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Courts-Scope of Authority-Sterilization of Mental Defectives

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COURTS—SCOPE OF AUTHORITY—STERILIZATION OF MENTAL DEFECTIVES—Respondent, age nineteen, appeared before the probate court of Muskingum County, Ohio, upon an affidavit[1] filed by her mother alleging the child to be feeble-minded and in need of medical treatment.[2] Results of psychological tests were presented at the hearing, revealing that respondent had an intelligence quotient of thirty-six and was therefore a feeble-minded person within the statutory definition.[3] Respondent had had one illegitimate child, for whom she was unable to provide even rudimentary care or financial support, and was physically capable of bearing more children. Taking judicial notice that the state mental hospitals were then overcrowded and unable to accommodate additional inmates, the probate court invoked its interim power to provide for the welfare of incompetents until they can be committed to an institution.[4] On order from the probate court, *held*, respondent will submit to a salpingectomy[5] operation in an approved hos-

1 OHIO REV. CODE ANN. § 5122.11 (Page Supp. 1962).

2 See Newman, *Sterilization: Pro and Con*, Detroit Free Press, July 4, 1962, p. 7, col. 1.

3 OHIO REV. CODE ANN. § 5125.24 (Page Supp. 1962).

4 OHIO REV. CODE ANN. § 5125.30 (Page Supp. 1962), which provides: "If by reason of inability of the hospitals for the feeble-minded to receive additional patients and if [state authorities are] . . . unable to provide for the custody and care of any feeble-minded person, the head of the hospital to which application is made shall forthwith notify the judge of the probate court in which the proceedings . . . are pending . . . . The probate judge shall then take such action and make such order as he deems necessary and advisable to provide for the detention, supervision, care, and maintenance of said feeble-minded person . . . until such time as he may be received in a hospital for the feeble-minded."

5 Salpingectomy is the medical term for cutting the Fallopian tubes to effect female sterilization.

pital by a licensed physician. The legislative grant of plenary power at law and in equity,[6] as well as the special interim authority to care for incompetents, enable the probate court to provide extraordinary relief which takes into consideration the interests of both the incompetent and the community. *In re Simpson*, 180 N.E.2d 206 (Ohio P. Ct. 1962).

The constitutionality of sterilization laws[7] is no longer a debatable issue so long as procedural safeguards such as notice, hearing, and judicial review are provided for and observed.[8] However, the significant feature of the principal case is that the state of Ohio has no such legislation. Thus, the court was forced to sustain its action on the basis of the statutory language providing probate courts with interim supervisory power when the mental hospitals are overcrowded, and also on its general equity power. In considering the validity of the latter basis, it is necessary to examine the early pattern of control over incompetent persons. Originally in England, the lord of the manor was entitled to the wardship of the land and person of those of unsound mind. However, because of frequent abuses of this power, control of idiots and lunatics become reposed in the crown, to the exclusion of the feudal lords.[9] The King, as *parens patriae*, was intrusted with the care and custody of his insane subjects, but to avoid the burden of direct administration he delegated the duty to the chancellor, as keeper of the King's conscience.[10] Thus, the lunatic became a ward of chancery by special royal commission and did not come within its

6 OHIO REV. CODE ANN. § 2101.24 (Page Supp. 1962), which provides: "Except as otherwise provided by law, the probate court has jurisdiction: . . . (F) To make inquests respecting lunatics, insane persons, idiots. . . . The probate court shall have plenary power at law and in equity to fully dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute."

7 Early attempts at state-authorized sterilization bowed to a host of constitutional objections. An Indiana statute which allowed a board of examiners full discretion, within prescribed procedures, to determine if sterilization should be performed was held to be a violation of procedural due process because it failed to provide an avenue for judicial review. Williams v. Smith, 190 Ind. 526, 131 N.E. 2 (1921). See also Davis v. Berry, 216 Fed. 413 (S.D. Iowa 1914). In Osborn v. Thompson, 103 Misc. 23, 169 N.Y. Supp. 638 (Sup. Ct. 1918), statutory delegation of judicial power to a board whose duty was to determine if sterilization should be performed was declared to be contrary to the doctrine of separation of powers. Statutes providing for sterilization of criminals, epileptics and the feeble-minded confined in public institutions, but not providing the same for those kept elsewhere, were deemed arbitrary class legislation which denied equal protection of the laws guaranteed by the fourteenth amendment of the United States Constitution. Haynes v. Williams, 201 Mich. 138, 166 N.W. 938 (1918); Smith v. Board of Examiners, 85 N.J.L. 46, 88 Atl. 963 (1913). *But see* Smith v. Command, 231 Mich. 409, 204 N.W. 140 (1925) (incompetent persons not an unreasonable classification denying equal protection); *In re* Main, 162 Okla. 65, 19 P.2d 153 (1933) (incompetent's right to procreativity subordinate to police power to legislate for general welfare).

8 *E.g.*, Buck v. Bell, 274 U.S. 200 (1927); State v. Troutman, 50 Idaho 673, 299 Pac. 668 (1931); State *ex rel.* Smith v. Schaffer, 126 Kan. 607, 270 Pac. 604 (1928); see Comment, 26 N.D.B. BRIEFS 183, 184 (1950).

9 11 AMERICAN & ENGLISH ENCYCLOPEDIA OF LAW, *Insanity* § 3, at 114 n.3 (1890); 1 HOLDSWORTH, A HISTORY OF ENGLISH LAW 473 (6th ed. 1938); MEGARRY & BAKER, SNELL'S PRINCIPLES OF EQUITY 493 (1954).

10 3 BLACKSTONE, COMMENTARIES 427 (Wendell ed. 1854).

general equity jurisdiction.[11] A landmark decision long ago put to rest any doubts as to the status of equity's power over incompetents.[12] Indeed, the chancery court was unable even to appoint a guardian of the lunatic's person.[13] Therefore, reliance on the traditional powers of equity in ordering sterilization of an incompetent is based on the erroneous assumption that courts of equity historically had jurisdiction of such persons.[14]

The other alleged source of authority for the court's action in the principal case is a statutory provision directing that the probate court shall intercede to provide for the "detention, supervision, care, and maintenance" of incompetents until admission to an institution is obtainable.[15] Whether this legislation was intended to encompass sterilization orders is certainly debatable. Less than four months prior to this decision the Ohio legislature made substantial revisions in its mental health laws relating to the substantive rights of incompetent persons in commitment proceedings.[16] It is certainly arguable that, if the legislature had intended to follow those states authorizing eugenic sterilization,[17] it could easily have enacted appropriate legislation in the course of this statutory revision. Even a broad construction of the words "detention, supervision, care, and maintenance" does not seem to suggest that sterilization would fit compatibly within their scope. It is conceded that the notion of "care" encompasses providing for both physical and mental welfare. If a ward of the court required an appendectomy or dental attention, for example, treatment could obviously be authorized.[18] Likewise, if the incompetent's home environment caused frustration and anxiety, it would be appropriate remedial relief to place

11 "The administration of idiots and lunatics' estates is, in virtue of a *personal* authority, committed by the crown, not the *court of chancery*, but to a certain great officer of the crown, not of necessity the person who has the custody of the great seal, though it generally attends him, by a warrant from the crown, which confers no jurisdiction, but only a power of administration." 2 MADDOCK, THE PRINCIPLES AND PRACTICE OF THE HIGH COURT OF CHANCERY 565-66 (1817).

12 Beall v. Smith, L.R. 9 Ch. 85 (1873), where the court stated: "It is to be borne in mind that unsoundness of mind gives the Court of Chancery no jurisdiction whatsoever. The Court of Chancery is not the curator either of the person or the estate of a person *non compos mentis* whom it does not and can not make its ward." *Id.* at 92.

13 *In re* Bligh, 12 Ch. D. 364 (1879); *In re* Brandon's Trusts, 13 Ch. D. 773 (1879).

14 In England today jurisdiction over incompetents is exercised by the Chancellor and the Lord Justices in Chancery. However, this result has been accomplished by modern statutory enactments. See 1 HOLDSWORTH, *op. cit. supra* note 9, at 476.

15 OHIO REV. CODE ANN. § 5125.30 (Page Supp. 1962).

16 See generally Haines & Myers, *Hospitalization and Treatment of the Mentally Ill: Ohio's New Mental Health Law*, 22 OHIO ST. L.J. 659 (1961); Tuma, *Civil Rights of the Mentally Ill in Ohio*, 11 CLEV.-MAR. L. REV. 306 (1962).

17 Alaska, Arizona, California, Connecticut, Delaware, Idaho, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Vermont, Virginia, West Virginia, Wisconsin. Four other states' sterilization laws have been declared unconstitutional and have not as yet been re-enacted in conformity with constitutional standards: Nevada, New Jersey, New York, Washington. See O'Hara & Sanks, *Eugenic Sterilization*, 45 GEO. L.J. 20, 33 n.80 (1956).

18 For cases where courts have ordered treatment for children over parental objection, see People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952) (blood transfu-

him in a foster home. Assuming that the stigma of bearing illegitimate children would cause an incompetent to suffer mental frustration and trauma, the question remains whether the probate judge's order in the principal case was a reasonable exercise of the authority conferred by the legislature. Important is the fact that the probate court is given only interim authority in the limited situation where overcrowded conditions do not permit immediate hospital confinement. Sterilization is a drastic measure imposing permanent incapacity and is hardly warranted in a situation that is but the temporary concern of the court. This is especially true when reasonable alternatives such as closer parental supervision, juvenile probation, or private psychiatric care could be implemented while commitment proceedings are pending.

The court indicated that the salpingectomy operation would be not only for the respondent's health and welfare but also "for the benefit of society as a whole."[19] The argument is frequently advanced that mental defects may be hereditary and thus increase the burden on society of caring for incompetents. However, it is by no means settled that defective parents are likely to procreate insane or incompetent children.[20] Indeed, the field of genetics is so perplexed in its assertions as to the heritability of mental deficiencies that some professionals claim the scientific basis to be a myth.[21] If it is properly within judicial discretion to order eugenic sterilization simply to obviate a tax burden of providing support for the incompetent's potential issue, what is to preclude a judge from directing the same treatment for those who must depend on public welfare assistance? And if such measures are proper in view of the societal economic interest, the basic principle might be extended to authorize abortions for women who are incompetent or indigent. The potential abuses associated with arbitrary judicial discretion in these matters are particularly magnified when the object of that discretion suffers from a mental handicap. Others of sounder mentality have the ability to guard their rights and dignity. But the incompetent and feeble-minded must depend largely on others for their protection. In the principal case the court even failed to appoint a guardian *ad litem* to represent the respondent's interests.[22] In the field of criminal

sion); *In re* Vasco, 238 App. Div. 128, 263 N.Y. Supp. 552 (1933) (removal of malignant eye); In the Matter of Rotkowitz, 175 Misc. 948, 25 N.Y.S.2d 624 (Dom. Rel. Ct. 1941); *In re* Weintraub, 166 Pa. Super. 342, 71 A.2d 823 (1950) (psychiatric treatment for delinquent).

19 Principal case at 208.

20 JENNINGS, THE BIOLOGICAL BASIS OF HUMAN NATURE 13 (1930) (stating that two feeble-minded parents may well have normal children).

21 See DEUTSCH, THE MENTALLY ILL IN AMERICA 372 (1937); Cook, *Eugenics or Euthenics*, 37 ILL. L. REV. 287, 295-98 (1943); Landman, *The History of Human Sterilization in the United States—Theory, Statute, Adjudication*, 23 ILL. L. REV. 463 (1929); Myerson, *Certain Medical and Legal Phases of Eugenic Sterilization*, 52 YALE L.J. 618 (1943). *But see* GOSNEY & POPENOE, STERILIZATION FOR HUMAN BETTERMENT (1938).

22 OHIO REV. CODE ANN. § 2111.23 (Page 1954), which provides: "In a suit or proceeding in which the guardian has an adverse interest, the court shall appoint a guardian ad litem to represent such minor or other person under legal disability."

law, there is substantial authority for the proposition that failure of a state court to appoint counsel for a youthful or incompetent defendant is a deprivation of rights essential to a fair hearing.[23] Surely an incompetent is entitled to due process of law whether a court is administering civil or criminal justice. Indeed, in juvenile court proceedings, which are closely analogous because of the absence of criminal sanctions, the right of the minor to be represented by counsel is recognized.[24] At least one federal court of appeals has squarely held that in commitment proceedings due process requires that the incompetent be represented by counsel, and the failure of the court to make such an appointment is reversible error.[25]

To sustain such extensive discretion as was asserted by the court in the principal case is not only dangerous as a precedent but it would render any notion of inherent limits on a judge's power illusory. Interpreting and applying the law is a proper judicial function, but the responsibility for lawmaking rests basically with the legislature.[26] Certainly statutory interpretation is not confined to the most strict and literal construction of the language possible. Such an approach would seriously impair effective government and impose an onerous burden on the legislature. Because statutes operate prospectively they must to some degree speak in general terms. It is the judge's function to apply the legislative policy to the myriad of factual situations that arise in litigation. If courts had to find an express legislative mandate for every case, adjudication would virtually come to a standstill. Indeed, settling disputes in court would become unnecessary because the legislature would make the rule for each circumstance. Even if

23 See Moore v. Michigan, 355 U.S. 155 (1957); Massey v. Moore, 348 U.S. 105 (1954); De Meerleer v. Michigan, 329 U.S. 663 (1947); Powell v. Alabama, 287 U.S. 45 (1932). The cases where failure to appoint counsel was held not to be a violation of due process under the "special circumstances" test are readily distinguishable from the principal case because the inability of the youthful and mentally retarded girl to represent herself before the court is undeniable.

24 In McDaniel v. Shea, 278 F.2d 460 (D.C. Cir. 1960), a case in a juvenile court which involved commitment of a minor to an institution, the court said: "We think the appellant needed a lawyer. Her status was, to say the least, in doubt, and she was in jeopardy. With her liberty in the balance, the assistance of counsel might well have furthered the best interests both of the child and of the authorities responsible in this delicate area of social welfare." *Id.* at 462. See also Shioutakon v. District of Columbia, 236 F.2d 666, 669 (D.C. Cir. 1956).

25 Dooling v. Overholser, 243 F.2d 825 (D.C. Cir. 1957); Howard v. Overholser, 130 F.2d 429, 434 (D.C. Cir. 1942).

26 Whether the court in applying the law to a specific factual situation is creating law or merely interpreting it remains a topic of dispute. For a treatment of the historical interpretative view, see 1 BLACKSTONE, *op. cit. supra* note 10, at 69; CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 124-25, 136-37 (1922); CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION 235 (1907); HALE, HISTORY OF THE COMMON LAW 67 (4th ed. 1739). For writers supporting the creative view, see AUSTIN, LECTURES ON JURISPRUDENCE 224 (4th ed. 1873); BENTHAM, A COMMENT ON THE COMMENTARIES 190 (Everett ed. 1928); GRAY, NATURE AND SOURCES OF LAW 84, 95, 170-72 (1909). While the basis of dispute is largely rhetorical, the predominant understanding today is that the judge does engage in the lawmaking process. The source of difficulty really goes to the scope and extent of such power. BODENHEIMER, JURISPRUDENCE 382 (1962).

the enormous task of constantly revising the law was administratively feasible, the rule would often result only after the harm had been done. Thus, the judicial function necessarily involves substantial discretion, but a corollary to this is that the courts must act responsibly so as not to abuse the power entrusted to them. Surely cases may arise where the social interest dictates that the judge "strike a path along new courses."[27] However, the invisible restraints of precedent and custom "hedge and circumscribe his action."[28] He is not possessed with broad, far-reaching power to initiate new policies or to design a legal order to his liking. In the tradition of the democratic process the making of major revisions of law must be left to those entrusted with the task of legislating.[29] Principles such as these have direct relevance to the circumstances of the principal case. No court of record[30] has ever asserted power to order the sterilization of incompetent persons in the absence of express legislative authorization. It is difficult, if not impossible, to avoid the conclusion that this court has simply conjured up a novel power without historical or statutory basis.

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27 CARDOZO, *op. cit. supra* note 26, at 112-14.

28 *Ibid.*

29 See BODENHEIMER, *op. cit. supra* note 26, at 380-86.

30 The opinion in the principal case does allude to an unpublished Maryland circuit court memorandum stating that a sterilization decree "could be made under the general equity powers of the court." Principal case at 208.