Evolving Public Attitudes: The Rise and Fall of Compulsory Sterilization of the Intellectually Disabled in the United States

Senior Thesis

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Michael Willrich, Advisor

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by
Jon Ostrowsky

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Jon Ostrowsky

Committee members (if applicable):

Name: Michael Willrich
Signature: __________________________

Name: Eileen McNamara
Signature: __________________________

Name: David Engerman
Signature: __________________________
Foreword

In 1927, Justice Oliver Wendell Holmes, Jr. wrote the Supreme Court’s opinion in *Buck v. Bell*, classifying the disabled as inferior citizens and mere costs to the state. Reading the opinion in my junior year legal history class, I found the language appalling. How could Holmes, the heroic American jurist, write such a cruel opinion, establishing a precedent for states to sterilize citizens? This essay explores the relationship between law and social change in the context of compulsory sterilization. It asks why the practice ended in twentieth century America, and it seeks to answer the question objectively though primary source research. My interest in this subject is not only academic; it is also personal. For five years, I have volunteered at an organization called ACEing Autism, teaching tennis to young children with autism. My father has worked more than three decades in the Massachusetts state government, providing support for families impacted by developmental disabilities. How American society progressed from treating the disabled as worthless members of the state to rights-bearing individuals, the worthy recipients of government-funded programs and services, is a fascinating story. This narrative describes the long journey of the disabled, from exclusion to inclusion.

Because this story analyzes evolving public attitudes, language provides key insight into societal biases of the era. However unpleasant words like “feebleminded,” “idiot,” “moron,” and “imbecile,” sound today, they express the attitudes of judges, scientists, doctors, and parents in the given time period. To most accurately tell the story of compulsory sterilization, I have used the original
word or phrase from the time. Shifting language reflects the chronology of public attitudes in this story.

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Introduction

Science and law cooperated at the turn of the twentieth century, and in an age of discovery, the story of compulsory sterilization began. Doctors developed a new procedure to sterilize patients, and state legislatures presented an arena for nearly unlimited progressive power. Progressives sought to broaden government power through regulation. They suppressed individual liberties to protect the common welfare of society, reducing crime, disease, and poverty to establish “real freedom” for all.¹ Cognizant of the political, economic, and social ills plaguing American neighborhoods, social scientists drafted an evolving list of cultural misfits, including criminals, alcoholics, drug addicts, the insane, the feeble-minded, and sexual deviants. In laboratories, scientists claimed new findings from decades-old genetic principles, applying the Austrian monk Gregor Mendel’s experiments of plant inheritance to human beings.² Eugenics advocates seized the moment to eliminate citizens designated as unfit and inferior stock, framing solutions to societal ills in terms of human betterment and race survival. Doctors planted the seeds for sterilization, legislators searched for social reforms, and scientists presented eugenic solutions.³ Public attitudes, persuaded by medicine, reflected in politics, and infiltrated by science, enabled sterilization to flourish.

² Legal and Socio-Economic Division of the American Medical Association, A Reappraisal of Eugenic Sterilization Laws (1960), 1.
³ Mark A. Largent, e-mail message to author, March 22, 2013.
Doctors did not wait for legislators to implement their ideas. In the 1890s, physicians developed alternative procedures to castration, removal of the testes or ovaries. They began sterilizing patients through vasectomy, surgical division of the vas deferens, in men and salpingectomy, surgical excision of the fallopian tubes, in women. Early sterilization bills hit roadblocks with the Michigan legislature in 1897 and the Pennsylvania Governor in 1905 before Indiana enacted the nation’s first sterilization law in 1907. Over three decades, 31 other states followed suit. Yet as quickly as legislatures stamped their approval, courts voiced skepticism, invalidating six state sterilization laws before 1920 and upholding only one, in Washington. The statues, the courts declared, violated state and federal constitutional guarantees of due process and equal protection of the laws. Some courts ruled that the measures constituted a form of cruel and unusual punishment, in violation of the U.S. Constitution’s Eighth Amendment.

The U.S. Supreme Court clarified state disputes in 1927, upholding Virginia’s sterilization law in *Buck v. Bell*. Writing for the majority, Justice Oliver Wendell Holmes, Jr. found compulsory sterilization to be well within the scope of the state’s police powers—the sovereign right of state and local governments to intrude upon personal liberty and property rights when the public welfare demanded it. “It is better for all the world,” Holmes declared, “if instead of waiting to execute degenerate offspring for crime, or to let them starve for their

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imbecility, society can prevent those who are manifestly unfit from continuing their kind.”\textsuperscript{7} He continued with his famous line, “Three generations of imbeciles are enough.”\textsuperscript{8} In the immediate aftermath of Holmes’ opinion, states found refuge under federal constitutional law and sterilization rates soared from more than 8,000 procedures in 1928 to more than 20,000 by 1935.\textsuperscript{9} Though the Supreme Court never explicitly overturned \textit{Buck}, in 1942 it declared sterilization as punishment for criminals to be unconstitutional in \textit{Skinner v. Oklahoma}.\textsuperscript{10} Although growing public outrage in the 1940s and 1950s brought American sterilization measures under greater public scrutiny, some states continued to sterilize patients into the 1970s. While estimates vary, doctors performed roughly 70,000 sterilizations in the United States.\textsuperscript{11}

American courts contributed to the slow collapse of eugenical sterilization nationwide, but more often than not, the courts followed public opinion, rather than led it. In the 1910s, court challenges succeeded on procedural grounds. Judges struck down laws for violating a patient’s due process requirements to a hearing, timely notice, and appeal. But most states ended the practice during the 1950s and 1960s because public attitudes had already shifted, scholars had withdrawn support, and doctors had stopped sterilizing patients. In fact, state

\begin{footnotes}
\footnote{\textit{Buck} v. Bell, 274 U.S. 200, 207 (1927).}
\footnote{\textit{id.}}
\footnote{\textit{Skinner} v. \textit{Oklahoma}, 316 U.S. 535 (1942).}
\footnote{See \textit{American Medical Association, A Reappraisal of Eugenic Sterilization Laws}, 30. Prior to 1907, superintendents of institutions, including Indiana and Kansas, sterilized patients illegally and other states reported sterilizations not listed in the Human Betterment Association statistics.}
\end{footnotes}
legislators and judges often repealed or invalidated laws several years after the last sterilization occurred.

Although the rising awareness of eugenical sterilization in Nazi Germany had weakened the movement in America, it did not directly drive its collapse. Before the Nazis, in the 1920s, American eugenicists filled universities, research institutions, and government offices, but their influence waned in the 1930s and 1940s. Nazi policies exposed the abuse of sterilization laws for social bias rather than social science. The Nuremberg Trials revealed the hypocrisy of American judges charging enemies with crimes they upheld decades earlier. But not until the late 1960s and 1970s, after sterilization had nearly ended, did scholars slowly connect Nazi Germany to American eugenics. It would be historically convenient to label the Holocaust as the pivotal event ending America’s sterilization movement, but it would also be historically inaccurate.

Instead, shifts in public knowledge, values, and attitudes unraveled the foundation of sterilization. Scientific opinion shifted away from viewing feeble-mindedness as hereditary to largely unpredictable or environmental. Parental advocacy in the 1950s reduced the stigma of peril and uselessness attached to retarded children. New principles of legal thought recognizing the right to bodily integrity and privacy forced judges, scholars, and legislators to close laboratory experiments on human bodies. Together, these forces and actors combined to erode public and professional support for sterilization in the United States.

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13 Mark A. Largent, comment on draft, March 22, 2013.
Unlike its abrupt beginning, eugenical sterilization collapsed slowly over several decades. Scholars have already analyzed the rapid rise of eugenics in the United States, extensively researching its historical relationship to racial thought, the progressive drive toward instrumental rationality and expertise, and the formation of the modern administrative state. But there remains little literature accounting for the much slower and uneven decline of compulsory sterilization in the United States. How did this once common institutional practice, which began so rapidly at the turn of the twentieth century, eventually die out more than 60 years later? Did law shape the evolution of public attitudes? Or did social change drive legal thought and the rulings of the courts?

Just as private citizens had launched the sterilization movement in institutions, operating rooms, animal breeding fairs, and social science classrooms, so too did private citizens plant the seeds for its collapse, criticizing the practice in lawsuits, newspapers, and scientific, religious, or legal periodicals. Yet simply because public officials in courtrooms and legislatures did not directly end sterilization does not mean they merely reacted to social change. Through evidence, reasoning, and societal norms documented in law, advocates and opponents found a forum for measuring the rights of individuals against the power of the state.

With sterilization as a lens, this story examines relationships between law and medicine, law and politics, and law and public opinion. It relies mostly on primary sources to highlight the interaction of law and school change. Sources draw heavily on court cases and opinions, while law review articles express the
attitudes surrounding those cases. Comparing the tone, citations, and logic of judicial rulings is a common thread of my argument’s evidence and analysis. Writings from institution superintendents, physicians, and eugenicists explain the movement’s birth. Newspaper articles, court records, and scientific periodicals, combined with parent advocacy in social science journals, convey how support for sterilization slowly deteriorated in the middle of the twentieth century. Secondary sources from scholars on the history of eugenics and sterilization have helped place my evidence in its full historical context.

Like any narrative of law and social change in American history, compulsory sterilization is a federalist one, merging stories of national and state progress. The pace of shifting public attitudes, from viewing sterilization as a social remedy for crime, poverty, and disease to a fundamental violation of privacy, varied greatly across state lines. Telling the diversity of the state story is vital to understanding the national one. This essay follows a chronological time frame while also devoting significant attention to the movement in New York, Kansas, and Washington. These states represent the diversity of sterilization in twentieth century America, and each reveals key actors, events, or trends driving the movement’s collapse nationally.\textsuperscript{14} In New York, an original Northern Progressive state, doctors performed only 42 sterilizations before the state’s highest court invalidated the law in 1918 and the legislature never amended it.\textsuperscript{15} In Washington, where progressivism struck the West later than New York, the

\textsuperscript{14} Mark A. Largent, email message to author, January 21, 2013.
state’s supreme court first upheld a sterilization law in 1912 then struck down a different one in 1942. In Kansas, a state once leading the movement with castration in the nineteenth century, public outrage over inhumane conditions abruptly ended the practice by 1951.

This thesis begins in the 1880s with the birth of eugenics, followed by the early struggle to pass sterilization laws around the turn of the twentieth century. Next, it explores how following *Buck*, in the 1930s, scientific discoveries rejected the hereditary basis of legislation and religious opposition gained momentum. The thesis then examines the decline of sterilization after the Second World War, analyzing how science, public attitudes, and legal thought merged to collapse the movement. Lastly, this narrative briefly analyzes the new hurdle sterilization opponents faced in the 1970s and 1980s as parents claimed the power to represent their child’s best interest in court. In weaving the experiences of selected states into a national story, I have highlighted key events or decisions, rather than present an evenly spaced historical timeline. What follows is a story about how American law and society evolved, competing and supportive forces in a struggle of state power versus reproductive rights, the most intimate of personal liberties.

**The Birth of European Eugenics**

Eugenics, driven by biologists, and sterilization, practiced by doctors, did not collide until after the turn of the twentieth century. While eugenics focused on human breeding, sterilization targeted crime prevention. Support for sterilization as a solution to crime, mental deficiency, and sexual deviance preceded and
outlasted the eugenics movement. In America, doctors began advocating castration as punishment for crime as early as 1849. In Kansas, Oregon, Indiana, Pennsylvania, and Illinois, medical authorities sterilized prisoners and mental health hospital inmates before legislative approval. In nineteenth century Europe, scientists planted the seeds for eugenics, while doctors and criminologists advocated sterilization in America. Not until 1904 did biologists launch their movement in the United States, introducing the term eugenics into public discourse. Nonetheless, eugenicists helped justify sterilization in America for several decades and its foundation began more than a century earlier in Germany.

In the late eighteenth century, German physician and philosopher Johann Peter Frank predated eugenics theory, advocating castration of the mentally deficient to prevent racial harm. Frank published *A System of Complete Medical Police* in 1779, arguing for marriage prohibitions between crippled, maimed, stunted, and dwarfed individuals in order to “leave the work of procreation to a healthier class of citizens.” Frank concerned himself with curing the mentally sick but viewed race interest as paramount. He introduced his nine-volume work by quoting French philosopher Jean-Jacques Rousseau’s observation that race degeneracy “lies in the origin and perfection of the way human beings dwell together.” To Frank, those with mental disease “who want to produce children,...

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16 Largent, comment on draft, March 22, 2013.
20 Ibid., 20.
are like spiders who devour their own young.”

Frank viewed treatment for insanity as a responsibility to cure the mentally sick and simultaneously protect the healthy from danger. He believed in continuing to aid, not only isolate the insane. Frank rejected asylum style treatment of the early 1700s, where authorities treated insane people like animals.

By 1830, public sentiment had begun to erase the old thought “once insane, always insane,” and state authorities, recognizing mental disease was curable, began to build mental hospitals. That strain of thought advanced towards the insane but not towards the feeble-minded. Illness produced a different stigma than retardation. Born normal, the mentally ill could be cured back to their original condition. But born defective, the retarded were worthless.

In 1880s Europe, scientific absolutism merged with a fear of insanity, and eugenics grew rapidly. Medicine and science gained prestige in cultural attitudes. Historian Leslie Reagan writes, “Regular medicine’s social power also rose in tandem with the great scientific discoveries in bacteriology in the late nineteenth century.” Eugenicists viewed mental disease, along with its tendencies towards crime and sexual devianc, as hereditary. Charles Darwin’s cousin, Sir Francis Galton, first coined the term eugenics in 1883, tracing the hereditability of human ability and intelligence in his book *Inquires into Human Faculty and Development*. Galton advocated replacing the inferior, unfit race with the superior, defining eugenics as a “a brief word to express the science of improving

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21 Ibid., 51.
stock.” He labeled energy a hereditary trait and condemned the idea of preserving “sickly breeds for the sole purpose of tending them,” because “the land is overstocked and overburdened with the listless and incapable.” Building on Mendel’s study regarding hereditary traits of plant life, first published in 1866, Galton applied the research to human beings. Galton claimed an inarguable foundation in scientific experiment to establish eugenic theory. Yet prior to 1900, superintendents expressed little desire to practice sterilization on higher functioning inmates for eugenic purposes.

**Doctors Introduce Sterilization**

Still independent of scientists advocating eugenics in Europe, for superintendents and physicians at American institutions, castration presented a solution for excessive masturbation and publicly offensive sexual activity. In the nineteenth and early twentieth centuries, society condemned nearly any sexual activity besides heterosexual intercourse. Homosexual behavior, anal or oral sex, and masturbation, known as “the crime against nature,” could be cured through surgery, doctors believed.

In March 1894, F. Hoyt Pilcher, superintendent of the Kansas State Asylum for Idiotic and Imbecile Youth, began castrating older boys and men who

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25 Ibid., 18-19.
masturbated. Journalists criticized the practice on both political and humanitarian grounds.\textsuperscript{29} E.P. Greer, the Republican and anti-Populist editor of the \textit{Winfield Daily Courier}, wrote in August 1894, “What reason Dr. Pilcher can have for these wholesale mutilations is a mystery to all with whom we have talked. The principle underlying the management of all public charities is that the most humane methods only should be employed.”\textsuperscript{30} In 1895, the \textit{Kansas City Times} quoted Charles T. Wilbur, superintendent of a private Michigan institution, claiming that doctors like Pilcher “should be placed in the penitentiary just as quick as possible for such atrocious practices. It was never practiced in institutions in this or other countries.”\textsuperscript{31} After Pilcher had castrated 11 male inmates, voters elected a Republican governor in 1895, but two years later the Populists regained control and reappointed Pilcher superintendent. In two years, he had castrated 14 female and 33 male patients.\textsuperscript{32} Other superintendents joined Pilcher in advocating for castration to control sexually deviant inmates, but public outrage overwhelmed medical support. The \textit{Texas Medical Journal} argued that Pilcher had adopted a “rational view of the subject” and “performed the operation … for its curative effect” but nonetheless recognized public sentiment: “There is a strong probability that he will be indicted for mayhem, to the everlasting disgrace of the civilization of the nineteenth century.”\textsuperscript{33} Superintendents initially supported castration in the

\textsuperscript{29} Trent, “To Cut and Control,” 58-59.  
\textsuperscript{30} Quoted in Frederick D. Seaton, “The Long Road Toward ‘The Right Thing to Do:’ The Troubled History of Winfield State Hospital” \textit{Kansas History} 27 (2005): 253.  
\textsuperscript{31} Quoted in Trent, “To Cut and Control,” 59.  
\textsuperscript{32} Ibid.  
1890s, but as public opposition grew, doctors questioned the political ramifications of performing the operation without legal approval.\(^{34}\)

The Michigan legislature became the first state to introduce an asexualization bill but soon defeated it in 1897. The proposed legislation granted a board of three physicians the power to sterilize epileptic and feeble-minded inmates. It also enabled judges to order the operation for criminals. Initially, the medical community remained hopeful. Doctor W. R. Edgar introduced the bill and surveyed 300 physicians to ask their opinion, receiving 190 out of 198 favorable replies.\(^{35}\) Although Galton had coined the word eugenics more than two decades earlier, the bill never mentioned it explicitly. Instead the proposed legislation referenced vaguely eugenic language – “to render them unable to reproduce their kind.”\(^{36}\) Advocates anticipated the legislation easily passing the House but with many legislators absent for the vote, others grew doubtful and withdrew their support. The vote fell six members short of a majority, and Edgar explained why legislators did not introduce the bill again:

The cry was raised by the sentimentalist ‘They dare not pass such legislation.’ What a slogan it would be in future campaigns to say, ‘see what this or that party will do when they have the power; if you do not come up to a certain standard of intelligence we will cause you to be unsexed.’ So fast did this cry gain opposition, that we became disgusted and dropped the subject.\(^{37}\)

In Michigan, like Kansas, medical advocacy did not outweigh political fear. Legislators signed onto the idea of reducing degeneracy, preventing masturbation,

\(^{34}\) Trent, “To Cut and Control,” 59.
\(^{35}\) Ibid., 291.
\(^{37}\) Ibid., 292.
and deterring crime. But fearing public uproar, Michigan and Kansas officials waited for other states to advance the sterilization agenda.

**Sterilization Finds New Hope**

The turn of the century brought new hope for sterilization advocates, as doctors developed a new procedure. With the American invention of the vasectomy for males and the French discovery of the salpingectomy for females, by the late 1890s doctors possessed what one sociologist called “less draconian means” to prevent procreation.\(^{38}\) Castration required removing the testes in men and the ovaries in women. But vasectomy only divided the vas deferens and salpingectomy involved an excision of the fallopian tube.\(^{39}\) The new procedures still brought pain and complications, but doctors could now sterilize patients without repressing sexual desires and practicing ancient abuses. Harry C. Sharp, superintendent of the Indiana reformatory, is frequently credited with inventing the vasectomy, yet other physicians had reported attempting the vasectomy in 1897.\(^{40}\) Sharp, however, seized on the invention, sterilizing more than 600 boys at the state reformatory before legislative approval.\(^{41}\)

With a new procedure to reduce the public uproar stemming from castration, sterilization advocates turned to eugenics to justify legislation. In 1904, Galton officially launched the eugenics movement, aiming to control human reproduction by increasing stock of the fit and decreasing population of inferior individuals. Applying Mendel’s studies on the genetics of plant life to human

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38 Trent, “To Cut and Control,” 61.
beings, eugenicists labeled mental illness, mental deficiency, epilepsy, criminality, pauperism, and other social ills hereditarily. Sociologist James W. Trent, Jr. conveys the shift in legislative reasoning: “‘Preventing increase’ became a new rallying cry to justify sterilization and to advocate for the legal authority to perform it. No longer could superintendents be vulnerable to the accusation of punishing inmates merely because their behavior was offensive.”

Superintendents also employed eugenics to frighten the public about the growing number of the feeble-minded, encouraging legislators to increase funding for their institutions. Alexander Johnson, a former superintendent of the Indiana School for Feebleminded Youth, described the threat in 1912. He cited a mathematical model that 1 in 300 was an idiot or feebleminded person and claimed that 75 percent of them had parents of the same type. Psychologist and eugenicist Henry Goddard argued in 1909 that two percent of all school-aged children suffered from mental deficiency. In 1917 he labeled 40 to 50 percent of immigrants feebleminded. Goddard relied on the Binet-Simon test, first introduced in the United States in 1908, which tested intellectual deficiencies without medical classifications, drawing instead on opinions from teachers. Eugenicists found so many people abnormal that the majority could no longer be considered normal.

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42 Ibid., 1.
43 Ibid., “To Cut and Control,” 61.
44 Ibid., 61.
Fear of feeblemindedness also stemmed from its perceived association with crime. Galton had classified the mentally deficient as inferior, but Goddard labeled them dangerous. In his 1915 book *Criminal Imbecile*, Goddard examined three murder cases before proposing his solution: “Feeble-mindedness as related to crime may be exterminated in a few generations if we will but use our intelligence to attack this problem at its root.”48 Johnson too, linked mental defect to crime, promiscuity, and other social ills. He stated in 1912, “Every other social trouble is complicated by feeble-mindedness.”49 Simply because superintendents like Johnson adopted the language does not mean they believed in the theory of eugenics. Through hereditary science, eugenicists managed to disguise views of race betterment. Johnson advocated for legislative support while eugenicists captured the moment to advance a racist agenda. As Johnson framed the problem, “We know just *what ought to be done*, and if there is a *problem* remaining it is simply that of how we can wake up the Legislatures and the public to a realizing sense of the importance of doing it.”50

Even after the American birth of eugenics in 1904, sterilization advocates struggled for public support and legislative approval. In 1905, Pennsylvania became the first state to pass a sterilization bill titled, “An Act for the prevention of idiocy.” Under the bill, a neurologist and surgeon could approve an operation “safest and most effective” to prevent procreation for those state institutional

50 Ibid., 169.
inmates with mental conditions unable to improve.\textsuperscript{51} Republican Governor Samuel Pennypacker vetoed the bill and highlighted its illogical language:

\begin{quote}
It is plain that the safest and most effective method of preventing procreation would be to cut the heads off the inmates, and such authority is given by the bill to this staff of scientific experts. The bill is furthermore, illogical in its thought…. A great objection is that the bill …would be the beginning of experimentation upon living human beings, leading locally to results which can readily be forecasted.\textsuperscript{52}
\end{quote}

Pennypacker attacked the power of a state government to interfere with the private bodies of its citizens for the sake of appeasing medical and scientific authorities. While courts later struck down sterilization laws on procedural grounds – for denying patients a hearing, appeal, or timely notice – Pennypacker vetoed the bill for its substance and avowed purpose. It would take judges decades to translate the Pennsylvania Governor’s tone in 1905 into their court opinions. After failures in Michigan and Pennsylvania, Indiana became the first state to legalize sterilization in 1907. The legislature grouped imbeciles, idiots, rapists, and criminals into the same law. Aided by legal protection, physicians sterilized 119 men before Governor Thomas R. Marshall issued a moratorium on sterilizations at state institutions.\textsuperscript{53} Superintendents viewed sterilization as a means of institutional control, eugenicists advocated it to empower human breeding, and governors frequently vetoed the practice, fearing public opinion. But after overcoming political and public roadblocks in the legislatures, sterilization found new resistance in the courts.

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\textsuperscript{51} American Medical Association, \textit{A Reappraisal of Eugenic Sterilization Laws}, 2. \\
\textsuperscript{52} Ibid. \\
\textsuperscript{53} One of the men sterilized, Eddie Millard, petitioned Marshall in 1909, arguing he was sterilized against his will and not a convicted criminal. See Alexandra Minna Stern, “We Cannot Make a Silk Purse Out of a Sow’s Ear: Eugenics in the Hoosier Heartland,” \textit{Indiana Magazine of History} 103 (2007): 11-12.
\end{flushright}
The Judicial Battle for Social Legislation

In the 1910s, opponents of compulsory sterilization found a legal climate hostile towards social legislation. Beginning in the 1890s, state and federal courts had imposed judicial restraint to limit the rise of the American labor movement. Judicial reasoning defining property as a nearly absolute right contrasted with nearly a century of American legal tradition upholding the police power as omnipresent at the state and local level. Confronted with laws regulating the number of hours in a workday, judges reversed course, discovering a newfound faith in property protection and contract rights. Political and class bias in the judiciary; broadly redefined, constitutionally supported property rights; and a looming fear of Socialism drove judges to repeatedly invalidate labor laws at the turn of the century.

Long before the U.S. Supreme Court applied the federal Bill of Rights to state legislation, sterilization opponents turned to the equal protection and due process clauses of the Fourteenth Amendment. Occasionally judges cited the Eighth or Fifth Amendments before they had been incorporated. Due process clauses of the Fifth and Fourteenth Amendments stated that no one shall “be deprived of life, liberty, or property without due process of law.” Procedural due

55 Under Chief Justice Melville Fuller at the turn of the twentieth century, the Court frequently held that the Fourteenth Amendment did not make the Eighth Amendment, the Sixth Amendment right to a jury trial, or the Fifth Amendment ban on self-incrimination applicable to states. See David P. Currie, The Constitution in the Supreme Court: The Second Century 1888-1986 (Chicago: University of Chicago Press, 1990), 59. In U.S. v. Carolene Products Co., 304 U.S. 144 (1938), Justice Harlan Stone, writing for the majority, declared a “new rational basis” standard for upholding economic regulation but added in the following footnote: “There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”
process claims related to inmates denied a timely notice, hearing, appeal, or trial by jury to contest a sterilization order. Substantive due process claims objected to not only the decision-making process but also the operation of sterilization itself. Mirroring the federal constitution, many state constitutions adopted nearly identical due process language. Judges also cited the Eighth Amendment ban on cruel and unusual punishments to evaluate castration, vasectomy, and salpingectomy as procedures causing physical pain and emotional torment. Lastly, the equal protection clause of the Fourteenth Amendment stated, “no state shall … deny to any person within its jurisdiction equal protection of the law.” Because public institutions committed only a small percentage of mentally deficient citizens, sterilization statutes unfairly targeted them, leaving the majority of the deficient population free. To supplement their legal arguments, judges also employed dicta to inject value judgments into their opinions.

In 1912, Washington’s highest court upheld the involuntary sterilization of a man who had been convicted of rape and sentenced to life in prison. The Supreme Court ruled that vasectomy, as punishment for rape, did not violate the state’s constitutional protection against cruel and unusual punishment.\(^56\) The death penalty could easily apply to the heinous crime—rape of a female child—without constituting cruel and unusual punishment. Therefore, a penalty less than death, without inflicting pain, could not be labeled cruel and unusual.\(^57\) In its opinion, the Court quoted testimony from Dr. William D. Belfield, a staunch supporter of sterilizing criminals. Belfield said vasectomy “is less serious than the extraction

\(^{56}\) Washington v. Feilen, 70 Wash. 65 (1912).
\(^{57}\) Id. at 67.
of a tooth.”\textsuperscript{58} The Court framed its argument in language of judicial restraint, where judges declined to overrule legislative decisions about public policy: “Guided by the rule that, in the matter of penalties for criminal offenses, the courts will not disturb the discretion of the legislature save in extreme cases, we cannot hold that vasectomy is such a cruel and unusual punishment as cannot be inflicted upon appellant for the horrible and brutal crime…”\textsuperscript{59} In distinguishing vasectomy from ancient punishments like whipping, burning at the stake, amputation of the nose, or strangling to death, Washington’s judiciary established constitutional protection for the operation.\textsuperscript{60}

One year later in New Jersey, in a case unrelated to crime, the state Supreme Court struck down a sterilization law on equal protection grounds but also invoked value judgments. In reviewing the plaintiff’s case, where the state board of examiners ordered an epileptic woman to undergo a salpingectomy, Justice Charles Garrison recognized the impact of legal logic to create potentially absurd consequences: “For the feeble-minded and epileptics are not the only persons in the community whose elimination as undesirable citizens would, or might in the judgment of the legislature, be a distinct benefit to society. If the enforced sterility of this class be a legitimate exercise of government power … it would be difficult to assign a legal limit.”\textsuperscript{61} After critiquing the statute’s logic and purpose, Garrison cited the equal protection clause of the Fourteenth Amendment

\textsuperscript{58} Id. at 69.
\textsuperscript{59} Id. at 71-72.
\textsuperscript{60} In 1918, Nevada’s Supreme Court ruled that sterilization was a cruel and unusual punishment and invalidated a statute but the state had never coercively sterilized its citizens. See Mickle v. Henrichs, Warden of Nevada State Prison, et al., 262 F. 687 (1918). For a discussion of the case, see Largent, Breeding Contempt, 85-86.
\textsuperscript{61} Smith v. Board of Examiners of Feeble-Minded, 85 N.J.L. 46, 52 (1913).
to strike it down. The percentage of epileptics in public vastly outnumbered those institutionalized. Epileptics in public were more likely to procreate, so the law unfairly discriminated for no logical purpose.\textsuperscript{62} Garrison’s language contrasted with other who justices invoked judicial restraint to focus on the narrow application of a specific law.

In 1914, a federal court in Iowa followed New Jersey’s logic to invalidate a statute mandating vasectomy for prisoners convicted of two felonies. Despite recognizing the differences between vasectomy and castration, the Court differed from \textit{Washington v. Feilen}. It classified vasectomy as cruel and unusual punishment and a violation of the U.S. Constitution. “The physical suffering may not be so great, but that is not the only test of cruel and unusual punishment; the humiliation, the degradation, the mental suffering are always present and known by all the public, and will follow him wherever he may go,” Justice Smith McPherson wrote in the majority opinion. “This belongs to the Dark Ages.”\textsuperscript{63} Furthermore, the administrative board made a decision without a hearing, evidence, or public proceedings, and plainly violated the federal due process clause: “The public does not know what is being done until it is done…. Due process of law means that every person must have his day in court, and this is as old as the Magna Carta.”\textsuperscript{64} McPherson also labeled the statute a bill of attainder—a statute inflicting punishment without trial by jury. Beyond invalidating the statute, McPherson invoked dicta to label marriage “one of the rights of every

\begin{footnotes}
\item[62] \textit{Id.} at 54.
\item[63] Davis v. Berry et al, 216 F. 413, 416 (1914).
\item[64] \textit{Id.} at 418.
\end{footnotes}
man of sound mind.” The government, he concluded, had no power to regulate the private relationship:

As of course all persons concede that it would be better for society if some men did not beget children; diseased, deformed, mentally weak children, and criminally inclined are brought into the world, oftentimes to their own shame and against the interest of the public. But are they not at the minimum? Must the marriage relation be based and enforced by statute according to the teachings of the farmer in selection his male animals to be mated with certain female animals only?65

With only two prior cases regarding sterilization, the U.S. court in Iowa established a pivotal precedent for striking down future laws.

Judging Law and Morality in New York

In 1918, the New York Supreme Court struck down a sterilization statute for denying equal protection but also commented on its inhumane and unreasonable standards.66 Frank Osborn, a 22-year-old feeble-minded inmate of the Rome Custodial Asylum, sought a permanent injunction against the New York Board of Examiners to prevent his vasectomy. Amendments to a 1912 public health law enabled a surgeon, neurologist, and medical practitioner to order the “most effective” procedure preventing procreation of those “who would produce children with an inherited tendency to crime, insanity, feeble-mindedness, idiocy or, imbecility.”67 A 1915 state panel connected crime, mental defect, and hypersexuality to broadly define the menace of abnormal citizens. It concluded, “This danger is in turn aggravated by the well known propagating tendency of the feebleminded, and because, owing to their lack of mental balance, they are in

65 Id. at 416-417.
67 Id. at 639.
most cases, potential delinquents or criminals, peculiarly susceptible to the suggestions of evil minded associates.”

To reduce rape, an administrative board sterilized mental defectives.

In court, unconvincing expert testimony revealed an enormous gap between legislative intent and medical application. Doctors found no proof that vasectomy reduced rape tendencies, with two advocating castration as the most effective operation. On cross-examination, Dr. Charles Andrews, a member of the Board of Examiners, shared recommendations grounded in academic theory, not medical experience. He had never personally witnessed vasectomy or salpingectomy performed to prevent procreation. Dr. Charles Bernstein, superintendent of the asylum, argued that vasectomy would remove fears of impregnation, encourage sexual intercourse, and increase the spread of venereal disease. Although Bernstein preferred castration, he nonetheless called procreation a human right, stating, “Why it seems to be the one thing that most human beings live for, the inherent tendency to propagate the race is one of the sustaining factors in the human race.” He objected to vasectomy “because it won’t help the boy, it won’t help society…. Vasectomy with this boy is not going to give us the thing society wants today, protection from his ravages.”

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69 Osborn, 169 N.Y.S. at 639-640.
71 Osborn, 169 N.Y.S. at 640-642.
73 Ibid., 106.
also explained new scientific studies presenting treatment options for cases of mental defect not purely hereditary. He then stated, “My general opinion is this: That our legislation is in advance of our enlightenment on this subject; that we don’t know today just what we are dealing with.”74 New York’s highest court would conclude a similar general opinion.

In striking down the statute, Justice William Rudd echoed both the legal argument and social judgment of the New Jersey court five years earlier. The law violated the federal constitution’s equal protection clause because it permitted the Board of Examiners to only sterilize institution inmates. Rudd framed the question, “Can it be said that the law can direct the physical mutilation of the bodies of those who are in the state’s care, and not be concerned with the same class of persons who are in the world at large?”75 He found his answer in the Fourteenth Amendment: “The law certainly denies to some persons of a class and similarly situated the protection which is afforded to others of the same class.”76 The state argued that sterilization enabled institutions to release mentally defective inmates into society. Rudd responded by emphasizing the government’s obligation to care for Osborn: “Such does not seem to this court to be a proper exercise of the police power. It seems to be a tendency almost inhuman in its nature.”77 The Court reminded the public Osborn was not a criminal but “deficient without personal responsibility for such defect,” likely poor and without family to

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74 Ibid., 109.
75 Osborn, 169 N.Y.S. at 643.
76 Id. at 645.
77 Id. at 644.
California’s Attorney General called the statute “an enlightened piece of legislation,” but Rudd rejected the eugenics thesis without hesitation, emphasizing the statute’s overly broad scope:

Why sterilization by vasectomy of patients in a hospital, who are grouped as a class with rapists in a state prison, strikes an awakening note in a new era will lead to the day to which the attorney-general so poetically refers, is beyond the comprehension of this court and is not enlightening.79

After the legislature’s repeal two years later and a total of 42 operations performed, New York stopped sterilizing its citizens forever.80

While judges and lawmakers ended the practice of sterilization in New York, private citizens heavily influenced their decisions. In courtroom testimony, lawyers questioned the statute’s logic. Doctors and scientists who helped craft the law admitted they actually knew very little about the individual effects and community impact of vasectomy. The eugenics theory linking crime and mental defect crumbled in legal argument. Yet simply because sterilization ended in only eight years does not prove public perceptions of the feebleminded had shifted drastically. In fact, doctors publicly advocated castration and called mental health patients “inmates” and costs to the state. By 1918, however, Rudd conveyed a dialogue significantly more progressive than in other states. New York pioneered special education for the mentally ill. In 1914, a state commission had recognized the fundamental right of liberty for the deficient. It sought “a better general knowledge of the characteristics and the needs of the feeble-minded … the lot of

78 Id. at 643.
79 Id. at 645.
the feeble-minded [should be] left at liberty, and should, at the same time, greatly safeguard the interests of the State.” In discussing the mentally deficient, doctors, judges, and scientists articulated common eugenic views on hereditary disease and progressive attitudes about crime and institution funding. But they simultaneously injected their beliefs about humanity and social care. Although New York invalidated a compulsory sterilization statute, with no federal guidance, other states accelerated the procedure at alarming rates. In Michigan and Virginia, judges filled benches with a set of attitudes and biases different from those in New York.

**Sterilization Finds Success in Court**

After striking down a sterilization statute in 1918 for violating the federal constitution’s equal protection clause, the Michigan Supreme Court reversed course and upheld a different law in 1925. The parents of 16-year-old Willie Smith, who was labeled feeble-minded by a probate court, filed a petition to have their son sterilized. Chief Justice John McDonald declared state interest paramount to individual liberty. He wrote, “It is true that the right to beget children is a natural and constitutional right, but it is equally true that no citizen has any right superior to the common welfare.” The Michigan law stood apart from other state legislation because it only applied to mental defectives, not criminals. It also required a jury trial, appeal, and review of written testimony. In the early twentieth century, the authority of administrative agencies grew rapidly

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but also raised concerns about executive power unchecked by due process of law. Legislatures invested administrative bodies with broad police powers “and resorted to a new way of dealing with old problems which are vexing modern society in novel and acute shapes,” as John Dickinson wrote in 1927.\(^8^4\)

Other states allowed an administrative board to evaluate patients, but Michigan required courts to ensure extensive procedural safeguards before ordering the sterilization.

The Michigan Court relied on an overwhelming authority of legal reasoning supporting the state’s police power to sterilize citizens. McDonald ignored the question about hereditary mental deficiency, claiming the Court was not convinced “beyond rational doubt” to overrule the legislature’s finding. Instead of evaluating the law’s logic, the Court found refuge in social judgment. McDonald expressed the sentiment, “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 our time. Whether this belief is well founded is not for this court to say.”\(^8^5\) He continued to describe eugenic sterilization as good, progressive law: “It is an historic fact that every forward step in the progress of the race is marked by an interference with individual liberties.”\(^8^6\)

Yet in a scathing dissenting opinion, Justice Howard Wiest marked the gradual evolution of legal, medical, and social thought. Wiest doubted the

\(^8^5\) *Smith*, 231 Mich. at 425.
\(^8^6\) *Id.* at 425.
hereditary claims about mental deficiency and considered sterilization cruel and unusual punishment, but he also coined the right of “bodily integrity.” He wrote, “The inherent right of mankind to pass through life without mutilation of organs or glands of generation needs no declaration in constitutions, for the right existed long before constitutions of government … and is beyond the reach of the governmental agency known as the police power.” In an opinion combining legal analysis with ancient history, Wiest continued his attack on the Court’s Chief Justice:

When pity and mercy and humanitarianism are subordinated to utilitarian considerations and power of the State is employed to destroy the virility of unfortunate human beings rather than their segregation and treatment toward recovery or amelioration, we as a people invite atavism to the state of mind evidenced in Sparta, ancient Rome and the dark ages where individuality counted for naught against the mere animal breeding of human beings for purposes of the State or tribe.

He extended the historical analogy by concluding, “Even savages have had more consideration for idiots.” In 1925, Wiest previewed the collapse of sterilization—the scientific realization that mental defect was not hereditary and the cultural awakening that eugenical sterilization is comparable to animal breeding. But it would take a more structured resistance to shape that language into a mainstream dialogue.

**Setting a Federal Precedent**

Twenty years after Indiana enacted the nation’s first compulsory sterilization law, the U.S. Supreme Court faced a test case from Virginia’s

87 Id. at 428, 436.
88 Id. at 430.
89 Id. at 435.
medical authorities. Dr. Albert Sidney Priddy, superintendent of the Virginia State Colony for Epileptics and Feebleminded, orchestrated the legal test by ordering the sterilization of Carrie Buck, an 18-year-old woman at the institution. When Priddy died, Dr. John Hendren Bell became superintendent and assumed control of the legal battle. Buck’s lawyer Irving Whitehead framed the “bodily integrity” argument in his brief, but undoubtedly his loyalty lay with the state.\(^{91}\) Whitehead had no interest in helping Carrie Buck win her case. Whitehead never mentioned that Buck became pregnant only after she had been raped because he supported sterilization under Priddy and served as a founding member of the colony’s Board of Directors.\(^{92}\) Expecting social stigmas surrounding promiscuity to prevail over legal jargon, advocates of eugenic sterilization found a forum to legalize social theory. Holmes seized the moment.

After quickly dispatching the procedural argument, underscoring the timely notice, hearing, and appeals structure required by the statute, Holmes responded to substantive due process and equal protection charges. He divided citizens into classes and designated the feeble-minded as inferior: “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.”\(^{93}\) Relying

\(^{91}\) *Buck*, 274 U.S. at 201-202.

\(^{92}\) Paul A. Lombardo, *Three Generations, No Imbeciles: Eugenics, the Supreme Court, and Buck v. Bell* (Baltimore: Johns Hopkins University Press, 2008), xi.

\(^{93}\) *Buck*, 274 U.S. at 207.
on Justice McDonald’s opinion from Smith v. Wayne Probate Judge, Holmes cited the Supreme Court’s stance on compulsory vaccination as precedent:

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory sterilization is broad enough to cover cutting the Fallopian tubes. Jacobson v. Massachusetts, 197 U.S. 11. Three generations of imbeciles are enough.\(^{94}\)

Following the guidance of Chief Justice, former President, and eugenicist William Howard Taft, Holmes emphasized the Buck family’s perceived hereditary defects.\(^{95}\) In response to the equal protection argument, Holmes wrote that “the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow.”\(^{96}\) Holmes advocated that institutions sterilize inmates and then release them. This would alleviate costs to the state, and open the institution to other feeble-minded citizens, ensuring that “the equality aimed at will be more nearly reached.”\(^{97}\) In the 1920s, superintendents lobbied legislators to approve sterilization as a cost-reducing measure, seeking to reduce the population of their institutions. Holmes ensured the legal protection of their

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\(^{94}\) Id. See Smith, 231 Mich. at 416. McDonald referenced compulsory vaccination to argue that compulsory sterilization was not cruel and unusual punishment. He wrote, “There is no element of punishment involved in the sterilization of feeble-minded persons. In this respect it is analogous to compulsory vaccination. Both are nonpunitive. It is therefore plainly apparent that the constitutional inhibition against cruel or unusual punishment had no application to the surgical treatment of feeble-minded persons.”

\(^{95}\) Lombardo, Three Generations, No Imbeciles, xii.

\(^{96}\) Buck, 274 U.S. at 208.

\(^{97}\) Id.
view.\textsuperscript{98} As the number of citizens sterilized grew, no longer would the state have to distinguish between those “within the lines” of an institution and those outside. Eventually all would be sterilized and feeblemindedness would die out, Holmes indirectly argued. In a forum for legal analysis, Holmes took no caution to withhold social judgment. Although only one justice dissented, even Holmes’ colleagues found the language of his opinion “brutal.”\textsuperscript{99}

*Buck* established the legal foundation for a wave of new sterilization laws, and superintendents implemented them without hesitation. But the very extremity of Holmes’ language also provided critics in science, law, and medicine with a target for their arguments. For two decades judges in state courts had cautiously evaluated the constitutional arguments surrounding compulsory sterilization. In nuanced opinions, they conveyed sympathy for the mentally deficient but articulated the state’s power to guard the common welfare. Holmes could have upheld the Virginia statute in a similar manner. He did not have to distinguish between the “best” and “manifestly unfit” citizens who “sap the strength of the state.” He did not have to select *Jacobson* as his only precedent. In *Jacobson*, the Court upheld a financial penalty for those who chose not to submit to vaccination against a deadly disease—fundamentally different from an order to cut the reproductive organs inside one’s body. Holmes did not have to speculate about three generations of imbeciles in support of Taft’s belief in eugenics. He could have included scientific facts and legal evidence to support his opinion. In taking

\textsuperscript{98} See Trent, “To Cut and Control,” 64-65 for a discussion of population growth at institutions. In 1923, American institutions housed 43,000 mentally retarded people. This figure grew to nearly 81,000 by 1936.

\textsuperscript{99} Lombardo, *Three Generations, No Imbeciles*, xii.
the opposite approach, he drafted a document that lawyers and scientists could easily refute. But in the short term, judges discovered a new precedent for exercising judicial restraint and upholding compulsory sterilization laws.

**Kansas Reacts to the Supreme Court**

In Kansas, where Republican newspapers and public sentiment drove the end of nineteenth century castration, *Buck* eased legal concerns and sterilization grew rapidly. In 1917, the legislature amended a 1913 sterilization statute, replacing the court’s authority to review cases with powers from an administrative board.\(^{100}\) Former Kansas Governor and U.S. Senator Arthur Capper embodied eugenic thought in 1927, telling the *Topeka Capital*, “It is as important for Kansas to grow fine men and women as it is to grow fine cattle and hogs.”\(^{101}\) While political actors had advocated and protested sterilization in Kansas for three decades, judges reviewed a legal challenge for the first time in 1928.

Less than one year after Holmes’ decision, *Smith v. Schaffer* asked Justice Rousseau Angelus Burch to measure police power against individual liberty.\(^{102}\) C.K. Schaffer, a surgeon at the Topeka State Hospital, challenged an order from the Board of Examiners mandating he perform a vasectomy on Emily Luthi. The Board found Luthi’s defect “hereditary” and classified it a “permanently impaired mental condition.”\(^{103}\) Relying on Holmes’ language, Burch easily dismissed constitutional critiques about the state’s police power with one sentence: “The

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103 Alternative Writ of Mandamus, In the Supreme Court of Kansas, No. 28229. Found in Kansas State Historical Society, Supreme Court, *State v. Schaffer*. 
supreme court of the United States has decided otherwise.”

Schaffer did not mimic the equal protection argument advanced before Buck that claimed discrimination between institution inmates and free citizens. Instead, he charged that the statue denied inmates equal protection because it only ordered sterilization for those “who in the judgment of the institution official, would procreate defective or feeble-minded children having criminal tendencies.” The Court rejected Schaffer’s argument, but inserted dicta to evaluate the police power. “Reducing this problem of personal liberty and governmental restraint to its lowest biological terms, the two functions indispensable to the continued existence of human life are nutrition and reproduction,” Burch wrote for the Court. “The race may insure its own perpetuation and such progeny may be prevented in the interest of the higher general welfare.” Procreation of mentally deficient children likely to commit crime would harm the race. The Court connected controlled procreation with race survival but never mentioned procreation as a natural right.

In the center of American progressivism, administrative power trumped a surgeon’s medical advice and knowledge. With the state’s highest court alleviating legal concerns, Dr. Charles S. Huffman, Chairman of the State Board of Administration rushed to implement the law. In October 1928, he organized hearings for nearly 90 state hospital patients in Topeka and Osawatomie. The Topeka Journal conveyed Huffman and superintendents’ beliefs in societal

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104 Smith, 126 Kan. at 607 (1928).
105 Id.
106 Id. at 608.
107 Id.
betterment, the view that the “proper use of the sterilization law will not only tend
toward direct improvement of a number of persons suffering from mental
disorders, but that society generally will be protected against propagation by
mentally unfit.”

Previously, Republican newspaper editors motivated by anti-
Populist politics reported on the inhumanity of castration at Winfield and physical
abuse at other institutions. But in 1928, journalists echoed the language of judges
and mass sterilization began in Kansas without public outrage. In about 10 years,
the sterilization rate in Kansas nearly quadrupled, with doctors performing nearly
2000 operations by 1938.

Legal Thought After Buck

Nebraska and Idaho followed Kansas’ lead in 1931. Courts found legal
shelter in Holmes’ reasoning, upholding sterilization statutes by referencing but
never defining the state’s police power. When the Nebraska Supreme Court
upheld a statute mandating inmates be sterilized before released, Justice James
Dean wrote, “The legislative act before us is in the interest of the public welfare
in that its prime object is to prevent the procreation of mentally and physically
abnormal human beings.”

Language of “abnormal human beings” continued to
convey societal stigmas towards the disabled.

In 1931 Idaho’s Supreme Court upheld a compulsory sterilization statute
in State v. Troutman, with Justice William McNaughton claiming the certainty of
science to express the majority opinion. He asserted that experts “leave no doubt

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110 In re Clayton, 120 Neb. 680, 684 (1931).
in our minds that heredity” causes feeble-mindedness and continued, “here we are administering a fixed and definite law, and are only concerned with that present law, not with what future legislators may do. Nor are we concerned with what political enthusiasts may try to do.”\textsuperscript{111} Despite its citation of scientific expertise, the Court never referenced actual findings, publications, or studies. McNaughton confidently declared the state’s police power supreme over constitutional objections already refuted by Holmes.\textsuperscript{112}

As easily as judges upheld sterilization laws, governors continued to veto them. In 1935, the Alabama Governor requested an advisory opinion on the constitutionality of the state’s sterilization statute. Justices of the Supreme Court reaffirmed their faith in the bill’s purpose, but objected to its violation of state and federal due process clauses, writing, “We do not doubt the police power of the state to provide for the sterilization of the subjects enumerated in the bill when the proper method is prescribed for the ascertainment or adjudication of their status.”\textsuperscript{113} In Georgia, governors had previously vetoed legislation. But with new Progressive leadership in 1937, Georgia became the last state to pass a compulsory sterilization law.\textsuperscript{114} Beginning with Pennsylvania in 1905, sterilization advocates discovered far stiffer resistance in the executive than legislative or judicial branches of government. Even in Progressive legislatures, the election of a new governor could suddenly halt the state’s sterilization

\textsuperscript{111} State v. Troutman, 50 Idaho 673, 678-679 (1931).
\textsuperscript{112} Id. at 679.
\textsuperscript{113} In re Opinion of the Justices, 230 Ala. 543, 547 (1935).
movement. Whereas courts confined their evaluation to constitutionality, governors frequently commented on the danger of social discrimination. The executive branch could appoint institution superintendents in line with a governor’s social views. But critiquing sterilization laws after *Buck* became increasingly more difficult for governors. Previously they had only dissented with state lawmakers. But after 1927, political opposition translated to arguing with the U.S. Supreme Court. *Buck* built a legal environment immediately supportive of sterilization. But outside of government, religious officials and scientists found Holmes’ opinion eloquently written but inadequately supported. Historian Michael Klarman argues that *Brown v. Board of Education* produced a political backlash, as enforcement of the ruling incited violent opposition against desegregation. *Buck* created a backlash too, but opponents of sterilization turned to the outlets of civil society, not violence, to protest the decision.115

**Catholics Speak Out**

The Catholic Church held no official position on eugenics or compulsory sterilization before 1927, but Holmes’ concise opinion provided a brutal argument to attack.116 Catholics united to critique sterilization as anathema to their religious values. The practice neglected care for the mentally deficient and violated natural law. A form of birth control, sterilization encouraged sex without the intent of procreation. The Church reacted to *Buck* on moral grounds, but it also advanced


116 Largent, *Breeding Contempt*, 105-106.
its beliefs beyond sterilization, promoting views on the sanctity of human life and condemning contraception in any capacity. In 1930, the Church officially published its opposition to compulsory sterilization in encyclicals and newspapers. As that opposition grew, it gradually infiltrated into the broader American dialogue on morality and disabled rights.

The Catholic Justice Pierce Butler had dissented in *Buck*, but he wrote no opinion. Many have signaled Butler’s religion as a motive for his dissent, yet no conclusive evidence exists to confirm this theory. Holmes did tell a colleague, “Butler knows this is good law. I wonder if he will have the courage to vote with us in spite of his religion.”

![Image](https://via.placeholder.com/150)

But Butler had also proved to be a staunch advocate of individual liberties and Catholics shared ambiguous views on sterilization through the 1920s.

Just two weeks after *Buck*, the Catholic publication *America* rushed to condemn the decision in a May 1927 editorial titled “Unjustified Sterilization.” The editors conceded that under certain circumstances, protection of the public welfare may justify sterilizing mentally defective citizens. But those circumstances required that an “imminent danger” exist with no alternative form of protection available. *America* categorized the decision as another case “of the tendency of Federal courts to set aside the deeper consideration of humanity and public policy in favor of conceptions that are purely legalistic.”

Sterilization would only promote promiscuity and the spread of sexually.

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117 Ibid., 102.
118 Ibid., 103.
120 Ibid.
transmitted diseases. Segregation was the reasonable alternative, the editorial argued. Yet the strongest argument by Catholics extended beyond practical and legal terms. *America* framed the moral basis of Catholic opposition:

“Fundamentally our objection is based on the fact that every man, even a lunatic, is in image of God, not a mere animal, that he is a human being, and not a mere social factor. To care for the dependent with sacrifice, foresight and charity, is a work which ennobles the individual, and is a source of vigor to the State.”\(^\text{121}\) In framing their moral objections to *Buck*, Catholics also seized the opportunity to advance their religious agenda.

Catholic officials recognized their chance to condemn not only sterilization but also any form of contraception. Sterilization interfered with the highest law of God because it granted human beings control over natural consequences of reproduction.\(^\text{122}\) In 1930, Pope Pius XI authored the encyclical on Christian Marriage, declaring the Church’s official view. He wrote, “Public magistrates have no direct power over the bodies of their subjects,” and continued to broaden the argument “that private citizens have no other power over the members of their bodies than that which pertains to their natural ends; and they are not free to … in any other way render themselves unfit for their natural functions.”\(^\text{123}\) In a publication by the National Catholic Welfare Conference, Reverend Edgar Schmiedeler declared procreation as the only purpose for sex.

\(^{121}\) Ibid.


“The burden of procreation and the happiness of love are counterparts,” she wrote. “To evade one while profiting by the other, is to run counter to this arrangement of nature. It is to violate the moral law.” Catholics viewed family as a far more powerful institution than government. Religious opposition gained momentum for its analysis of natural, not constitutional law. Holmes had infuriated Catholics by declaring the state’s power over bodily integrity as nearly unchecked.

The Scientific Gap in Law

Holmes had also justified his decision by emphatically citing false laws about hereditary mental defect. This provided competent scientists with an easy avenue to present new facts, research, and cultural thought. Beginning in the 1920s, Abraham Myerson, a neurology professor at Tufts University Medical School, launched a campaign against eugenic sterilization. Myerson critiqued compulsory sterilization as outdated science, arguing against the heritability of certain characteristics associated with mental defect. The Supreme Court upheld compulsory sterilization nearly entirely from the hereditary theory. By the 1930s, scientific authorities had not conclusively revoked findings about the hereditability of mental disease, but they had cast serious doubt and recognized uncertainty. Scientific opposition also borrowed from religious arguments to

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125 Ibid.
126 See Largent, *Breeding Contempt*, 103. Before Holmes wrote the opinion in *Buck v. Bell*, Taft sent him a note, writing, “The strength of facts in three generations of course is the strongest argument.”
inject social judgment and label compulsory sterilization anathema to strong, democratic government.

Myerson pioneered scientific opposition to eugenic sterilization. In 1925, he published *The Inheritance of Mental Disease*, vehemently critiquing Goddard’s criminal research and scientific competency. Myerson mocked Goddard’s study of the Kallikak family linking criminal tendencies with mental defect. Goddard’s staff judged from a “first glance” that “a nameless girl” alive a century earlier was feeble-minded. “Judge how superior the field workers trained by Dr. Goddard were!” Myerson wrote. “They know this, and Dr. Goddard acting on this superior female institution, founds an important theory of feeble-mindedness, and draws sweeping generalizations, with a fine moral undertone from their work.”

Myerson rejected Goddard’s theory connecting syphilis and feeblemindedness. Syphilis, he argued, was not a condition affecting only the disabled but “found in all ranks of society, amongst gallant soldiers, shrewd men of commerce, in ranks of the great writers, and even amongst those who dare to preach to their fellows.” Myerson also concluded that even applying Mendel’s principles of heredity to feeblemindedness required sterilizing normal parents.

As early as the 1930s, legal scholars began to reference Myerson’s work, concluding that epilepsy and insanity were not hereditary. In 1934, an article in the *Kentucky Law Journal* acknowledged half of all feeblemindedness was hereditary, but sterilization could still not correct the disease: “The weapon,

127 Abraham Myerson, *The Inheritance of Mental Diseases* (Baltimore: Williams & Wilkins Company, 1925), 78-79.
128 Ibid., 80.
furnished by eugenic enthusiasts, with which to combat the threat of feeble-mindedness is woefully inadequate to cope with the situation." Driven to rid the human race of anti-social behavior, eugenicists never fully considered the practical implications of their theory.

Myerson continued his attack on eugenic sterilization when he served as chairman of the American Neurological Association. In 1936, the Association published a report titled *Eugenical Sterilization: A Reorientation of the Problem*. Their study referenced the ambiguity of hereditary findings to draw several conclusions. Any sterilization law should be voluntary; applicable to both institution patients and the community at large; presented to one or several boards by superintendents, parents, private physicians, or patients; and provide legal protection for surgeons performing the operation, the report stated. The committee authoritatively wrote that social behavior and problems were not linked to hereditary traits: “Particularly do we wish to emphasize that there is at present no scientific basis for sterilization on account of immorality or character defect.” Furthermore, the report divided mental defect into specific diseases. The neurologists recognized heredity as a possible factor, but objected to its citation as the foundation for legislation:

Nothing in the acceptance of heredity as a factor in the genesis of any condition considered by this report excludes the environmental agencies of life as equally potent and, in many instances, as even more effective. That scientific day is past.

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132 Ibid., 113.
when the germplasm and the environment are to be considered as separate agencies or as opposing forces. Both operate in the production of any character, though in different degrees, but the degree in which each operates is, at present, mostly in the field of the unknown.”

Just a decade earlier, Michigan’s Supreme Court ruled that it could not invalidate legislation based on hereditability theory without a rational doubt. Now, science had announced one. But in crafting their opinions, judges made choices about when and how to inject science into legal reasoning.

Just as judges frequently deviated from a purely legal analysis to insert social judgments, scientists like Myerson supplemented their research with value statements. Myerson recognized the fear of poverty and cultural stigmas embedded in the overly broad diagnosis of mental deficiency. He wrote, “What is really meant by talk of the fertility of the feeble-minded is the fertility of people of low cultural level, or low economic status, or else unsophisticated in the trends of modern society.”

He highlighted the national fears of social problems and rejected the tactic of employing mental disease as their scapegoat. Myerson mocked the reasoning of the eugenics movement:

If one includes in the ‘criminalistic’ group the delinquent and wayward, and especially if one includes those guilty of sex delinquency, then one would have had to impose sterilization on some of the finest figures in the world’s history—the greatest poets, the finest painters, the most brilliant writers, the leaders of nations—as well as on every second man and probably on every third woman in the community.”

Myerson’s committee also cited specific state laws, criticizing Kansas in 1936 for its unusual style of progressive governing. Although it claimed to represent

133 Ibid., 178.
134 Myerson, The Inheritance of Mental Diseases, 82.
progressive values—remaining dry after the repeal of prohibition—the state “rather sadistically, perhaps, practices sterilization.”\textsuperscript{136} Science offered a powerful rebuttal to eugenics theory. Neurologists rejected the idea that only the best citizens could help achieve the optimal public good. “It is precisely in those communities where social care is good that we find the evidence of the finest culture and, on the whole, the best biology,” Myerson’s Association wrote in its 1936 report. “It is in those communities where social care is poor that the population presents an appalling spectacle of degradation.”\textsuperscript{137}

But research and reports in scientific journals alone would not end sterilization. Religious opponents referenced the new hereditability studies to bolster their moral argument. As Schmiedeler wrote in 1937, “The best authorities insist that we know practically nothing regarding the laws of human heredity.”\textsuperscript{138} The rising discovery of mental disease, she argued, did not necessarily correlate with rising birth rates of the deficient: “Ignorant people speak as if there were some natural tendency for illness and degeneracy to propagate abnormally.”\textsuperscript{139} Although Catholic opposition grew from moral values and natural law, Church authorities referenced science to frame their radical view, making it more moderate and eventually credible under the law. From different professions, Schmiedeler and Myerson recognized the same potential horror—not propagation of mentally deficient people but the unlimited power of American legislatures to control human reproduction.

\textsuperscript{136} Myerson, et al., \textit{Eugenical Sterilization: A Reorientation of the Problem}, 13.
\textsuperscript{137} Ibid., 58.
\textsuperscript{139} Ibid., 18, 22.
Public Uproar in Kansas

In 1930s Kansas, a female Catholic politician revealed institution abuses and sterilizations to incite public outrage. After sterilization supporters overcame political opposition, doctors at state institutions performed more than 1,700 sterilizations through 1936. Although public exposure planted the seeds for collapse, sterilization did not abruptly end until more than a decade later. The New York Osborn Association, a private welfare organization, investigated the Girls Industrial School at Beloit in early 1937. In October, former Democratic Congresswoman Kathryn O’Laughlin McCarthy charged that in the last year, 62 of the 148 girls at the Beloit Industrial School had been sterilized, with 22 more scheduled for the operation. McCarthy used political power to present her case in the press. But political prominence alone could not change the law. She would need public support to do so.

The Congresswoman appealed to public sentiments to counter eugenic arguments about societal betterment. State officials claimed that sterilizations of “sexual perverts, obstreperous, fighters or near degenerates” occurred after formal hearings with parental consent. But speaking at a Democratic women’s conference, McCarthy disagreed and pledged to change the coercive statute: “So far as I can determine, sterilization was done as a punishment rather than for any special good for society,” she said. “It is horrible to think these girls have been

deprived of motherhood and a chance for a happy married life.”

One girl sterilized in 1936 recounted her story for the *Kansas City Times*. After caught in a stolen car with her sister at age 13, she was sent to Beloit. School officials never examined her and notified her parents three days after the operation. “I thought for awhile that life had very little left for me,” the girl recalled. “I think that the whole system of sterilization is wrong, and only two out of the sixty-two sterilized should have had it, in my opinion.”

On the list of girls recommended for sterilization, scant evidence existed. The following notations described five girls scheduled for sterilized at Beloit:

- I.Q. 76—Steals, runs away, immoral.
- I.Q. 102—Incorrigible; very, very bad.
- I.Q. 93—Incorrigible.

McCarthy also attacked the logic of sterilization, arguing it creates nervous disorders, hinders development, “builds an inferiority complex and defeats the objects and purposes of the correctional institution by making the inmates unfit to return to society.”

Sterilization failed to correct individual behaviors or social problems.

Aside from Kansas officials critiquing the charges as merely political retaliation for a lost election, private citizens applauded McCarthy’s investigation.

William Connor from the Case Western Reserve School of Applied Science urged

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143 “Girl Tells of Operation,” *Kansas City Times*, October 26, 1937. Found in McCarthy Papers, Section 12.
the American public to react. In a letter to McCarthy, he wrote, “Civilization is a word that should be cast from the vocabulary of the American people, for the crime of Kansas has cast a black shadow over our entire nation, for no power on earth can restore to those poor girls their God-given right to motherhood….”

Michigan resident Victor E. McMillen questioned how public sentiments had not already driven legislative repeal: “How much longer can the public remain indifferent to this sterilizing craze without having the Preamble to the Constitution … rewritten to read ‘That all men are created equal, and have a right to life, liberty, and the pursuit of happiness’ and the use of their reproductive functions only at the will of the M.D.’s.”

As readers reacted to the Kansas story, national media publicized McCarthy’s charges. Editorial pages questioned the theory behind sterilization legislation. Ten years after America condemned Buck v. Bell, it highlighted the Beloit investigation and urged legislative repeal. In a 1937 editorial titled “Sterilization No Remedy,” the newspaper wrote, “Researches by qualified investigators … tend to show that as a check upon insanity sterilization is not necessary, and that as a restraint upon crime and various forms of social conduct, its effects are negligible. It is to be hoped that the deplorable conditions discovered in the Kansas institution will put an end to legislation of this kind.”

By 1937, it was not only religious periodicals that rejected the logic of compulsory sterilization. While the Dallas Morning News supported compulsory sterilization in theory, it

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147 Victor McMillen, Letter to Kathryn McCarthy. Found in McCarthy Papers, Section 11.
cited Kansas as reason for caution. “It is difficult to accept as a disqualification for motherhood obstreperousness in an adolescent child or fighting spirit by no means strange to any indignant imprisoned animal, human or otherwise. The Beloit charges make out the case against official sterilization that is difficult to defend,” it’s editorial stated. “Our best intentions and our best directed plans may be tragically misdirected by the human element in charge.” With no oversight of the institution superintendents, journalists served as a government watchdog, noting the abuse of state laws. *Time* magazine highlighted the shifting perceptions towards sterilization. No longer was it a procedure in the name of societal betterment. In 1937, *Time* described the sterilization of girls who “had been surgically rendered incapable of having children.” An objective national news report emphasized the tangible, negative impact of the operation, not its theoretical benefits to society.

For one week in 1937, a former congresswoman drew national attention to sterilization and caused a public uproar. But in the 1930s, within Kansas and other states, sterilization rates continued to climb. McCarthy’s story highlighted the abuse of laws to sterilize promiscuous girls and social outcasts. It did not draw widespread opposition to sterilization of the disabled. In fact, a 1937 *Fortune* survey revealed that 66 percent of the population supported compulsory sterilization of mental defectives. More shocking, 45 percent approved of “mercy killings for defective infants, and 37 percent supported the practice for the

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“incurably ill.”\textsuperscript{150} Public opinion towards the mentally deficient had shifted but not erased its social stigmas. Within a decade, the societal backlash gaining momentum in the 1930s would infiltrate the courts through judicial opinions. But overseas in Germany, the Nazis designed a racial agenda and employed sterilization to eliminate abnormal citizens.

**Nazi Experiments with Sterilization**

The Nazis referenced American sterilization laws and Holmes’ opinion in *Buck* when crafting their own program in the 1930s. As part of their euthanasia campaign, the Nazis sterilized 375,000 and murdered more than 275,000 insane, feebleminded, and physically handicapped Germans.\textsuperscript{151} The Nazis employed sterilization as a means to genocide, but the Holocaust did not directly coincide with the end of the sterilization in the United States. Surely the arguments of American jurists prosecuting Nazi war criminals at the Nuremburg Trials sounded hypocritical. America’s own eugenics history weakened the case, but not until the 1960s did historians begin connecting American sterilization to the Holocaust.

Drawing on the success of European and American eugenics, in 1933 Germany passed its first law mandating sterilization of the mentally deficient. The law cannot be traced to only the rise of Hitler and the Nazi Party, since eugenics research began several years earlier.\textsuperscript{152} The statute sought to prevent hereditary types of feeblemindedness, schizophrenia, insanity, epilepsy, Huntington’s

\textsuperscript{150} “Sterilization of Criminals,” *Fortune*, June 1937: 106.
\textsuperscript{151} Deutsch, *The Mentally Ill in America*, 377. For a discussion about Nazi courts and eugenics see also Ingo Müller, *Hitler’s Justice: The Courts of the Third Reich* (Cambridge: Harvard University Press, 1991), 120-125. In addition to the groups mentioned, the Nazis also targeted male, but not female homosexuals, banning same-sex acts between men.
\textsuperscript{152} Myerson, *Eugenic Sterilization*, 22.
chorea, blindness, deafness, blindness, and extreme physical deformity. It stated, “Those hereditarily sick may be made unfruitful [sterilized] through surgical intervention when, following the experience of medical science, it may be expected with great probability that their offspring may suffer severe physical or mental inherited damage.”153 Under the statute, hereditary health courts guaranteed the opportunity for trial and appeal. The Nazis relied on Harry Laughlin’s Model Eugenic Sterilization Law in 1922 and the Human Betterment Foundation’s 1934 report, but the German law embraced a more moderate approach. Many German racial theorists opposed the American style of sterilization as punishment and legal enforcement through administrative boards rather than courts. Germany produced a national law, reflecting lessons from American’s legal struggle with sterilization earlier in the century.154

Although the German leaders praised their new law for its scientific foundation and procedural safeguards, they had merely propagandized racist social policy. The Nazis broadened the definition of feebleminded people to include political enemies. They even created a new category of people to sterilize, labeling them “slightly feeble-minded.”155 Eugenic News applauded the Nazi law that “will in legal history constitute a milestone which marks the control by the most advanced nations of the world of a major aspect of controlling human reproduction.”156 But the publication also reprinted an article in the German press

153 Ibid.
155 Deutsch, The Mentally Ill in America, 377.
156 Quoted in Kühl, The Nazi Connection, 46.
arguing Berlin was overpopulated with Jewish physicians.\textsuperscript{157} While the German law did not specifically enable sterilization for racial purposes, it established the framework.

The Nazis briefly cited American sterilization in their defense. In 1949, they published an extract from a 1937 report of the Racial-Political Office. In defense of SS General Otto Hofmann, who attended the 1942 Wannsee Conference where the Third Reich discussed their Final Solution, a plan for Jewish extermination, the Nazis presented the document at the Nuremburg Trials. The three-page report summarized race protection laws in Europe and quoted a translated version of Holmes’ opinion in \textit{Buck}. But the report also referenced anti-miscegenation legislation, stating “Although it is clearly established in the Declaration of Independence that everyone born in the United States is a citizen of the United States and so acquires all the rights which an American citizen can acquire, impassable lines are drawn between the individual races, especially in the Southern States.”\textsuperscript{158} Certainly American judges and Nazi war criminals viewed Supreme Court decisions in fundamentally different contexts. Holmes saw a question about the power of state legislatures. Nazis saw propaganda to advance an agenda of extermination. In the 1940s, the Nazis demonstrated what Pennsylvania’s Governor had feared in 1905—that sterilization laws would “be the beginning of experimentation upon living human beings.”\textsuperscript{159} The legal

\textsuperscript{157} Ibid.
\textsuperscript{159} American Medical Association, \textit{A Reappraisal of Eugenic Sterilization Laws}, 2.
community took notice and cited the Nazi application of American laws, along with new scientific findings, to advocate repeal in the 1960s. Yet unrelated to the German genocide, legal thought shifted in the United States during the war.

**Shifting Legal Attitudes**

During the 1940s legal thought shifted away from viewing the police power as supreme and instead recognized procreation as a fundamental personal liberty. Although the Supreme Court never explicitly overturned *Buck*, in 1942 it struck down Oklahoma’s sterilization law for habitual criminals. The law ordered sterilization for criminals convicted of larceny but not embezzlement, crimes nearly equal in fine and imprisonment penalties. The Oklahoma Supreme Court had ruled five to four that a man convicted of stealing chickens in 1926 and armed robbery in 1929 and 1934 undergo a vasectomy. On review before the U.S. Supreme Court in *Skinner v. Oklahoma*, Justice William O. Douglas passed over questions of due process and cruel and unusual punishment to address the equal protection challenge. Legislation cannot separate criminals convicted of virtually identical crimes, the Court ruled. Inflicting different punishment for crimes of embezzlement and larceny violated the Fourteenth Amendment’s guarantee to equal protection of the laws. Douglas found no logic to support the distinction and concluded, “We have not the slightest basis for inferring that the line has any significance in eugenics, nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between those two offenses…. Embezzlers are forever free. Those who steal or take in other ways or not.”¹⁶⁰

¹⁶⁰ *Skinner*, 316 U.S. at 541-542.
Beyond his legal analysis, Douglas commented on the individual harm resulting from sterilization:

We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.¹⁶¹

Douglas assessed a new legal value to procreation, labeling it a fundamental civil right. No longer was it simply a state regulated behavior. But Douglas’ opinion dealt with criminals, not mental defectives. The majority opinion made no reference to classification between normal and defective citizens. Concurring and dissenting opinions, however, reframed the discussions.

Justice used their opinions to commentate on current scientific findings and public perceptions. In his concurring opinion, Chief Justice Harlan F. Stone cited Myerson’s 1936 report to reject the hereditability of crime theory. “Science has found and the law has recognized that there are certain types of mental deficiency associated with delinquency which are inheritable,” Stone wrote. “But the State does not contend – nor can there be any pretense – that either common knowledge or experience, or scientific investigation, has given assurance that the criminal tendencies of any class of habitual offenders are universally or even generally inheritable.”¹⁶² By 1942, law rejected crime as a hereditary trait. It would take another decade to falsify Stone’s claim that science proved mental deficiency hereditary.

¹⁶¹ Id. at 541.
¹⁶² Id. at 544.
In his dissenting opinion, Justice Robert Jackson questioned the validity of the statute’s purpose. For the first time in the Supreme Court, a justice doubted the substantive due process of compulsory sterilization laws. Jackson, who later prosecuted the Nazis at Nuremberg, broadened the question about criminals to condemn sterilization of any citizen: “I also think the present plan to sterilize the individual in pursuit of a eugenic plan to eliminate from the race characteristics that are only vaguely identified and which in our present state of knowledge are uncertain as to transmissibility presents other constitutional questions of gravity.” He continued to argue for legislative limits on the state’s police power: “There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority – even those who have been guilty of what the majority define as crimes.” Jackson recognized the present case never posed this question, but he mentioned it anyway. The nation’s highest court had amended its stance on sterilization.

Also in 1942, state courts launched new discussions about science and humanity. In In re Hendrickson, Washington’s Supreme Court invalidated a sterilization law on familiar due process and equal protection grounds. Reversing its 1912 decision, the Court upheld an injunction preventing the sterilization of Hollis Hendrickson, an insane inmate of the Western State Hospital. Justice Samuel Driver did not question the state’s police power to sterilize, but he acknowledged the unreasonable burden court proceedings placed on the insane.

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163 Id. at 546.
164 Id.
165 In re Hendrickson, 12 Wn.2d 600 (1942).
and feebleminded. Driver wrote about the mentally incompetent citizen, “Very likely, he could not read the order served upon him, or, if he could, he would be incapable of comprehending its purport. Clearly, such a provision does not meet the requirements of due process.”\textsuperscript{166} The statute also did not allow patients without parents or guardians present a fair opportunity for appeal. Institution superintendents could not be trusted to protect their patient’s best interest, Driver argued: “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.”\textsuperscript{167}

By the end of the century, courts recognized a different conflict of interest as parents tried to substitute consent for their own children. But for the 1940s, Washington’s highest court demonstrated new public attitudes, recognizing superintendents could not represent their patient’s best interest. Earlier in the century superintendents had gained legislative support by advocating sterilization as a cost control measure. Although the Court upheld the injunction on procedural grounds, in effect it killed the statute’s substantive power to sterilize. After 685 sterilizations by 1942, the legislature never passed another law and the state stopped the practice.\textsuperscript{168} Courts had indicated the emergence of new legal attitudes towards both sterilization and the disabled. Private citizens continued to shape those attitudes in the 1950s.

\textbf{Public Uproar Continues in Kansas}

\textsuperscript{166} \textit{Id.} at 606-607.
\textsuperscript{167} \textit{Id.} at 607.
Kansas once ranked third in total sterilizations, but public uproar abruptly ended the practice in 1951. Without changes to sterilization laws, doctors stopped performing the operations. Influenced by journalists and a federal lawsuit, public support declined throughout the 1940s. As the hereditary argument about mental illness and retardation grew outdated, organizations preaching eugenics lost support. Kansas provides a classic example of social attitudes driving and ending sterilization. Panic about hypersexuality led to castration in the nineteenth century. In the early twentieth century, fear of legal and political repercussions halted the progressive cause, but in the 1950s the practice died out with legislation still on the books.

In 1953, the *Kansas Law Review* published an article titled, “What has Happened to Kansas’ Sterilization Laws?” predicting the opposition to sterilization would spread to other states. The author, Dwayne L. Oglesby recalled that sterilization produced a reaction because the state operated on not only mentally deficient children, but also on those with low IQs and those struggling to find jobs. In a recent interview he said, “They were sterilizing people because they didn’t have the resources to take care of their kids.” The case for sterilization adopted a new tone as superintendents addressed the rights of children born to deficient parents. Writing in 1951, Lewis C. Tune, superintendent

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171 Ibid.

172 Dwayne L. Oglesby, phone interview with author, April 11, 2013.
of the Winfield State Training School, advocated sterilization to cure hypersexuality of the feeble-minded but also to protect “the individual who is unequal to the exacting task of parenthood” along with the “mental and economic strain” it entails. Oglesby framed the dilemma: “This was a drastic thing to do to be sterilized. On the other hand, this was a bad thing to bring children into the world who couldn’t be properly cared for.”

In 1953, Oglesby sent a letter and questionnaire to 26 Kansas psychiatrists, and 14 replied but none said they supported the current sterilization statute. Ten of the 14 wrote they opposed sterilization in any form; three found the law desirable if amended; and one stated that Church membership shaped his opposition. In commenting on sterilization, the psychiatrists doubted its benefits to society, recognized the individual harm inflicted, and questioned the hereditability of mental disease. One psychiatrist wrote, “I am against the use of a procedure mutilating to both body and self respect on the rationale we have no other solution. To date in respectable hands it has proven notoriously unsuccessful. Our knowledge of hereditary factors is scanty and has not given sufficient positive proof of the transmission of undesirable traits.” The comments attacked the practical effects: “Sterilization is not a treatment. Its benefits, if any, are open to question. It would seem as logical to cut their hands off or some similar asinine procedure.”

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174 Oglesby, phone interview with author, April 11, 2013.
176 Ibid., 178.
177 Ibid.
“undesirable and in many cases extremely traumatic to all concerned with the exception of the surgeon.”

Earlier in the century, eugenicists had advocated sterilization and merged criminals, sexually deviant, insane, and feeble-minded citizens into an evolving list of societal misfits. By 1950, medical professionals distinguished disease from crime and stigmatized social behaviors. Rather than preaching social theory, they examined the lack of results accompanying sterilization.

A decade after McCarthy exposed the sterilizations at Beloit, journalists continued to report on conditions at state mental institutions. In 1947, Albert Deutsch investigated more than 20 institutions, including schools in Kansas, and reported his findings in a series of magazine articles culminating in his book Our Rejected Children. Deutsch referred to institutional treatment of the mentally ill as a societal sickness in itself: “The facts as I found them shook me profoundly. They added up in my eyes to a black record of human tragedy, of social and economic waste, of gross brutality, crass stupidity, totalitarian regimentation in institutions and a corroding monotony even deadlier than physical violence.”

Deutsch wrote to Lula B. Benton, superintendent of the Beloit school, in 1947, inquiring about the status of sterilization. Benton responded that no inmates had been sterilized in the past decade, but she believed a large group of feeble-minded girls should be. She wrote, “When they leave here on Parole—as is bound to

178 Ibid.
happen—they will breed more of the same or worse.” Benton attributed the end of sterilization at Beloit in 1937 to politics:

The opposition party [in this case the Republicans were on the board] the New Dealers exposed the policy and blew every one up on the place so probably none will ever be sterilized in the future. Deutsch published Benton’s reply in a New York newspaper, and Beloit replaced her with a new superintendent. Following Deutsch’s reporting, Kansas newspapers continued their coverage of inhumane institutional conditions.

Charles Graham wrote an investigative series for the Kansas City Star in 1948. Describing the state hospitals at Bedlam and Osawatomie, Graham explained, “They impart it to a nineteenth century aspect, both in buildings and in the care and treatment of the mentally ill.” Patients, he wrote, “live there under an iron discipline not usually found today even in prisons. They are dressed in drab gray overalls and shirts, and the heads of many have been shorn with clippers.” As journalists publicized abuses, one boy’s parents filed a federal lawsuit against the state.

Seeking to frighten state officials, the mother of a boy sterilized in 1943 sued the Kansas Board of Examiners and claimed $1 million in damages. The defendants, represented in court by Kansas Attorney General Harold Fatzer, viewed the claim by Paul Jacob Brown’s mother as excessive. They called it a publicity stunt “brought to frighten the defendants into paying something to avoid

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180 Deutsch, Our Rejected Children, 64.
181 Ibid.
the risk of an enormous and ruinous judgment, and the greatness of the claim casts a doubt on the truthfulness of all the allegations in the complaint.”183 The Board of Examiners said Jacob’s “comfort of having children and enjoying sexual activities” could not be traced to the state because “it was prevented by his misfortune in being mentally defective, long before the operation.”184 Nancy Brown responded by defining the core of her complaint: “Defendants object to the amount claimed as damages. There are few men who would sell the right to beget and raise children of their own blood, which is man’s primary function and chief pleasure in life, for a million times a million dollars.”185 Judges had previously defined procreation as a fundamental right. But in 1950, a parent spoke about the right of personal happiness and fulfillment.

**Parental Advocacy**

In a context broader than sterilization, parents launched a new movement during the 1950s to advocate for the rights of their retarded children. Prior to World War II, state officials viewed the retarded as helpless individuals exploiting government resources. But in the 1950s, language shifted from “deficient,” “unfortunate,” and “feeble-minded” to “retardation.” The new terminology expressed disability as a disease, not a defining characteristic. Through publications, private research organizations, and lobbying, parents campaigned to increase government funding and awareness.

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183 “Brief of Defendants On Their Motion to Dismiss,” in No. KC-70, Nancy N. R. Brown, as Guardian of Paul Jacob Brown v. David L. MacFarlane, et al., District Court of the United States for the District of Kansas at Kansas City. Found in National Archives at Kansas City, Missouri. Civil Case Files, Box 8.

184 Ibid.

185 “Brief of Plaintiff in Opposition to Defendants’ Motion to Dismiss,” filed June 11, 1952 in No. K.C.-70.
Movie star and songwriter Dale Evans Rogers spearheaded the campaign in 1952 with her bestselling book *Angel Unaware*. Rogers told the story of her daughter Robin Elizabeth, who died from complications with Down syndrome before age two. Written in her child’s voice, Rogers urged the American public to shift its perceptions: “Yes there was music. I even heard happy songs that they couldn’t hear. They just saw my sickness, and they felt sorry for me. But I knew *why* I was sick, and that because I was sick I could do things for them and as they say Down There, that was ‘music to my ears.’”

Rogers advocated for care from families and not only hospitals. “Up here we know that if we want to be happy we have to make others happy; Down There, they haven’t quite caught up with that idea,” she wrote. “But they will.” She continued to call policy solutions of segregation and mass institutionalization mere “noise.” In her daughter’s voice, Rogers wrote, “Father, it’s so *noisy* Down There. So much babble and silly racket. What are they trying to do, anyway? Are they noisy because they’re afraid of something, or what?”

Following her story, the Oklahoma County Council for Mentally Retarded Children renamed itself the Dale Rogers Training Center.

Parents continued their campaign by driving a new field of research in medical journals and publications. Reflecting on the 1950s in the journal *Mental Retardation*, Augustus Jacobs examined the shift in attitudes when “parents of mentally retarded children began to cast aside their age-old attitudes of resignation, despair, and shame and to form associations to demand services and

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187 Ibid., 25.
188 Ibid., 30.
legal protection for their children.”\(^{189}\) Writings in the *American Journal of Mental Deficiency* and the *Journal of School Health* presented special education as an alternative to institutionalization. Parents, educators, and scholars separated antisocial behavior from disability.\(^{190}\) Doctors continued using intelligence tests but also recognized their cultural stigma and inadequate results.\(^{191}\)

Led by the National Association for Retarded Children (NARC), parent organizations urged government to respond. Congressman John E. Fogarty of Rhode Island launched his publicity campaign at a meeting with parents in 1954. One year later, he pressed the Chairman of the House Sub-Committee on Appropriations for the Department of Health, Education and Welfare and asked, “What are we doing on behalf of these millions of (mentally retarded) children in this country?”\(^{192}\) NARC reported the story in its newspaper *Children Limited*:

> “History was made for retarded children on a national scale today when the House Appropriations Committee urged an all out attack on the ‘great and growing problem.’”\(^{193}\) No longer did lawmakers blame the retarded for every social problem. Retardation became the problem, and the federal government funded programs to treat the disease. NARC Committee Chairwoman Elizabeth Boggs recognized the shift in public attitudes driving legislation. In 1956, she declared, “Good laws are essential but they are no better than the people who interpret


\(^{193}\) Ibid.
The federal government, however, did not sit passively as public opinion evolved. Influenced by his sister Eunice Shriver, President John F. Kennedy launched a national program to combat mental retardation.

**Presidential Publicity Campaign**

Kennedy used presidential power to advocate for increased federal funding and informed public attitudes about the retarded. Stereotypes associating retardation with crime, alcoholism, drug addiction, and sexual deviance faded. In 1961, Kennedy began a national address by defining the disease. “Simply stated, mental retardation is a condition resulting from a basic abnormality of the human mind. It refers to the lack of intellectual ability resulting from arrested mental development,” he said. “The causes are many and obscure. Some have already been determined and are easy to highlight; others are beyond our present knowledge and would yield only to research.”

Legislators had enacted sterilization laws from inconclusive scientific findings about the hereditability of mental disease. Kennedy recognized the gaps in scientific knowledge and established research programs to fill them.

Kennedy also formed the nation’s first Presidential Panel on Mental Retardation, appointing a group of doctors and scientists to investigate government policy and attitudes. In a Task Force Report on Law and Public Awareness, the committee did not formulate an explicit view on sterilization, but it framed the question in new terms. Law Professor Murray L. Schwartz

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concluded, “The social argument addresses itself to the right of every child to be born to parents who can give him at least minimum opportunity, and conversely to the right of a mentally retarded adult not to be deprived of marriage when the complications of child rearing would tip the balance against him in a marginal case.”196 The panel also doubted the logic and effectiveness of compulsory sterilization:

There are serious questions about both the validity of the scientific assumptions on which these laws were based and the way in which it is decided who should be sterilized. Only a very small percentage of retarded children inherit their condition from retarded parents, so that even if sterilization of the retarded were total, the incidence of mental retardation would drop only slightly.197

Kennedy’s panel cited scientific research, not eugenics theory to describe sterilization.

**Law and Science Merge Against Sterilization**

Scientific research and legal attitudes combined to condemn the practice in the 1950s and 1960s. Although courts did not suddenly invalidate sterilization laws, private citizens used legal arguments and periodicals to convey their opinions. Religious and secular arguments opposing sterilization overlapped but stemmed from a fundamentally different thesis. To Catholics, sterilization was a form of contraception. The practice violated natural law because it encouraged sex but prohibited its chief purpose of procreation. To legal opponents, sterilization denied citizens their right to bodily integrity. Individuals, not the Church, could privately determine the purpose of sex. The Supreme Court

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197 Ibid.
conveyed this stance when it ruled that state governments could not restrict abortion or contraception. Catholics protested those decisions on the same theological grounds of natural law they used to condemn sterilization. Yet legal scholars referenced those cases and the new zone of privacy to bolster their opposition.

In 1956, James B. O’Hara and T. Howland Sanks published an article documenting the declining support for sterilization in the *Georgetown Law Journal*.\(^{198}\) Largent argues that their article signified the shift from Catholic opposition into a broader, secular critique but attributes too much power to religious advocacy.\(^{199}\) Catholic officials began the early attack on sterilization, but scientists and legal scholars established a separate view to critique the practice and cause its demise. Sterilization remained popular throughout the 1940s but began to accelerate its decline in the 1950s. In 1949, doctors performed 1,500 sterilizations. By 1959, they performed only 614 sterilizations.\(^{200}\)

In their 1957 article, O’Hara and Sanks portrayed the decline of sterilization and accurately predicted its diminishing public support. They began their argument by attacking Holmes’ decision and labeling procreation a fundamental right. The scholars objected to Holmes’ analogy of sterilization and conscription:

> But, it is fallacious to argue that because we have the right to sacrifice the lives of our best young men in battle for the public

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\(^{199}\) Largent, *Breeding Contempt*, 124.

\(^{200}\) Ferster, “Eliminating the Unfit,” 633. See also Edward Leroy van Roden, “Sterilization of Abnormal Persons as Punishment and Prevention of Crimes,” *Temple Law Quarterly* 23 (1949): 100. From 1941 to 1946, doctors performed more than 9,200 sterilizations and only 6,100 from 1951 to 1956.
welfare, then we likewise have the right to sterilize our less fortunate citizens. In fact, there is a necessity and an urgency that causes us to sacrifice men in self-defense which is wholly lacking in the case of eugenic sterilization. The right of procreation is a fundamental right.201

O’Hara and Sanks categorized their view as one representing a rising national trend since the 1940s “to recognize that the right of procreation is a fundamental one, and there is a growing reluctance to enforce laws which impair such a right.”202 They continued to center their critique on the Buck opinion, quoting a 1950 article in Temple Law Quarterly mocking Holmes’ comparison between sterilization and vaccination. In Jacobson, the Court upheld enforcing a five-dollar fine for citizens refusing vaccination against small pox. Unlike retardation, small pox was both a fatal and preventable disease.203 O’Hara and Sanks referenced Hitler’s totalitarian abuse of eugenic sterilization against the Jews, Myerson’s scientific findings published in 1936, and Catholic writings to convey public sentiments. Buck had created a cushion of “constitutional safety” for states enacting or amending sterilization laws after 1927.204 But through inaccurate analogies and evidence, it also enabled legal scholars to attack the substance and precise purpose of sterilization.

Theories of inheritance launched the birth of eugenics but also drove its collapse. The American Neurological Association’s 1936 report cast doubt on eugenics research, questioning the hereditability of mental disease but also admitting gaps in knowledge. In the 1950s and 1960s, legal scholars wrote with

202 Ibid., 38.
203 Ibid.
204 Ibid., 31.
new certainty about the myth of mental retardation and insanity as hereditary conditions. In 1949, a Pennsylvania judge spoke at an international law conference and stated, “Of course the general objection to all statutes for sterilization is a lack of faith in the laws of inheritance.” In 1960, the legal division of the American Medical Association published a report titled “A Reappraisal of Eugenic Sterilization Laws.” It stated, “Since court decisions have assumed that the conditions included in sterilization statutes are hereditary, the constitutionality of such statutes is questionable if scientific opinion is divided concerning the effectiveness of this procedure.” In 1969, a writer in the Denver Law Journal used scientific evidence to refute the logic in Buck: “The scientific analysis has clearly shown that sterilization of potential parents of socially inadequate offspring will not eliminate the problem—contrary to the assumptions upon which Buck was decided.” As legal periodicals and associations continued to highlight the gap between the Supreme Court’s logic in 1927 and scientific knowledge of the 1960s, sterilization declined rapidly. By 1963, compulsory sterilizations dropped to just 467 in 1963. After that year, the Human Betterment Association stopped tracking the number of sterilizations. Yet a handful of states, including North Carolina with 240 operations in 1963, continued the practice into the 1970s.

Unlike earlier in the century, courts did not invalidate legislation to collapse the movement. The American Bar Foundation emphatically stated the

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relationship between declining sterilization rates and law. In 1971, it concluded, “The decrease was not caused by court decisions.” Science, journalism, medicine, parental advocacy, and legal thought shaped a new dialogue around disability rights, individual liberty, and privacy. With a chance to settle the constitutional issue in 1968, the U.S. Supreme Court declined to hear an appeal from Nebraska’s highest court upholding compulsory sterilization. But in other cases, the Court defended the concept of sexual privacy and reproductive rights.

In the 1960s, the Supreme Court embraced legal liberalism, interpretation of law through constitutional and deductive reasoning, over the Progressive Era’s sociological jurisprudence, inducing law as a means to correct social problems. Justice Douglas commented on the right of privacy in Skinner, but he dramatically broadened the concept in 1965. In Griswold v. Connecticut, the Court struck down a Connecticut law banning contraception. Douglas cited the limits of government interference in the regulation of American couples’ sex lives. He referenced the First Amendment’s “penumbra” of privacy by association, along with the Fourth and Fifth Amendments to articulate the origin of the right: “We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.” In Roe v. Wade, the Court struck down abortion restrictions by citing the right of privacy, yet mentioned compulsory vaccination and sterilization as exceptions. Justice Harold Blackmun conveyed the Court’s selective process of applying the right of privacy: “We, therefore,

conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.” In their interpretation of constitutional law, justices make political choices about how to apply their reasoning. Acknowledgement of the right to privacy came decades earlier. In 1928 Holmes applauded Justice Louis Brandeis for dissenting against the government’s surveillance powers in *Olmstead v. United States*. Brandeis described the constitutional intent of the framers to articulate the legal concept of privacy: “They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized man.” The Supreme Court never directly correlated privacy with sterilization, but its application to reproductive rights cases in the 1960s and 1970s underscores the shift in legal views about sexual liberty. As judges redefined the right of privacy in the 1960s, parents launched a new battle in courts to gain control of their children’s decision-making powers.

**A Different Parental Advocacy**

Although Nebraska, in 1968, and Oregon, in 1972, upheld compulsory sterilization laws, doctors had largely stopped supporting the practice, and courts resolved new dilemmas of parent rights in the context of a child’s best interest. In 1974, a federal court declared Alabama’s statute unconstitutional and referenced a new set of restrictions for sterilizing retarded citizens. Sterilization had to be the least harmful option, meaning the disabled individual had to first demonstrate an

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inability to use birth control or contraception.\textsuperscript{213} The operation also required consent; no longer could it be compulsory. In 1979, Alabama’s Supreme Court rejected a petition from parents seeking to sterilize their 16-year-old daughter. Writing for the Court, Justice Reneau Almon invoked the right of privacy: “An individual’s decision with respect to bearing children is at the very heart of a cluster of recognized and protected constitutional rights.”\textsuperscript{214} Almon continued to assert the constitutional issue of violating the bodily integrity principle. Without legislation documenting parental rights to sterilization, he advocated judicial restraint: “The profound nature of the constitutional and social issues raised by this case and the irreversible character of the physical consequences of the requested relief preclude judicial resolution absent legislative action.”\textsuperscript{215} But by the 1970s, legislators had no interest in revising the issue of coercive sterilization. In Alabama, judicial restraint essentially answered the legislative question.

In North Carolina, a series of court decisions in the 1970s and 1980s eventually transferred power into the hands of disabled citizens. In 1976, the state’s Supreme Court ruled that parents acting for their children could provide consent to sterilization. The patient’s mother, the Court wrote, “unquestionably is in a position to know what is best for the future of her child.”\textsuperscript{216} But later that year, a federal court declared sterilization constitutional only when sexual activity and an unwillingness to use contraception should make it necessary. Circuit Judge Braxton Craven, Jr. rejected the Supreme Court’s reasoning and wrote that the

\textsuperscript{214} Hudson v. Hudson, 373 So. 2d 310 (1979).
\textsuperscript{215} Id.
\textsuperscript{216} In re Moore, 289 N.C. 95, 109 (1976).
law “grants to the retarded person’s next of kin or legal guardian the power of a tyrant.” He continued, “In short, the medical and genetic experts are no longer sold on sterilization to benefit either patients or the future of the Republic.” In 1985, the North Carolina Supreme Court asserted no legal obligation to follow the federal court’s decision, yet recognized its logic. The Court upheld a lower court of appeal’s decision prohibiting sterilization because the respondent did not demonstrate a likelihood to engage in sexual activity.

In Wisconsin, where progressivism embraced eugenics as sound scientific policy, involuntary sterilization remained state law until 1978. In 1981, the state’s Supreme Court reviewed a case where parents had filed a petition to sterilize their mentally retarded daughter. The Court recognized the complexity of legal consent for the severely disabled and wrote, “We are dealing with a special class of persons – the severely mentally retarded who cannot, on an informed and voluntary basis, give their consent to an irreversible procedure.” But the Court ruled that parents could not determine the best interest of their child: “We accordingly conclude that it would be inappropriate to either permit the sterilization of Joan Eberhardy where there has been no determination by the legislature … defining what is in Joan’s (and others’) best interests.” The Court joined Alabama in exercising judicial restraint. In effect, it denied the parents’

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218 Id.
221 In re Guardianship Eberhardy, 102 Wis. 2d 539, 572 (1981).
222 Id.
petition and affirmed the right of the disabled to make their own reproductive choices.

Many of the sterilization cases from first half of the twentieth century, even when interpreted objectively, undoubtedly represent grave miscarriages of justice. States performed an operation that violated the fundamental right of citizens to be left alone and make private decisions about procreation. As challenges from parents reached courts in the 1970s and 1980s, however, cases became increasingly more complex. For the severely disabled teenager engaging in sexual activity without contraception, parents had a legitimate and understandable reason to advocate sterilization. Courts adopted the view that families, not government, had to resolve the issue, but parents could not substitute consent to a medical operation for their children.

**Conclusion**

In an era of hysteria surrounding sexual deviance, crime, and mental disease, physicians advocated sterilization and scientists introduced eugenics. Institutions and actors from civil society, not government, ultimately ended the practice of compulsory sterilization in America. Even in Washington and New York, where institutions immediately ceased sterilization after judicial or legislative intervention, evolving public attitudes filled testimony, briefs, and dissenting opinions. In Kansas, sterilization stopped long before legislative repeal in the 1970s as journalists and parents exposed physical abuse and mistreatment. Only when private citizens recognized the false theories about mental defect as a hereditary trait and surgery as a solution to crime and deviance, did the arguments
of sterilization quickly collapse. Those theories and stereotypes fell apart in law journals, religious writings, science publications, parent organizations, novels, and most importantly, in the minds of physicians ordered to sterilize their patients.

Law, however, proved a significant institution in the rise and fall of America’s compulsory sterilization movement. It reacted to public opinion but also shaped a recurring dialogue about individual rights and perceptions of public welfare. Judges reflected, participated, and occasionally influenced public discourse through the social views embedded in their opinions. Even when making legal arguments, judges cannot escape the political and social biases of the era they live in. Advocates and opponents of sterilization turned to courts to advance their respective agendas. And private citizens looked to law for validation of their beliefs, policies, and social values.
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