cooperation with the physician, psychiatrist, and psychologist."[242] This admits of several explanations -- in some ways it shows a more humane attitude, which seems a lot less focused on what sterilization is going to do for the state. In other ways it may make a gross intrusion on personal autonomy seem like something that's family-centered. The 1960 manual frames the issue -- perhaps disingenuously -- from the perspective of the person to be sterilized. "The law" provides, the manual noted, "for sterilization of individuals ... when such individuals are found to be in need of the protection of sterilization from the standpoint of their social, emotional, mental and physical development and related environmental factors."[243] It had this focus on the patient, despite the fact that the 1933 law that emphasized public good was still part of the North Carolina code.

The 1960 manual provided more guidance -- many would likely say not enough, but certainly more than the 1948 manual -- on what consent meant: "that the individual for whom sterilization is being considered, the spouse, parents, and/or next of kind have participated in the

---

[239] *Id*. at 70.

[240] WOODSIDE, *supra* note 234, at 91.

[241] MANUAL, THE EUGENICS BOARD OF NORTH CAROLINA, sec. 10 (1960), available at: http://digital.ncdcr.gov/cdm4/document.php?CISOROOT=/p249901coll22&CISOPTR=417492&REC=3

[242] *Id.*

[243] MANUAL, THE EUGENICS BOARD OF NORTH CAROLINA, sec. 30 (1960).

casework plan leading to the decision for sterilization."[244] One of the other changes in the 1960 manual is the addition of "form 7" to provide more guidance on a person's "social history," to "giv[e] an explanation as to why sterilization seems to be indicated."[245]

3. North Carolina's Data: "Compulsion and Consent"[246]

How many were sterilized by order of the superintendent vs. family members? The role of consent in this is central. What we do not know if the percentage who were sterilized without any consent. There are some summary figures, however, from which was can begin to draw some inferences. The Eugenic Board's 1966 annual report provides historical figures on the number of people sterilized each year from the beginning in 1929 through 1966.[247] Those data are broken down by those who were institutionalized and those who were based in the community. (Table 1). One thing that is surprising is that the highpoint of sterilization in North Carolina was in the 1950s, well after most other jurisdictions had begun their decline. In fact, the Eugenics Board seems to have been quite pro-active in the decade after World War II ended. They published an administrative manual in 1948, which coincides with the increase in sterilizations. Perhaps that administrative manual, by making clearer the procedures to be used, was instrumental in the Eugenics Board's increased effectiveness.[248]

The biennial reports of the Eugenics Board reveal that only a small percentage of people were sterilized over the objection of their family members. Table 2 lists the percentage of petitions received by the Eugenics Board in which there was no consent by family members. After the first biennial report (1932-34), when the Eugenics Board was apparently still working out strategies for effectively finding and approving people for sterilization, the petitions almost always had the consent of family members. As the 1944 biennial report observed, "if the case for sterilization is properly presented, the cooperation of the family can be secured in most instances."[249] And from 1956 onward, the biennial reports did not even list the number of cases where there was no "consent." Apparently there were very few, if any, such cases. The 1960 biennial report noted the usual cooperation: "the individual and husband, or wife, or close relative usually participate in the plan and mark their own decision in favor of the operation before signing

---

[244] *Id.*, sec. 50 (1960), available at: http://digital.ncdcr.gov/cdm4/document.php?CISOROOT=/p249901coll22&CISOPTR=417492&CISOSHOW=417454

[245] *Id.*, section 80 (1960), available at: http://digital.ncdcr.gov/cdm4/document.php?CISOROOT=/p249901coll22&CISOPTR=417492&CISOSHOW=417479

[246] WOODSIDE, *supra* note 232, at 19.

[247] 16 BIENNIAL REPORT OF THE EUGENICS BOARD OF NORTH CAROLINA, JULY 1, 1964-JUNE 30, 1966 26 (1966), available at: http://archives.hsl.unc.edu/nchh/nchh-08/nchh-08-016.pdf and at https://archive.org/details/biennialreporteug16nort

[248] *See, e.g.*, 8 BIENNIAL REPORT OF THE EUGENICS BOARD OF NORTH CAROLINA, JULY 1, 1948-JUNE 30, 1950 10 (1950) (touting the increase in sterilizations over the previous biennial period), available at: https://archive.org/details/biennialreporteug08nort

[249] 5 BIENNIAL REPORT OF THE EUGENICS BOARD OF NORTH CAROLINA, JULY 1, 1942-JUNE 30, 1944 10 (1944), available at: https://archive.org/details/biennialreporteug05nort

consent."[250] In the few instances when family consent was not obtained, the Eugenics Board still seems to have gone forward. For instance, in the 1948-1950 period, 81% of the petitions filed without family consent were still approved.[251]

What remains unclear – and will likely remain unclear until there is systematic study of records that are not open to the public – is how much was coercion there was. That is, how often was consent obtained through coercion? The biennial reports frequently reference the difficulty of obtaining consent from men. The 1948-50 biennial report, for instance, reported that "Men need much interpretation to assure them that the operation is simple and that its only effect is the prevention of parenthood."[252] Perhaps the dramatically declining percentage of men who were sterilized particularly after the mid-1950s reflects the difficulty of coercing men, or the relative ease of coercing women. (Table 4) The Eugenics Board often noted their efforts to secure compliance, including a report they prepared in the early 1950s regarding children of people who were subsequently sterilized. The study suggested that the children were disproportionately developmentally disabled.[253]

Moreover, the different issues of coercion of people in the community as opposed to those institutionalized merits significant attention. It seems that those based in the community could only have been sterilized through consent – though here, again, what consent meant and how much coercion was involved in obtaining "consent" is difficult, if not impossible, to solve at this point. Thus, while the number of institutionalized people sterilized remained in the hundreds through the middle of the 1950s, by the 1960s the more than eighty percent of people sterilized resided in the community.[254] (See table 1)

When social workers could extract consent, there was no hearing by the Eugenics Board; only in cases where there was no consent by either the patient herself or in the case of minors and incompetent patients, the patients' next of kin, would there be a hearing by the Eugenics Board with the patient. We do know that the Eugenics Board approved the vast majority of petitions in the early years, but by the 1960s was routinely rejecting petitions.[255] (Table 2) For instance, where in 1934 to 1936 the board authorized 301 of the 309 petitions presented, in 1964 to 1966, it authorized only 368 of the 461 petitions presented.[256] (Table 3)

Some hint of just how much planning was involved on the part of public health officials to obtain "consent" of family members to sterilization appears in the 1950 book *Sterilization in North*

---

[250] 13 BIENNIAL REPORT OF THE EUGENICS BOARD OF NORTH CAROLINA, JULY 1, 1958-JUNE 30, 1960 7 (1960), available at: https://archive.org/details/biennialreporteug13nort

[251] 8 BIENNIAL REPORT OF THE EUGENICS BOARD OF NORTH CAROLINA, JULY 1, 1948-JUNE 30, 1950 13 (1950), available at: https://archive.org/details/biennialreporteug08nort

[252] *Id.* at 11.

[253] *Id.* at 9 (discussing on-going study); 9 BIENNIAL REPORT OF THE EUGENICS BOARD OF NORTH CAROLINA, JULY 1, 1950-JUNE 30, 1952 (1952) (discussing results of the study, which was published in North Carolina State Board of Public Welfare's *Public* Welfare News (March 1952)).

[254] In the early 1950s, the Eugenics Board pushed the sterilization of people in institutions, which accounts for the jump in sterilizations of the institutionalized in the early 1950s. *See* table 1; 9 BIENNIAL REPORT OF THE EUGENICS BOARD OF NORTH CAROLINA, JULY 1, 1950-JUNE 30, 1952 8 (1952), available at: https://archive.org/details/biennialreporteug09nort

[255] BIENNIAL REPORT OF THE EUGENICS BOARD OF NORTH CAROLINA, JULY 1, 1964 TO JUNE 30, 1966, *supra* note 246, at 25 (table 11).

[256] *Id.*

Carolina: A Sociological and Psychological Study, by the social worker Moya Woodside. Because it was published in 1950, Woodside presents a picture of practices after the sterilization movement had passed its peak in North Carolina. Therefore, the movement to make this look as though it was done with the consent of the families – and for the benefit of the families, rather than the state – influenced the book. Nevertheless, Woodside was decidedly in favor of sterilization. The epigram for the book, for instance, was taken from famed North Carolina political scientist Howard Odum: "In the modern world of knowledge the folkways are supplanted largely by the technicways. If change can be brought about, it can best be done by understanding the folkways and substituting the technicways for them."[257]

Woodside described the ideas and practices of social workers as they tried to convince North Carolinians to accept sterilization.[258] In fact, the objects of sterilization and their family members often proved quite obstinate, which was cause for concern for Woodside. For instance she reported "One of the Negro gynecologists, accustomed to talk with husbands for permission to operate on their wives, said he thought an important factor in refusal was the pride a man had in his ability to make his wife pregnant."[259]

There was substantial emphasis on coercion, as Woodside's study reveals when she discusses some examples of petitions to the Eugenics Board. Some had consent from the patients themselves; many others had consent forms signed by family members.[260] For instance, one twenty-three year old man who already had one child and was described as "borderline mental defective" consented, along with his wife, to his sterilization.[261] A single, twenty-five year old African American woman who had a fifth grade education and who was described as "sexually permiscuous" and "physically and mentally incapable of protecting herself" signed her consent form, along with her sister.[262] A seventeen year old African American girl who was in the Samarcand institution and had an I.Q. of 58 had her consent form signed by her grandmother.[263] Those cases, perhaps representative, suggest that even when there was consent by an individual that individual may not have had adequate understanding of what was happening. And in other cases, the consent consisted of family members, who may themselves have been subject to coercion.[264]

Although white and black people (and a few Native Americans) were sterilized under the Eugenics Board, African Americans were disproportionately sterilized in much of the period afer

---

[257] WOODSIDE, *supra* note 232, at xiii.

[258] *Id.* at 60-95 (chapter 5, "Difficulties Impeding Wider Acceptance of Sterilization"). *See also* Mary Ziegler, *Reinventing Eugenics: Reproductive Choice And Law Reform After World War II,* 14 CARDOZO J. L. & GENDER 319 (2008).

[259] WOODSIDE, *supra* note 232, at 68.

[260] *Id.* at 16-17.

[261] *Id.* at 17.

[262] *Id.*

[263] *Id.*

[264] As part of North Carolina's office of Justice for Sterilization Victims Foundation a few redacted petitions were released, which illustrate the kinds of family and personal histories that were used to justify sterilization. The petitions reflect how little in the way of background the Eugenics Board had available to them when deciding on a petition. *See, e.g.*, http://www.sterilizationvictims.nc.gov/documents/DCR_Presentation_Handout_D-Sample_Patient_Case_File.pdf

World War II. That the program became more focused on race, rather than less, in the era of the Civil Rights movement invites further investigation. (Table 5)

III. The Case for Reparations and Limiting Principles

After a decade-long struggle the North Carolina legislature passed a compensation statute in 2013. This offers a test that a lot of other states may look to as they try to gauge what to do with their own histories with sterilization. North Carolina has chosen a plan that provides a complete cap on costs, the has important requirements that claimants show direct state involvement, and that puts the burden on claimants who were age of majority and competent to show that the sterilization was involuntary. Thus, North Carolina has a number of limiting principles that will make it difficult for victims to recover; for some people recovery may be impossible. However, the North Carolina plan also presumes that people who were minors or incompetent were sterilized involuntarily. This likely reflects both reality and may preference the cases that are most likely to be most meritorious. There is one other limiting principle: claimants must have survived until June 30, 2013 to be eligible. That is, there had to be a direct, living victim at the time the legislation was being debated. The lack of a direct, living victim is a frequent complaint in other reparations cases, such as those for slavery and often Jim Crow. And the Civil Liberties Act of 1988, which provided compensation to Japanese Americans interned during World War II, also required a direct, living victim.[265] That is the only people who received compensation were those who survived until 1982.

We are just now beginning to see how the Office for Justice for Sterilization Victims is administering the legislature's compensation program. Because applications were due at the end of June 2014, we now know the number of claimants – about 780. Of those 180 have been already deemed qualified; several hundred others have been requested to provide additional information and yet others have been denied.[266] One major flaw that has emerged is that only people who were sterilized pursuant to the Eugenics Board are entitled to compensation. Those who were sterilized by local authorities without authorization from the Eugenics board receive nothing. Thus, the legislation leaves many people who were coerced into agreeing to sterilization or whose family members authorized the sterilization without redress.[267]

A. Factors Favoring Legislative Reparations

There are some limiting factors here that distinguish this from other claims and make reparations for sterilization victims particularly compelling. First, the government was the bad actor here; this is not a claim for general societal discrimination. Second, the harm is extraordinary and of a greater magnitude that many other intrusions on personal autonomy and

[265] Civil Liberties Act of 1988, 50 U.S.C.A. § 1989b-1989b-9 (1988).

[266] *Victims of NC Eugenics Board Qualify for Payment*, RALEIGH NEWS AND OBSERVER (August 7, 2014), available at: http://www.newsobserver.com/2014/08/07/4057204/victims-of-nc-eugenics-board-qualify.html

[267] Rose Hoban, Eugenics Compensation Amendment Continues to Leave Some Victims Out, North Carolina Health News (May 29, 2015), available at: http://www.northcarolinahealthnews.org/2015/05/29/eugenics-compensation-amendment-continues-to-leave-some-victims-out/

liberty; third, many people at the time knew it was wrong and spoke against it; fourth, there remain direct living connections between harm and repair. Thus, there is some opportunity to make good on injustices imposed lo those many years ago.

Here is a case of government intrusion on personal autonomy that many people at the time understood to be unjust; there is a discrete class of victims and that class is limited to those who are still alive (or were alive when the state began to seriously consider compensation); and this is reparations for a discrete set of harms that were imposed by the state. This is not a generalized claim for societal discrimination, but a claim based on very specific, concentrated harm imposed by deliberate government policy and action. The intrusion on personal autonomy was significant and it was done for the convenience of the state.

Why, then, were monetary reparations successful in this case and virtually none others in the past several decades? What is it about sterilization that the North Carolina legislature was able to actually get substantial bi-partisan support? This was not race-based; it was a fairly limited class; and there were people across the political spectrum who saw the inhumanity of this. There were a lot of people as far back in the 1930s who argued that involuntary sterilizations were improper.[268] That is, people at the time realized that this was wrong. This is not a case of us reading back our early twenty-first century sense of what's right onto decisions made by legislators in the 1930s when North Carolina passed a sterilization act that passed constitutional muster.

The North Carolina compensation act also offered the opportunity for people to criticize whatever group they found responsible for this harm – in the case of some conservatives, it was the liberal scientists who refused to appreciate religious ideas;[269] in the case of liberals, it was another episode of the state that deprived women of their reproductive autonomy. This is one of the rare moments where there is close to unanimity across the political spectrum in terms of outrage about the state's actions, even if not a complete consensus on the morality of paying for the misdeeds of past government act. There was also a wide-spread sense that something should be done about this to make amends for previous injustice, even though the statute of limitations had long since run.

B. **Designing Future Eugenics Reparations Programs**

When other states contemplate reparations they can look to a number of factors in designing their programs. Part of what is important is finding out just how how each state's program functioned. There remain in North Carolina still critical questions of who was selected for sterilization; how did the administrative agency -- the state Eugenics Board -- operate; and what are the demographic data on the gender, age, race, and family status of those sterilized. Other states have those basic questions, too. North Carolina's first sterilization act, passed in 1929, was struck down by the North Carolina Supreme Court in *Brewer v. Valk* in 1933 because it did not afford enough due process.[270] Judging from the Eugenics Board Meeting minutes that are

[268] *See supra* Part II.D. (discussing opposition to sterilizations by law reviews).

[269] Maggie Gallagher, *The Human Betterment League,* NATIONAL REVIEW ONLINE (Dec. 12, 2011), available at: http://www.nationalreview.com/corner/285545/human-betterment-league-maggie-gallagher

[270] Brewer v. Valk, 167 S.E. 638, 641 (N.C. 1933).

on the North Carolina Sterilization Victims Compensation Fund website[271] the hearings were perfunctory and often no family members challenged the petition for sterilization. And rather hauntingly -- though understandably -- there were well-established administrative procedures for this, including pre-printed sterilization petitions for state officials to fill out.[272]

Closely related to those questions are very difficult questions to determine about the amount coercion (or, conversely consent -- if any) involved in the sterilizations. As the North Carolina Sterilization Task Force's final report acknowledges, there were varying levels of coercion involved in North Carolina's history.[273] For many people the sterilization was involuntary; for others there was coercion; and for some (the leading book on this subject, suggests that perhaps as many as 20% during the 1960s) the process was "voluntary."[274] Apparently many women, especially in the 1960s, sought state-supplied sterilization as a method of family planning. How many of those "voluntary" requests (what Schoen called elective sterilization) were coerced in some way, or suggested to those requesting them by government officials, or family members, is unclear. We may never know that information. Undoubtedly, some of this state action resulted in some of the most outrageous interferences in personal autonomy practiced in the United States in the twentieth century.

There remain some really important questions about what the compensation program ought to look like. What program would in some measure be fair to people whose personal autonomy was so deeply affected, so long ago? It's obvious that no amount of money can compensate for some harms. One response in some cases has been to provide a flat sum. Often times in thinking about these kinds of programs we need to balance limited state money against the desire to do something meaningful in terms of repair and also to try to assist people who have been harmed in a very direct and continuing way. So often we think about providing money only in those cases were there remains a direct, living connection -- only to those immediate victims who are still alive. Moreover, we often think that it is perhaps best to come up with a single figure and give that to every living victim, rather than trying to calibrate harm between victims. The most prominent case of this is the Civil Liberties Act of 1988, which provided $20,000 to every Japanese-American person interned during World War II who survived until 1986.[275] That had some obvious and unfortunate lumpiness, in that many people who had suffered internment -- and whose descendants had suffered from property loss -- received nothing.

Other states now have the opportunity to provide similar compensation regimes. They will likely focus on still-living people and seek evidence of coercion. Those two principles will limit – perhaps too much – the class of claimants. Yet, those limiting principles also seem to be

---

[271] Minutes of the October 25, 1950 Eugenics Board Meeting, available at: http://www.sterilizationvictims.nc.gov/documents/DCR_Presentation_Handout_B-Sample_Eugenics_Board_Minutes-October1950.pdf

[272] BROWN, EUGENICAL STERILIZATION IN NORTH CAROLINA, supra note 41, at 16 (reprinting forms for both).

[273] FINAL REPORT TO THE GOVERNOR OF THE STATE OF NORTH CAROLINA PURSUANT TO EXECUTIVE ORDER 83, at 5 (2012), available at: http://www.sterilizationvictims.nc.gov/documents/FinalReport-GovernorsEugenicsCompensationTaskForce.pdf

[274] SCHOEN, *supra* note 15, at 163.

[275] Civil Liberties Act of 1988, 50 U.S.C.A. secs. 1989b-1989b-9 (1988). *See also* Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 814-15 (2006).

appearing in many compensation statutes these days. There is something else that did not appear in the North Carolina Act, but that would be very useful and positive; it is the studying of just what happened. Who was chosen? What were the reasons given for sterilization? What was the evidence presented as to why they should be sterilized? Such questions can only be answered, if at all, by looking at records that are within the state's archives but those records are kept hidden for the legitimate privacy concerns of family members and the sterilization victims themselves. Yet a state legislature can order and fund a study of those records, so that in addition to compensating the victims we can all know the full measure of what happened and so that we can take a look at the evidence of where the appeals to white supremacy and economics led our nation in the twentieth century.

Table 1
Percentage of Sterilized North Carolinians
In Institutions, 1930-1966

Year	Institutionalized	Non-institutionalized	% Institutionalized
1929	0	1	0
1930	9	5	64
1931	3	4	43
1932	15	3	83
1933	2	2	50
1934	45	15	75
1935	82	85	49
1936	56	37	60
1937	82	42	66
1938	152	48	76
1939	70	59	54
1940	94	59	61
1941	103	73	59
1942	98	43	70
1943	107	41	72
1944	63	39	62
1945	74	42	64
1946	47	57	45
1947	65	69	49
1948	92	96	49
1949	109	135	45
1950	187	111	63
1951	255	112	69
1952	213	134	61
1953	115	168	41
1954	128	170	43
1955	127	165	43
1956	70	147	32
1957	81	224	27
1958	75	243	24
1959	45	215	17
1960	49	185	21
1961	34	214	14
1962	37	193	16
1963	36	204	15
1964	49	207	19
1965	26	141	16

1966	7	70	9

Source: BIENNIAL REPORT OF THE EUGENICS BOARD OF NORTH CAROLINA, JULY 1, 1964-JUNE 30, 1966, *supra* note 247, at 26.

Table 2
Percentage of Petitions Presented without Consent of
Individual or Family Member in Biennial Periods, 1934-1966

Years	Petitions Presented	Petitions Granted	Petitions w/o Consent	% without Consent
1934-36	309	301	54	17.5
1936-38	356	350	20	5.6
1938-40	352	345	23	6.5
1940-42	390	385	12	3.1
1942-44	328	309	11	3.4
1944-46	282	276	10	3.5
1946-48	337	330	16	4.8
1948-50	562	543	21	3.7
1950-52	743	796	25	3.4
1952-54	673	650	30	4.5
1954-56	657	634		*
1956-58	674	658		
1958-60	576	564		
1960-62	558	531		
1962-64	591	545		
1964-66	461	368		

Source: Biennial reports of the Eugenics Board from 1932-34 to 1964-66.
* Number of petitions without consent were not reported after the 1952-54 biennial report.

Table 3
Percentage of Petitions for Sterilization Authorized by
North Carolina Eugenics Board, 1934-1965 (biennially)

Years	Petitions Presented	Authorized	% Authorized
1934-36	309	301	97
1936-38	356	350	99
1938-40	352	345	98
1940-42	390	385	99
1942-44	328	309	94
1944-46	282	276	98
1946-48	337	330	98
1948-50	562	543	97
1950-52	743	796	107*
1952-54	673	650	97
1954-56	657	634	96
1956-58	674	658	98
1958-60	576	564	98
1960-62	558	531	95
1962-64	591	545	92
1964-66	461	368	80

Source: BIENNIAL REPORT OF THE EUGENICS BOARD OF NORTH CAROLINA, JULY 1, 1964-JUNE 30, 1966, *supra* note 247, at 30. The data are reported from July of the first year through June of the concluding year.
* The 1950-51 numbers seem to reflect petitions from an earlier period that were acted on in the 1950-51 period, when the Eugenics Board was aggressively pursuing its missions. *See* BIENNIAL

REPORT OF THE EUGENICS BOARD OF NORTH CAROLINA, JULY 1, 1950 TO JUNE 30, 1952 (1952), available at: https://archive.org/details/biennialreporteug09nort

Table 4
Sterilization by Gender,
1929-1966

Year	Total	Men	Women	% who are women
1929	3	2	1	33.3
1930	17	2	15	88.2
1931	11	0	11	100
1932	18	9	9	50
1933	4	1	3	75
1934	61	15	8	13.1
1935	178	24	154	86.5
1936	98	12	86	87.8
1937	128	21	107	83.6
1938	202	56	146	72.3
1939	138	36	102	73.9
1940	159	47	112	70.4
1941	181	49	132	72.9
1942	148	36	112	75.7
1943	152	33	119	78.3
1944	105	18	87	82.9
1945	117	18	99	84.6
1946	106	16	90	84.9
1947	140	26	114	81.4
1948	189	34	155	82.0
1949	249	31	218	87.6
1950	300	60	240	80
1951	372	106	266	71.5
1952	348	106	266	76.4
1953	283	40	243	85.9
1954	298	45	253	84.9
1955	292	75	217	74.3
1956	217	43	174	80.2
1957	305	52	253	83.0
1958	318	29	289	90.9
1959	260	22	238	91.5
1960	234	9	225	96.2
1961	248	8	240	96.8
1962	230	8	222	96.5

1963	240	7	233	97.1
1964	256	2	254	99.2
1965	167	3	164	98.2
1966	77	2	75	97.4

Source: 16 BIENNIAL REPORT OF THE EUGENICS BOARD OF NORTH CAROLINA, JULY 1, 1964-JUNE 30, 1966, *supra* note 247, at 26. Data for 1944 were corrected using 1944-46 biennial report. *See* 6 BIENNIAL REPORT OF THE EUGENICS BOARD OF NORTH CAROLINA, JULY 1, 1944-JUNE 30, 1946 11 (1946), available at: https://archive.org/details/biennialreporteug06nort

Table 5
Sterilizations by Race, 1946-1966

Years	Operations Performed	White	Black	Native	% Black
1946-48	291	238	53	0	18.2
1948-50	468	366	100	2	21.4
1950-52	704	531	171	2	24.3
1952-54	626	423	202	1	32.3
1954-56	556	357	198	1	35.6
1956-58	562	284	274	4	48.8
1958-60	534	209	315	11	59.0
1960-62	467	179	284	4	60.8
1962-64	507	150	323	14	63.7
1964-66	356	124	228	4	64.0

Source: Biennial reports of the Eugenics Board from 1946-48 to 1964-66.