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Republican Policy Committee

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The Shifted Mainstream

How the law on sterilization of the mentally retarded had been transformed in Alabama before the summer of 1974 when Dr. Henry Foster announced that he had recently begun to perform hysterectomies on mentally retarded patients.

President Clinton has nominated Dr. Henry W. Foster, Jr., to be Surgeon General of the United States. Today, the Committee on Labor and Human Resources holds a hearing on the nominee, who already has received a good deal of attention, in part because he surgically sterilized mentally retarded patients.

In the summer of 1974, Dr. Foster read a paper to a medical association and said, "recently, I have begun to use hysterectomy in patients with severe mental retardation." That paper was published in 1976 in the *Southern Medical Journal*. When the White House released Dr. Foster's writings, the article on hysterectomies was flagged because it contained the statement on sterilizations.

The Administration has taken the position that Dr. Foster's performing of hysterectomies to sterilize mentally retarded women was "within the mainstream" of medical practice at the time, although it is now discredited. The Administration is relying on descriptions of an amorphous "mainstream" of medical opinion in the 1970s, but there was little that was amorphous about much of the law in Alabama at the time. By the summer of 1974, when Dr. Foster spoke, federal judges had radically shifted the medical mainstream in Alabama by simply carving out a new streambed.

Alabama and the Law in 1972: The *Wyatt* Case

In the spring of 1972, Alabama's institutions for the mentally ill (Searcy Hospital and Bryce Hospital) and for the mentally retarded (Partlow State School and Hospital) were placed under sweeping and detailed court orders in two *Wyatt v. Stickney* cases. Those orders do not

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seem to have mentioned sterilization specifically. However, in the decree covering the mentally ill, experimental research and certain kinds of treatment were forbidden without express and informed consent, and in the decree covering the mentally retarded, "unusual and hazardous treatment" was forbidden without express and informed consent. Later, the federal court returned to the *Wyatt* case and addressed sterilization specifically (see below). However, that decision followed revelations about two sterilizations that caught the attention of the entire Nation.

June 1973: Two Alabama Girls Sterilized

On June 14, 1973, two Montgomery, Alabama girls, Mary Alice Relf, age 12, and Minnie Relf, age 14, were surgically sterilized (by tubal ligation, not the more radical hysterectomy which was the subject of Dr. Foster's speech). There seems to be conflicting evidence as to whether one or both or neither of these minors was mentally retarded. Their mother, who could neither read nor write, had put her mark on a "consent form" when she was told that her daughters were to be given shots. The arrangements for the sterilizations were made by a nurse employed by the family planning division of the local Community Action Program, a federally-funded community agency. Apparently, the sterilizations themselves were paid for by Medicaid. The Relf family was poor and black.

July 1973: Alabama Sterilization Case Gets Attention in Washington

When the sterilizations of the Relf girls came to light, there was an immediate public reaction. By the end of June, 1973, the Relfs had sued the federal government for $1 million. On July 7, 1973, the United States Department of Justice began an investigation to determine if the Relfs' civil rights had been violated. On July 10, 1973, Senator Kennedy held a day of hearings on the Relf case. The girls themselves were brought to Washington, but they were interviewed in private and did not testify in public (their parents and attorney did testify before the committee). On July 19, 1973, the Secretary of the Department of Health, Education, and Welfare (H.E.W.) announced that regulations on the use of federal funds for sterilizations would be published within weeks, and they were.

Those regulations sought to protect the rights of all persons (including the mentally retarded) with respect to sterilizations paid for with federal funds. However, those regulations never took effect. On March 15, 1974, a federal district court in Washington, D.C., in the case of *Relf v. Weinberger*, struck down the proposed regulations because, although the regulations did indeed set up a number of hurdles that had to be cleared before a sterilization could be performed, the court found that H.E.W. had no authority to fund any nonconsensual sterilization whatsoever, no matter how many hurdles it erected.

December 1973: Alabama Law Declared Unconstitutional

Meanwhile, the *Wyatt* plaintiffs apparently saw an opportunity to use the resentment that had been created by the sterilizations of the Relf girls, and on July 25, 1973 they filed an amended complaint that asked the federal court in Alabama to enjoin the state's law on the sterilization of institutionalized persons, and in December, 1973, in *Wyatt v. Aderholt*, the federal court held the Alabama statute unconstitutional.

January 1974: Judge Johnson Issues Mandate for Alabama

Just weeks after the three-judge court acted, Federal District Judge Frank M. Johnson, Jr., who perhaps more than any other single government official was responsible for the success of the civil rights movement in the South, issued an order in a second *Wyatt v. Aderholt* case that specified with particularity the procedures that would have to be followed in Alabama before an institutionalized mentally handicapped person could be sterilized. The judge required any sterilization of an institutionalized person to be approved by the director of the institution, a review committee, *and* the court — and that the procedure had to have been determined to be in the *best interest of the resident.*

A Glance Ahead: Alabama Court Protects Noninstitutionalized Persons

Only five years later, in 1979, in *Hudson v. Hudson*, the Alabama Supreme Court held that Alabama's courts had *no* equitable authority to order the elective (i.e., not medically indicated) sterilization of a mentally incompetent, *non-institutionalized child* (in that case, a physically mature 16-year-old with the intelligence level of a four-year-old) even when the request for the sterilization came from the child's parents. The court said, "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."

Foster and the Alabama Law: A Chronology

The *Wyatt* cases on sterilization were decided in December, 1973 (3-judge court) and January, 1974 (Judge Johnson) and the *Relf* case was decided in March, 1974. In the summer of 1974, months after *Wyatt* and *Relf* had been decided and the law in Alabama had been permanently rechanneled, Dr. Foster read a paper saying he had "recently begun to use hysterectomy in patients with severe mental retardation."

In summary, the chronology of key events which are discussed in this paper is as follows:

April, 1972	decrees issued in early *Wyatt* cases
June, 1973	Relf sisters sterilized
Summer, 1973	public furor began over sterilization of Relfs
July, 1973	amended complaint in *Wyatt* re sterilizations
December, 1973	Alabama sterilization law struck down
January, 1974	Judge Johnson issued order in *Wyatt*
March, 1974	H.E.W. regulations struck down (*Relf* case)
Summer, 1974	Doctor Foster read his paper
January, 1976	Foster paper published in medical journal

[Note: This paper is based on an RPC document that contains more extensive information and citations. Readers interested in obtaining the original document may contact the Policy Committee.]

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